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FREEDOM OF CHOICE IN MEDICAL TREATMENT: RECONSIDERING THE EFFICACY REQUIREMENT OF THE FDCA

INTRODUCTION

In 1962, the Federal Food, Drug and Cosmetic Act of 1938 was amended to add the requirement that new drugs be proven effective as well as safe.1 Recent controversy over the cancer drug laetrile has raised serious questions concerning the requirement that new drugs be shown effective by substantial evidence before receiving Food and Drug Administration (FDA) approval.2 Laetrile supporters, for instance, contend that the procedures necessary to establish effectiveness and secure FDA approval delay or prevent new drugs from reaching the market, and thereby restrict individual freedom of choice in medical treatment. Using laetrile as an example, this Note will examine the procedures for securing approval of new drugs, and the methods through which individuals can obtain review of the statutory provisions. Recent legislative and judicial confrontations with freedom of choice in medical treatment will also be examined. Finally, the article will discuss the relevant portions of the Food, Drug and Cosmetic Act (FDCA), with special emphasis on the provisions which may already provide adequate protection to the consumer in the absence of an efficacy requirement.

THE EFFICACY REQUIREMENT

Laetrile is used extensively in Mexico, where it is recognized as both effective and safe.3 However, the cancer drug has not been approved for distribution in the United States. Although there are compelling testimonials to laetrile's curative capabilities,4 this evidence is not relevant in an FDA determination whether the drug is effective.5 No pharmaceutical firm has yet taken the initiative to conduct the investigational tests required by the FDA, or to submit a New Drug Application (NDA) for laetrile. As a result, cancer patients have become victims of a procedural tangle. Patients have been

2. Id.
3. For a thorough discussion of the history of laetrile, also known as vitamin B17, amygdalin, or prunasin, see M. Culbert, Vitamin B17 78-80 (1974).
5. Pharmaceutical Manufacturers Ass'n v. Richardson, 318 F. Supp. 301, 309-10 (D. Del. 1970). But see Weinberger v. Bentex Pharmaceuticals, Inc., 412 U.S. 645 (1972). The Court in that case stated: "It may, of course, be true that in some cases general recognition that a drug is efficacious might be made without the kind of scientific support necessary to obtain approval of an NDA." Id. at 652-53.
unable to persuade the FDA to act on their behalf, and have found no support from drug manufacturers who are in a position to comply with FDA procedures.\(^6\) Unlike the individual patient, most drug manufacturers have the facilities and resources to conduct the extensive, long-term testing which is necessary to establish a drug's effectiveness.

The efficacy requirement has been criticized as sound in theory but unworkable in practice, since the principle question has become "Can the product be demonstrated to be effective in certain highly sophisticated, structured, and constantly changing tests, which probably neither the Congress, the FDA, nor the industry ever dreamed of at the time they all happily supported the concept that industry should indeed prove its drugs efficacious?" FDA guidelines for testing and evaluating new drugs are frequently revised. A new drug, therefore, may have to be tested more than once to comply with the most recent standards. These circumstances have caused drug manufacturers who originally favored an efficacy test to become dissatisfied with the FDA's implementation of the testing concept.\(^8\)

Although drug manufacturers are concerned with the complicated testing regulations for new drugs, the FDA requirement also presents serious problems for physicians. Doctors must choose between respecting an FDA ban on an unapproved new drug or giving that drug to patients in the belief that it will save lives.\(^9\)

Numerous hearings before state legislatures concerning the laetrile issue demonstrate that a strong demand for the drug exists.\(^10\) A few federal district courts have entered orders authorizing the use of laetrile on a case-by-case basis.\(^11\) However, the central problem

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6. The FDA assigned an Investigative New Drug (IND) application in April, 1970, to the McNaughton Foundation to test laetrile. Ten days later, permission was suddenly revoked by the FDA, allegedly after pressure from Surgeon General Jesse Steinfeld, a California physician who was also involved in the California Medical Association ban on the drug in the 1950's. The FDA stated that a review of the IND disclosed some serious preclinical deficiencies. A notice was issued advising the Foundation of the deficiencies and allowing them ten days in which to request a conference or correct them. It did neither, and the IND was terminated on May 12, 1970. See M. CULBERT, VITAMIN B17 81 (1974). However, according to the head of the National Cancer Institute's cytochemistry division, the IND application was superior in content to most IND applications granted to one of the largest research organizations in the nation. Id.


8. Id. at 43.

9. In a letter to the editor, J. Bohorfoosh, M.D., F.C.C.P., expresses his extreme frustration in this dilemma. 70 CHEST 407 (Sept. 1976).


remains that, because laetrile has not been approved by the FDA, distribution of the drug carries criminal sanctions.

The FDA's Position

In response to criticism from laetrile supporters, the FDA has repeatedly taken the position that the effectiveness of a drug is inseparable from considerations of safety. For example, Dr. Robert Young, FDA chief medical officer for anticancer drugs, has warned that permitting use of laetrile for cancer treatment would divert patients from conventional methods of treatment. In his opinion, availability of laetrile would cause patients to rely on a useless drug rather than on conventional treatments. However, Dr. Young's argument presupposes that conventional treatments are curative, so that if a patient rejects them in favor of laetrile, he will suffer otherwise avoidable harm. It follows from Dr. Young's argument, therefore, that laetrile must be shown effective by the FDA standards before it can be permitted to lure patients from conventional treatments, such as radiation and surgery, which do not have to meet the same tests of effectiveness.

If laetrile is to be measured against other cancer treatments in determining its "new drug" status, a relative efficacy test would result. Such a test, however, clearly contravenes the legislative intent that the efficacy requirement apply to claims made for the drug, not to its relative position among available treatments. Presently, conventional cancer-treatment methods do not have to be, and have not been, proven effective. Therefore, Dr. Young's argument fails to establish a justification for a total ban on laetrile.

