WORK INCENTIVE ASPECTS OF THE FAMILY ASSISTANCE PLAN

MARK L. WOLF*
JOHN V. ERICKSON**

Introduction

In 1970 the Nixon Administration offered a bold substitute for the welfare system in the United States. The 1970 Nixon Family Assistance Plan (FAP)[1] represented, despite its sponsors' statements to the contrary, an attempt to institutionalize a "guaranteed income" or a "negative income tax" for part of the nation's poor. FAP included the two identifying features of any negative income tax program: "the *basic allowance* which an eligible individual or family[2] may claim from the government, and the *offsetting tax* which every recipient of the basic allowance must pay on his other income."[3] Just as the positive income tax allows the government to share a family's earnings above a predetermined minimum, FAP commits the government to insuring in part against a family's failure to earn a specified amount.

The work incentive aspects of the Family Assistance Plan are of great political importance because "payment of the basic guarantee for no work to people who might be expected to work is a feature that attracts attention and opposition because it seems to conflict with a strongly ingrained American ethic."[4] A 1968 Gallup Poll

---

* B.A. 1968, Yale University; J.D. 1971, Harvard Law School. Mr. Wolf is currently a member of the Massachusetts Bar.

** B.S. 1966, M.S. 1967, Stanford University; Class of 1971, Harvard Law School.

1 The Family Assistance Act of 1970, H.R. 16311, 91st Cong., 2d Sess. (1970).

2 The Family Assistance Plan, as its name implies, covers only families with children and, therefore, aids only a segment of the nation's poor.

3 Tobin, Peckman & Mieszkowski, *Is the Negative Income Tax Practical?*, 77 YALE L.J. 1, 2 (1967). Two other features which distinguish a negative income tax from traditional welfare programs are (1) the inclusion of a work incentive by reducing benefits at a rate less than 100 percent of earned income, and (2) the use of objective criteria for determining eligibility and level of payments. *See* Asimow & Klein, *The Negative Income Tax: Accounting Problems and a Proposed Solution*, 8 HARV. J. LEGIS. 1, 1-2 (1970). *See also* Klein, *Familial Relationships and Economic Well-Being: Family Unit Rules for a Negative Income Tax*, 8 HARV. J. LEGIS. 361 (1971).

4 Statement of Professor James Tobin, *Hearings on Income Maintenance Programs Before the Joint Economic Committee*, 90th Cong., 2d Sess. 244 (1968).

indicated that a majority of Americans opposed a guaranteed annual income of $3200 per year, but overwhelmingly supported a plan that would provide enough work to supply this amount.[5] From their interviews the pollsters concluded that "[a]t the heart of this opposition is the belief that in our work oriented society people ought not get 'something for nothing.' "[6]

In recognition of this political fact, the Nixon administration emphasized in promoting the Family Assistance Plan of 1970 the efficacy of its work requirements and work incentives. Secretary of Labor, James Hodgson, demonstrated this approach when he stated to the Senate Finance Committee:

> The overriding point I want to make at the outset is that the family assistance plan is not — by concept or design — a "guaranteed income" or a "negative income tax." The Nixon Administration does not agree with those approaches.
>
> It is, instead, a complementary array of work incentives, work requirements, training and employment opportunities, child care to enable mothers to work, and income allowances.[7]

The purpose of this article is to analyze the work incentive aspects of the Family Assistance Plan. This will include both examination of its basic assumption that work incentives are an important element of a negative income tax plan and evaluation of its effort to institutionalize this assumption. More specifically, the ability of the poor to respond to work incentives will be examined and empirical evidence on the effect of various marginal rates of reduction of benefits on work incentives will be surveyed. The cumulative effect on work incentives of adding the federal FAP plan to state programs which will continue and other federal programs will also be explored. Finally, the co-ordination of FAP with the positive tax system to promote work incentives will be discussed. The provisions which require registration for training and work,[8] however

---

5 N.Y. Times, June 16, 1968, at 47, col. 1.

6 *Id.*

7 *Hearings on H.R. 16311 Before the Senate Finance Committee*, 91st Cong., 2d Sess. (1970) [hereinafter cited as *1970 Senate Hearings*].

8 H.R. 1, §§ 2111-18, 92d Cong., 1st Sess. (1971) [hereinafter cited as H.R. 1]. In the 1971 version of FAP that appears in H.R. 1, the work registration and training requirements were split off from the Family Assistance Plan into a separate program called Opportunities for Families Program (OFF). OFF is to be administered by the Labor Department, not HEW. The work registration and training

crucial to the effectiveness of FAP as a work