The 1962 Amendments to the Food, Drug and Cosmetic Act of 1938

Federal regulation of the drug industry began with enactment of the Food and Drugs Act of 1906, which did not require pre-market testing of drugs. It was not until 1938, when more than 100 persons...
died after taking "elixir of sulfanilamide" that attention was directed to pre-market testing of new drugs. That disaster paved the way for enactment of the Federal Food, Drug and Cosmetic Act of 1938 which requires pre-market testing of drugs to establish their safety for use under the conditions set forth on the label. The 1938 Act prohibited the introduction into interstate commerce of any new drug unless a New Drug Application filed with the FDA was operative, but there was no requirement that the drug be proven effective for its intended use.

Another drug-related disaster influenced enactment of the Kefauver-Harris Drug Amendments of 1962. Sharply strengthened safety controls were enacted as a result of a thalidomide scare which escalated during hearings on the amendments. In what might be considered an overreaction to the thalidomide tragedy, the amendments added the requirement that new drugs be proven effective as well as safe before securing FDA approval. The efficacy requirement, however, did not logically follow, since the risks associated with thalidomide were unrelated to its effectiveness as a sedative. The only function served by the efficacy requirement appears to be to provide more required testing time in which adverse side-effects may appear.

**Drug Testing to Establish Effectiveness**

By the time a new drug is approved by the FDA, it has been thoroughly tested in both animals and humans. The FDA requires that sufficient animal studies be performed initially to show that the drug is reasonably safe for human testing. Before human tests

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18. 52 Stat. 1041, 1052 (1938).
20. Thalidomide became a popular new sedative in Western Europe, England and Canada but, during 1961, the birth of 3,500 to 5,000 malformed babies motivated studies by four German universities. The drug was found to cause phocomelia, "seal limbs," in babies whose mothers took the drug in early pregnancy. See U.S. CODE CONG. & AD. NEWS, supra note 12, at 2905.
A thalidomide NDA was filed on Sept. 12, 1960. Several months later the FDA medical officer handling the application, Dr. Frances Kelsey, noticed a report in the British Medical Journal of instances where patients receiving thalidomide had developed inflammation of nerves in their hands and feet. She therefore delayed approval of the drug. It was not until March 8, 1962, after repeated delays by the FDA, that the sponsor withdrew the application. There appeared to be no dispute that thalidomide was an effective sedative. U.S. CODE CONG. & Ad. News, supra note 12, at 2907-08.
begin, the drug sponsor must submit a "Notice of Claimed Investigational Exemption for a New Drug" (IND) to the FDA. Once the application is approved, the manufacturer may distribute the drug for the limited purpose of conducting the investigational tests. The results of these tests are submitted with a New Drug Application seeking approval to market the drug. All stages of human testing must comply with stringent FDA standards. The FDA will not approve a new drug application for several reasons: if the tests are inadequate; if the results of tests show that the drug is unsafe; if the method of manufacture is inadequate to preserve the identity, strength, quality and purity of the drug; if all the available information is insufficient to determine safety and effectiveness; or if the labeling is false and misleading in any respect.

The 1962 amendments contain an exemption for a drug if "at any time prior to the enactment of this chapter it was subject to the Food and Drugs Act of June 30, 1906, as amended, and if at such time its labeling contained the same representations concerning conditions of its use." Thus, the definition of a new drug would not apply to drugs which were never subject to the new drug procedure, i.e., drugs which were on the market before the pre-market testing requirement of the 1938 Act. Drugs which had been approved under the 1938 Act were not required under transitional provisions to resubmit NDA's, but they were not exempt from the efficacy requirement. Under section 355(e)(3) the FDA is authorized to order drugs with prior approval off the market if after a two year grace period the FDA finds, on the basis of new information, that the drug is ineffective.

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22. "Sponsor" is defined as a "person or agency who assumes responsibility for an investigation of a new drug, including responsibility for compliance with applicable provisions of the act and regulations." 21 C.F.R. § 310.3(j) (1977).
24. Id. § 355(b). See also 21 C.F.R. § 314.1 (1977), which describes the form of applications and sets forth an example. The application must include a table of contents, a summary showing that the application is well organized, sufficiently tabulated, and statistically analyzed; an evaluation of safety and effectiveness including references to the volume and page number in the application where supporting reports can be found; copies of the label; a statement of any limitations on use; a full list of ingredients and substances used in manufacture; a full description of methods used in manufacture, processing and packing; samples of the drug and components; full reports of investigational testing; and a list of investigators.
25. Id. § 355(d)(1)-(6); 21 C.F.R. § 314.111 (1977).
26. Id. § 321(p)(1).
27. Id. § 321 (Historical Note, Effectiveness and Safety of New Drugs).
28. Id.
29. Id. § 355(e)(3).
30. It was this provision which enabled the FDA to review the hundreds of drugs which were approved without regard to their efficacy between 1938 and 1962.
Standard of Proof for Effectiveness

Section 355(a) provides that "No person shall introduce or deliver for introduction into interstate commerce any new drug, unless an approval of an application . . . is effective with respect to such drug." Section 355(d) lists the circumstances upon which the Secretary of Health, Education and Welfare shall refuse an application. Included is the provision for refusal if there is a lack of "substantial evidence" that the drug will have the effect it is represented to have. "Substantial evidence" is defined to mean "evidence consisting of adequate and well-controlled investigations, including clinical investigations, by experts qualified by scientific training and experience to evaluate the effectiveness of the drug involved, on the basis of which it could fairly and responsibly be concluded by such experts that the drug will have the effect it purports or is represented to have." The FDA has promulgated regulations which describe the kind of evidence it deems necessary to meet the "substantial evidence" test for effectiveness. Other regulations limit the right to a hearing on the approvability of new drugs to applicants who have proffered some evidence meeting the standards.

A new drug is defined under section 321(p) as one "not generally recognized among experts qualified by scientific training and experience to evaluate the safety and effectiveness of drugs, as safe and effective for use under conditions prescribed . . . or suggested in the labeling thereof." Although the Act does not define "generally recognized," it does not mean "unanimously recognized." Courts have interpreted the phrase to require at least substantial evidence of effectiveness supported by adequate and well controlled investigations. Drugs which have become generally recognized only through investigational testing are considered new drugs. Any drug which has not been widely used cannot be generally recognized as safe and effective. Thus, all newly developed drugs are "new drugs"

32. Id. § 355(d)(5).
33. Id. § 355(d).
34. 21 C.F.R. § 314.1 (1977). See also note 24 supra.
35. Id. § 314.200.
within the meaning of the Act.  

Congress did not intend to require uncontradicted evidence of effectiveness. "When a drug has been adequately tested by qualified experts and has been found to have the effect claimed, this claim should be permitted even though there may be preponderant evidence to the contrary based upon equally reliable studies." Therefore, a substantial split of opinion among experts should not defeat an NDA. The purpose of the efficacy requirement is to insure that safe new drugs become available so long as their effectiveness is supported by a responsible body of opinion.

CHALLENGING THE EFFICACY REQUIREMENT

The Due Process Challenge

Since individual patients are generally unable to comply with NDA requirements, some have sought judicial intervention to reassess the NDA procedures. Courts, however, have been reluctant to interfere in the absence of prior FDA action. The heart of the statutory procedure is the grant of primary jurisdiction to the FDA, subject to judicial review when administrative remedies are exhausted. Courts have consistently interpreted the FDA's authority to include determinations whether a drug is a "new drug" within the meaning of the Act and whether there is sufficient evidence to establish efficacy. The FDA has also been given the right to determine whether a drug sponsor is entitled to a hearing on the issue of efficacy.

Section 355 also provides for an administrative hearing prior to denial of a new drug application. However, this provision has been said not to contemplate a proceeding leading to a final administrative order subject to statutory judicial review.

42. Id.
45. 412 U.S. at 617.
46. The Act requires that notice and an opportunity for a hearing be given the applicant when an NDA is disapproved, 21 U.S.C. § 355(c)(d) (1970); or when prior approval is withdrawn, 21 U.S.C. § 355(e) (1970).

Section 355(c) provides that "if within 180 days after the filing of an application, or such additional period as may be agreed on by the Secretary and the applicant," the Secretary shall either approve the NDA or give notice of an opportunity for a hearing on the question of whether the application is approvable. If after notice and opportunity for a hearing, the
Because of the FDA’s complete control of the NDA procedures, attempts by individuals to obtain new, unproven drugs, or to comply with FDA requirements for approval of drugs, are often stymied. Section 355(b) provides, “Any person may file with the Secretary an application,” but that application must be accompanied by full reports of investigations made to show whether the drug is safe and effective, a full list of the drug’s components, a full statement of the drug’s composition, a full description of methods used in manufacturing, processing and packing the drug, and samples of the drug.

The sponsor is responsible for pre-market testing of the new drug under controlled conditions which satisfy FDA standards. After the manufacturer’s application and data have been studied by the New Drug branch of the Bureau of Medicine of the FDA, the NDA is either approved or refused, after the sponsor has been given notice and an opportunity to be heard.

Under section 371(a) of the Act, the Secretary has authority to promulgate regulations for the efficient enforcement of the Act. In addition to the statutory demands, the sponsor of a new drug must comply with extensive regulations. For example, the Secretary, pursuant to regulation, has the authority to reject an NDA where it is shown that the drug was tested under insufficiently controlled conditions.

It is apparent that most individuals lack the facilities and resources necessary to comply with the FDA standards and to effectively sponsor a new drug. To compensate for the inability to obtain FDA approval of certain cancer drugs, patients have sought judicial assistance. In Rutherford v. American Medical Association, individual cancer patients brought an action in federal court after sponsors of krebiozen, a drug thought helpful in cancer treatment, failed to obtain FDA approval. The plaintiff alleged that the FDA placed impossible or unreasonable conditions on approval of new drugs. The district court dismissed the plaintiff’s complaint. On appeal, the Court of Appeals for the Seventh Circuit held that, “Without an attempted good faith application for approval or exemption, we

Secretary finds a lack of substantial evidence that the drug is effective, the application is refused. 21 USC § 355(c) (1970).


51. Id. § 355(b).

52. Id. § 371(a).


54. 379 F.2d 641 (7th Cir.), cert. denied, 389 U.S. 1043 (1967).
have no jurisdiction to determine whether the FDA has illegally placed impossible or unreasonable conditions on approval or exemption. . . .”55 Although the plaintiffs attacked the constitutionality of the NDA procedure rather than a specific FDA order, the court held that FDA action was a prerequisite to invoking the court’s jurisdiction. Therefore, individuals are forced to rely on drug manufacturers to submit NDA’s for FDA action before the court will consider the procedure which those individuals are challenging. “Until someone has attempted to comply with the Act . . . plaintiff’s appeal should be to the sponsors of the drug.”56 This advice does not benefit laetrile supporters, since the drug has no sponsor.

Individual cancer patients were unsuccessful in another Seventh Circuit case, Tutoki v. Celebrezze,57 in which it was determined that “An essential element of proof by plaintiffs would be a showing that if the FDA had passed on Krebiozen . . . it would have been approved or exempted.”58 As the decision indicates, plaintiffs would have to demonstrate in district court a substantial probability that a particular drug can be shown to be effective and safe.59 Such a showing would apparently require evidence similar to that required by NDA procedure. However, the district court is an improper place for that demonstration. Although relief sought in a court of appeals “presupposes a determination by the district court that Krebiozen should be approved. . . . [t]his determination is a matter within the primary jurisdiction of the FDA.”60 In Tutoki, the court indicated that the judgment was without prejudice to any future proceeding for injunctive relief under 22 U.S.C. § 371(f), to enforce their alleged right to an FDA determination as to any application they filed.61 Therefore, the plaintiffs were turned full circle back to the FDA, and consequently to the “drug sponsor.”

Relief was also denied laetrile supporters in Hanson v. United States.62 While the district court noted that the plaintiffs were drug distributors rather than individual consumers, there was no indication that the distributors had the means necessary to comply with

55. Application had been made under § 355(i) for an exemption for investigational use in 1963, later withdrawn, and again in 1966. 379 F.2d at 643. Presumably neither sufficiently complied to be considered a good faith application to give the court jurisdiction.
56. 379 F.2d at 643.
57. 375 F.2d 105 (7th Cir. 1967).
58. Id. at 107; accord, Rutherford v. American Medical Ass’n, 379 F.2d 641, 643 (7th Cir. 1967).
60. 375 F.2d at 107.
61. Id. at 107.
FDA regulations or that suit by an individual consumer would have required a different result.63

Despite the requirements for invoking the jurisdiction of the court of appeals in FDA cases,64 an alternative means of review is provided by the Administrative Procedure Act.65 In *Rutherford v. United States*,66 the Tenth Circuit Court of Appeals upheld an injunction issued by the district court against FDA interference with the use of laetrile. The district court had held that patients were denied freedom of choice for treatment of cancer, and were deprived of life, liberty or property without due process of law.67 The trial court found that laetrile was effective in curing this particular plaintiff's cancer, a determination other courts ordinarily deferred to the FDA. Furthermore, it was held that the FDA regulations made it virtually impossible for an individual to have an NDA processed, and that Congress intended the FDA to either approve or disapprove the use of laetrile on its own initiative and in good faith.68 Since the FDA abdicated its duty to make a clear determination regarding laetrile, and inaction was said to amount to disapproval, the court acquired jurisdiction over the matter.69 FDA inaction was recognized as an effective denial of the patients' right of free choice, since they were wholly without the means or resources needed to comply with provisions of section 355(b).70 Jurisdiction was partially based on a showing of hardship since plaintiff's use of laetrile would subject him to criminal prosecution, whereas failure to use it might cost him his life.71 Jurisdiction was also predicated on 28 U.S.C. § 1337.72

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62. 417 F. Supp. 30 (D. Minn.), aff’d per curiam, 540 F.2d 947 (8th Cir. 1976).
63. *Id.* at 37.
67. 399 F. Supp. at 1213.
68. *Id.* at 1212.
69. *Id.* The United States Supreme Court also stated that the FDA, by reason of the Administrative Procedure Act, 5 U.S.C. § 544(e) “may issue a declaratory order to terminate a controversy over a 'new drug' or remove any uncertainty whether a particular drug is a 'new drug.'...” Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609, 626 (1973).
70. 399 F. Supp. 1213.
72. 28 U.S.C. § 1337 (1970), provides, “The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.”
The Tenth Circuit did not reach the issue of laetrile’s effectiveness or the constitutionality of the NDA provisions, but confined its inquiry to the procedures involved. Two FDA determinations were differentiated. The first was a determination whether a drug is a new drug or exempt under the grandfather clause from the NDA procedures. The second was whether a drug is shown to be effective and safe. Whereas the latter is a determination which can be made only after a new drug application is filed with the FDA, the first is not and thus could be fully tried. Since the FDA determination that laetrile is a new drug was made without citing any facts whatsoever to support that decision, it was entirely proper for the district court to entertain the case. The court of appeals upheld the injunction and remanded the case for hearings to enable the FDA to make a record and allow laetrile proponents to express their views.

Although the Rutherford decision appears to be encouraging to laetrile proponents, its actual value to those seeking approval for laetrile is limited. If the FDA determines after hearings that laetrile is a new drug, the NDA procedure must be complied with. If the FDA finds that laetrile is exempt under the grandfather clause, it can order the drug off the market on the basis that laetrile is not effective for treating cancer as claimed on the label.

The Right of Privacy Challenge

The recent controversy over laetrile raises further constitutional questions concerning a patient’s decision to use an unproven drug. Although the right to privacy arguably encompasses that decision, courts have been reluctant to respond to that challenge.

The Constitution does not explicitly set forth a right of privacy, yet the Supreme Court has long recognized it as an aspect of indi-

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73. 542 F.2d at 1138.
74. See text accompanying notes 26 through 28 supra.
76. The FDA Commissioner concluded that laetrile is a new drug within the meaning of that Act and is not exempt under the grandfather clauses. The court has yet to rule on the matter. 42 Fed. Reg. 39,768 (Aug. 5, 1977).
78. In Rutherford v. United States, 399 F. Supp. 1208, 1214 (W.D. Okla. 1975), aff’d and remanded, 542 F.2d 1137 (10th Cir. 1976), the district court raised the right of privacy but the court of appeals did not reach the issue.
idual liberty\textsuperscript{79} protected by the due process clauses of the fifth\textsuperscript{80} and fourteenth\textsuperscript{81} amendments.\textsuperscript{82} The right has been held to include "the interest in independence in making certain kinds of decisions."\textsuperscript{83} Entitled to this coverage are personal decisions regarding abortion,\textsuperscript{84} marriage,\textsuperscript{85} contraception,\textsuperscript{86} child rearing and education,\textsuperscript{87} family relationships,\textsuperscript{88} and procreation.\textsuperscript{89}

The patient's choice of a particular course of medical treatment should be no less entitled to Constitutional protection than a woman's decision to terminate pregnancy.\textsuperscript{90} Although the right to make fundamental decisions is not absolute, the right to be free from unwarranted governmental intrusions is implicit in the right of privacy.\textsuperscript{91} There are situations, however, where the government's interest in the health of its citizens may override the individual's prerogative to make certain decisions.\textsuperscript{92} However, the governmental interference must be justified by a compelling interest, and legislation "must be narrowly drawn to express only legitimate state interests. . . ."\textsuperscript{93} Thus, regulations must be drafted to avoid intrusion

\textsuperscript{79} Although a right of privacy was recognized as early as 1891, see Union Pacific R. Co. v. Botsford, 141 U.S. 250, 251 (1891), there was no explicit recognition until Griswold v. Connecticut, 381 U.S. 479 (1965). Griswold held that the privacy right existed in the penumbras of specific guarantees of the Bill of Rights "formed by emanations from those guarantees that help give them life and substance." Id. at 484. This has been held to include the right to be free from unwarranted governmental intrusions into such fundamental matters as the decision on whether to bear a child. Eisenstadt v. Baird, 405 U.S. 453, 453 (1972).

\textsuperscript{80} U.S. Const. amend. V.

\textsuperscript{81} U.S. Const. amend. XIV.

\textsuperscript{82} The right to privacy may arguably be found in other amendments as well:

In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment, . . . in the Fourth and Fifth Amendments, . . . in the penumbras of the Bill of Rights . . . in the Ninth Amendment, . . . or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment . . .


\textsuperscript{83} Whalen v. Roe, 97 S. Ct. 869, 876 (1977).


\textsuperscript{85} Loving v. Virginia, 388 U.S. 1, 12 (1967).


\textsuperscript{88} Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

\textsuperscript{89} Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

\textsuperscript{90} Presumably the right of privacy is sufficiently broad to encompass a patient's decision to decline medical treatment. In In re Quinlan, 70 N.J. 10, 255 A.2d 647 (1976), the father of a young woman whose vital life functions were being artificially sustained, petitioned the court for a determination whether the life sustaining machinery should be turned off. The New Jersey Supreme Court held that the termination decision was protected by the right of privacy. Id. at 27, 255 A.2d at 664.


\textsuperscript{92} See text accompanying notes 120 through 121 infra.

into the area of protected individual rights, with less burdensome alternatives employed where they will achieve the desired goals.\textsuperscript{24} Regulations substantially limiting access to contraceptives and thereby burdening an individual's decision to prevent contraception, were therefore invalidated in a recent Supreme Court opinion because they were not justified by a compelling state interest.\textsuperscript{25}

In \textit{Whalen v. Roe},\textsuperscript{96} the Supreme Court upheld a New York statute\textsuperscript{97} under which a centralized computer record is maintained with names and addresses of all persons who obtain by prescription certain drugs for which there is both a legal and illegal market. Physicians and patients argued that the statute invaded the right of privacy,\textsuperscript{98} alleging that some persons will decline needed medication because of their fear that "the misuse of the computerized data will cause them to be stigmatized as 'drug addicts.'"\textsuperscript{99} While finding no violation of the right of privacy, the Court nevertheless made two significant points. First, the New York statute had not "deprived [any individual] of the right to decide independently, with the advice of his physician, to acquire and use needed medication,"\textsuperscript{100} and second, the statute did not impose requirements of advance approval before use of the drug could be prescribed.\textsuperscript{101}

Unlike the regulatory scheme of \textit{Whalen}, the efficacy requirement for new drugs does place an "advance approval" obstacle in the path of patients seeking new drug treatment alternatives. In addition, the procedure for securing advance approval is far more complex and burdensome than others invalidated by the Court.\textsuperscript{102} Thus, not only must a patient await FDA approval before a particular drug treatment alternative is available, but he also has no means to initiate FDA consideration of the new drug. Furthermore, a cancer patient seeking to use laetrile is in a different situation than a New York

\begin{footnotes}
\item[96] 97 S. Ct. 869 (1977).
\item[98] Cases characterized as protecting privacy have involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters and another is the interest in independence in making certain kinds of fundamental decisions. 97 S. Ct. at 876.
\item[99] \textit{Id.} at 874.
\item[100] \textit{Id.} at 878.
\item[101] An advance approval requirement relating to abortions had been invalidated in \textit{Doe v. Bolton}, 410 U.S. 179 (1973). That statute required written consent from two state-licensed physicians, other than the patient's personal physician, and advance approval of a committee of not less than three members of the hospital staff where the procedure was to be performed.
\end{footnotes}
patient whose choice of drugs may be somewhat burdened by concern about a computer record. The cancer patient faces a total bar to certain alternatives, and thus to a meaningful choice.\textsuperscript{103}

**Congressional Justifications**

In *Carey v. Population Services International*,\textsuperscript{104} the Supreme Court invalidated regulations which limited access to contraceptives\textsuperscript{105} because New York had not shown a compelling interest to justify the burden on access.\textsuperscript{106} Although the "compelling state interest" test may not apply to an act of Congress, the rights of the individual are fundamental whether they be under state or federal regulation. The Food, Drug and Cosmetic Act of 1938 was enacted pursuant to congressional authority to regulate interstate commerce.\textsuperscript{107} The power of Congress to determine the means necessary to implement its purpose in preventing interstate shipment of harmful articles was recognized when the 1906 Act was challenged in *McDermott v. Wisconsin*.\textsuperscript{108} Thereafter, in *United States v. Sullivan*,\textsuperscript{109} the Act dealing with labeling of drugs shipped in interstate commerce was validated. Both of those cases involved regulations reasonably calculated to promote the purpose of assuring that only safe drugs reach the consumer, and neither of those cases involved the issue of protected individual rights. Yet, where other federal statutes have endangered fundamental interests, the Supreme Court has struck down those provisions.\textsuperscript{110}

The interest advanced by Congress to justify the 1962 amendments to the Food, Drug and Cosmetic Act of 1938, was to "bring about better, safer medicine and to establish a more effective system of enforcement of the drug laws."\textsuperscript{111} In view of the thalidomide disaster,\textsuperscript{112} it is reasonable to assume that safety was the primary concern behind the amendments. Thalidomide evidently could have been shown to be an effective sedative without removing the pre-

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\textsuperscript{103} Whalen indicated, however, that the state probably could prohibit entirely the use of certain drugs. 97 S. Ct. at 878. Apparently prohibition would be based on the potential dangerousness of those drugs. Reference is made to opium, cocaine, methadone, amphetamines and methaqualone. *Id.* at 873 n.8.

\textsuperscript{104} 97 S. Ct. 2010 (1977).

\textsuperscript{105} *Id.* at 2015-18.

\textsuperscript{106} *Id.* at 2019.

\textsuperscript{107} U.S. Const. art. 1, § 8, cl. 3.

\textsuperscript{108} 228 U.S. 115 (1913).

\textsuperscript{109} 332 U.S. 689 (1948).

\textsuperscript{110} See, e.g., Aptheker v. Secretary of State, 378 U.S. 500 (1964) (right to travel); Lamont v. Postmaster General, 381 U.S. 301 (1965) (right to receive information and ideas).


\textsuperscript{112} See note 20 *supra* and accompanying text.
natal dangers which developed. The government's interest in regulating which drugs will reach the market is substantial when safety is the concern. The ability of the individual or physician to foresee potential side-effects is extremely limited, and a trial and error method of determining a drug's safety once it is on the market would have terrible consequences. However, where efficacy is concerned the interest is substantially diminished. The regulation is no longer designed to protect the unwary consumer from a harmful product, but to protect a knowing consumer from a potentially "harmful" choice by which he may abandon established methods of treatment. Trial and error testing of a safe drug on the market to determine effectiveness may have disappointing consequences, but ineffectiveness is a foreseeable result which a patient and his responsible physician necessarily will consider in consultation.

FDA Justifications

The efficacy requirement and procedures involved may not actually serve the articulated purpose of bringing about safer and better medicine. Admittedly, it assures the consumer that certain technical investigational procedures have been complied with before the drug is made available, but it can also serve to encourage relaxation of standards by previously responsible parties—physician, patient, and pharmacist. The FDA, faced with the significance which the public will attach to its approvals, may be so cautious as to seriously delay the availability of new life saving drugs. In the meantime, patients suffer. Some die who may have been saved and others find that when the drug is finally approved, their disease has progressed beyond the point where the drug would benefit them.113

The FDA's argument, that availability of an unproven drug will lure patients from conventional treatments, necessarily involves a value judgement that conventional treatments are better for the patient. However, if the patient and doctor are adequately informed that a particular drug has not been proven effective, they will be in a better position than the FDA to make that value judgement. Were a cancer patient to take laetrile without effecting a cure, the reasonable question should not be whether availability of that drug caused him to forego other treatment, but whether he was sufficiently informed of the drug's status to make a reasoned decision.

In arriving at that decision, a patient and doctor can arrive at an individualized determination, as opposed to the FDA's broad deter-

mination which must await long term testing and investigational procedures by a drug sponsor. The physician must consider treatment alternatives in light of the particular patient's situation. The consequences of conventional methods are such that a person suffering from cancer may choose to forego treatment altogether because he does not wish to submit to presently available treatments. Surgical treatment for cancerous tumors frequently requires sacrificing body parts without an assurance of recovery. Radiation involves many risks and does not enjoy certainty of success. An important consideration is the degree to which the individual's cancer has progressed, since one who has been pronounced terminally ill with no hope of recovery has little to lose in trying an unproven new drug. It is difficult to comprehend how the government's interest in efficacy could supersede that patient's right of self determination.

Assessing the Justifications

At some point the government's interest may become more persuasive. For example, in the abortion situation, the Supreme Court has held that the state's interest increases as the pregnancy advances. Where conventional cancer treatment in the early stages of the disease involves minimal bodily invasion, and the chances of recovery are good, the argument can be made that the interest in encouraging those methods may be sufficient to overcome the individual's interest in self determination. As the disease progresses and conventional methods involve greater bodily invasion and less probability of recovery, the government's interest may be less compelling. The difficulty with this line of reasoning is that, unlike pregnancy, cancer stages are not uniform. Medical opinions differ, and the effect of an unproven drug will vary from one individual to the next, since "even a placebo can be highly efficacious in the right patient."

Presumably, an individual's physician will consider the probability of success if conventional treatment is employed and make rec-

116. Id. at 83. The conventional approach is radiation and chemotherapy. "These methods are so marginally effective that no optimistic assault on cancer incidents and death rate statistics has been made." Culbert, supra note 3, at 49, 139.
ommendations accordingly. Proper warnings regarding the drug's unproven status, given to the physician and the patient, should be sufficient to insure that conventional methods will be relied upon when they offer the best opportunity for recovery.

The government's concern that access to unproven drugs will mislead unwary patients may be unwarranted. The government reasons that a substantial harm will result from non-reliance on established methods of treatment. Hence, in the absence of proof of resulting harm, the policy behind the efficacy requirement and the intrusion into the individual's right to make certain fundamental decisions becomes unjustified.

**The Food, Drug and Cosmetic Act Alternative**

The United States Supreme Court has held that where fundamental individual rights are involved, least restrictive alternatives should be employed. Under section 355(d) of the FDCA, if a drug is not proven effective, access to that new drug is denied. It has been held in other situations that rules limiting access to medical treatment have a "'maximum destructive impact' on privacy rights." For example, Supreme Court decisions have held unconstitutional statutes that limited in a variety of ways a woman's access to contraceptives. In *Carey*, the Court declared a state statute unconstitutional not "because there is an independent 'right of access to contraceptives,' but because such access is essential to exercise of the constitutionally protected right of decision in matters of childbearing. . . ." It follows that possible alternatives to a total ban on an unproven new drug must not so limit access to the drug as to deny the patient a realistic choice. Regulations must be tailored to serve the governmental interest and respect the individual exercise of the right of self determination.

The efficacy requirement is not essential to the government's interest of insuring that only safe drugs reach the consumer. Nor is it necessary to prevent the consumer from being misled by false

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121. In *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) the Court stated that by "forbidding the use of contraceptives rather than regulating their manufacture or sale," the Connecticut statute had a "maximum destructive impact" on privacy rights.
123. *Id.* at 2018. Section 6811 of the New York Education Law reviewed in *Carey* made it a crime: (1) for any person to sell or distribute any contraceptive to a minor under 16, (2) for anyone other than a licensed pharmacist to distribute contraceptives to a person over 16, and (3) for anyone, including a licensed pharmacist, to advertise or display contraceptives.
124. *See note 20 supra* and accompanying text.
claims of effectiveness. Labeling regulations embodied in the Act provide a viable alternative to the requirement of a pre-market showing of effectiveness. Under the Act, drugs which have not been proven effective are required to state that fact on the label to avoid misleading the consumer. In the Senate reports to the 1962 amendments, the provisions regarding false or misleading labeling were said to already include effectiveness: "[W]ith respect to effectiveness of the drug, the labeling of a drug claimed to be effective for particular disease conditions . . . would also have to make a full disclosure as to its [the drug's] usefulness and the limitations in the scientific evidence to support its use."

Although the efficacy requirement would no longer apply to the NDA procedure, labeling is presently effected by the NDA provisions of the Act which can remain unchanged. The FDA may refuse approval to a new drug if the label is false or misleading. There are regulations to implement the various labeling requirements. If the drug sponsor does not present substantial evidence of efficacy, the FDA can require specific warnings that the drug has not been proven effective for its intended use.

Section 352(a) provides that a drug is misbranded if its label is false or misleading in any way. In determining whether a label is misleading, the FDA will consider not only representations made or suggested, but also the extent to which the labeling fails to reveal facts which are material in light of those representations. Therefore, if the ability of a drug to effectively treat a particular condition has not been established, that fact must be revealed on the label, or the drug will be deemed to be misbranded.

In addition to section 352(a) controls, certain labeling procedures can be established under the authority granted in 21 U.S.C. § 371 to promulgate regulations. One approach would be to require package inserts with appropriate warnings. Of course, the intended purpose of a particular drug will determine to a great extent the nature of the warnings to be required on the label.

In order to insure that the warning contained in the label or package insert is adequate to both physician and patient, section 352(c)
provides that information which the Act requires to appear on the label must be conspicuous and in a form which is understandable to the ordinary individual.\textsuperscript{132}

Other provisions of the Act clarify requirements as to certain types of drugs. In section 812,\textsuperscript{133} a schedule of controlled substances is set forth. Presently, there are five schedules. If Congress determines that labeling regulations would provide inadequate protection, it can create a "Schedule VI" for drugs of unproven effectiveness which may cause persons to forego accepted treatments. That schedule can then be incorporated into provisions which would be appropriate. For example, a limited prescription can be required under section 829(b) which, by amendment, would include the newly created schedule. Section 829(b) presently provides:

Except when dispensed directly by a practitioner, other than a pharmacist, to an ultimate user, no controlled substance in schedule III or IV, which is a prescription drug as determined under the Federal Food, Drug and Cosmetic Act . . . may be dispensed without a written or oral prescription . . . [and it] may not be filled or refilled more than six months after the date thereof or be refilled more than five times after the date of the prescription unless renewed by the practitioner.\textsuperscript{134}

One argument advanced against eliminating the efficacy requirement is that persons would be unable to exercise a real choice, because they would be persuaded by false claims and appealing sales techniques to demand unproven drugs. Congress, however, has anticipated this problem and provided for FDA regulation of prescription drug advertising. Basically, the manufacturer or distributor is required to include in all advertisements information relating to side effects, contraindications, and effectiveness as required in regulations issued by the Secretary.\textsuperscript{135}

If the efficacy provisions are eliminated, a great number of ineffective drugs may enter the market. While the individual's free choice can be respected by eliminating the efficacy test for new drugs, the standards for establishing effectiveness to the FDA's satisfaction can be retained for a modified purpose. Drugs which have not established effectiveness would be marketed but without the FDA's approval as effective. Drugs which do satisfy the FDA stan-


\textsuperscript{133} Id. § 812 (1970).

\textsuperscript{134} Id. § 829(b) (1970). Somewhat more stringent requirements could possibly be applied from 21 U.S.C. § 829(a) (1970).

standards would be removed from the newly created schedule and, de-
pending on the nature of the drug, enjoy less stringent prescription
regulations. The manufacturer could then present a specific, FDA
approved claim of effectiveness for the drug. This scheme serves the
FDA’s purpose of encouraging the individual to choose established
medical treatments. Moreover, the consumer will be better able to
evaluate the available drug options.

When combined with proper regulations to suit particular catego-
ries of new drugs, the above provisions are adequate to insure that
the individual is sufficiently informed of the drug’s status; yet those
provisions would not restrict access to new drugs whose effectiveness
is unproven. Thus, the patient is presented with a meaningful
choice.

THE APPEAL TO CONGRESS

Although the constitutional right to make certain fundamental
decisions may include the right of an individual to choose a course
of medical treatment which has not been established as effective,
the right has achieved limited recognition in the courts.136 Attacking
the procedure for NDA’s requires overcoming the persuasive argu-
ment that “the fact that compliance might be expensive and bur-
densome is not unfairness in the procedure, but a consequence of a
reasonable Congressional scheme for the introduction of new
drugs.”137

Whether the congressional scheme is in fact reasonable, is directly
related to the purpose for which the effectiveness requirement is
employed. Notwithstanding elimination of an efficacy requirement,
the safety of drugs would still have to be established. Thus the end
result of eliminating the latter requirement would be to release
harmless but possibly ineffective new drugs into the market. Chal-
lenges can continue to be made through the courts that preventing
unproven drugs from reaching the consumer is improper, since it
unnecessarily restricts freedom of choice in medical treatment.
However, an appeal to Congress would be more likely to achieve the
desired result and can bring about amendment to the Act in a
swifter, more certain manner.

Just as public reaction to drug related tragedy pressured the Con-
gress in 1938 and 1962,138 laetrile has found public support which has
motivated courts and legislatures to re-examine the FDCA. The

136. See Rutherford v. United States, 542 F.2d 1137 (10th Cir. 1976).
138. See notes 19-20 supra and accompanying text.
testimonials of citizens that laetrile has a curative effect has caused state and federal legislatures to reconsider the wisdom of those intensified requirements occasioned by those past disasters, particularly when they defeat the availability of a drug with potential lifesaving qualities.

Recently, several state legislatures have attempted to legalize the use of laetrile within their borders.\footnote{139} The Illinois legislature recently overrode Governor James Thompson's veto of a bill\footnote{140} which exempts laetrile from the state's food and drug law\footnote{141} which requires that a new drug have FDA approval before it can be sold within the state.\footnote{142} It provides that no health care facility can restrict or prohibit the use of laetrile when administered by a person licensed to practice medicine.\footnote{143}

A basic and serious difficulty with such legislation is that the FDA ban prevents shipment of laetrile into the state.\footnote{144} It is not clear in just what form the substance necessary to manufacture the drug could be transported.\footnote{145} Such legislation may amount to little more than a paper victory for laetrile supporters, although it may influence Congress.

The freedom of choice appeal is best directed at Congress, for it is within its power to amend the Act to free all new drugs from the efficacy requirement and avoid inevitable state-federal conflict. Reconsideration of the efficacy requirement is in progress. Representative Steven D. Symms has introduced a bill in the House to "expand the medical freedom of choice of consumers by amending the Federal Food, Drug and Cosmetic Act to provide that drugs will be regulated under that Act solely to assure their safety."\footnote{146} That bill would eliminate the terms "effective," "effectiveness" and "efficacy" from the Act, while adding a new paragraph\footnote{147} which would provide that a drug is misbranded if it does not contain the statement, "This drug has not been tested or reviewed for efficacy by the Federal Government."\footnote{148} A similar bill, "Medical Freedom of

\footnotesize{139. Chicago Sun-Times, June 22, 1977, at 50, col. 1.}
\footnotesize{140. Chicago Sun-Times, Aug. 25, 1977, at 2, col. 1.}
\footnotesize{141. Chicago Sun-Times, Nov. 18, 1977, at 3, col. 1.}
\footnotesize{142. ILL. REV. STAT. ch. 56 1/2, § 517 (1973).}
\footnotesize{143. H.B. 1200.}
\footnotesize{144. 21 U.S.C. § 355(a) (1970).}
\footnotesize{145. Laetrile is processed from apricot pits, but shipment of the pits themselves might be prohibited by the FDA. See generally CULBERT, supra note 3.}
\footnotesize{146. H.R. 54, 95th Cong., 1st Sess. (1977) (referred Jan. 4, 1977 to the House Committee on Interstate and Foreign Commerce.) [Hereinafter cited as H.R. 54].}
\footnotesize{147. 21 U.S.C. § 352(u) (legislation pending before the U.S. House of Representatives).}
\footnotesize{148. H.R. 54, supra note 146, at 2.}
Choice Act," has been introduced in the Senate by Senator Jesse L. Helms.\textsuperscript{149}

Passage of these bills is far from assured. However, the arguments advanced by critics of the efficacy requirement will finally be presented to Congress, the most appropriate forum for consideration of the FDCA's provisions.

CONCLUSION

The lack of FDA approval of a particular new drug is not equivalent to a finding that the drug is ineffective. There are various reasons why a particular drug may have unproven status. For instance, the drug may not be proven effective by investigational testing. Moreover, an NDA, although establishing effectiveness, may be denied because of defects in the testing methods or because of inadequate reports. The present status of the drug laetrile may be attributed to the failure of a sponsor to assume the responsibility for making application to the FDA and for conducting the required testing. Although the debate continues over whether laetrile is effective in cancer treatment, the mere possibility that the drug may be life saving should be an adequate incentive to Congress to reconsider the efficacy standard of the Food, Drug and Cosmetic Act.

Congressional action cannot resolve all problems that confront laetrile. Before the drug can be considered by the FDA, a manufacturer or distributor must assume the responsibility to sponsor an NDA. Safety must be established and labeling must comply with regulations. However, passage of the pending legislation can remove the statutory efficacy barrier to new drugs and self determination in drug treatment. The principle has been advanced and aptly stated:

An individual cannot be deprived of the enjoyment of a constitutional right, because some governmental organ may believe that it is better for him and for others that he may not have this particular enjoyment. The judgement as to that and the effects upon himself therefrom are matters for his own responsibility.\textsuperscript{150}

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\textsuperscript{149} Chicago Sun-Times, June 22, 1977, at 50, col. 1.
\textsuperscript{150} Dove v. Parham, 282 F.2d 256 (8th Cir. 1960) (school desegregation).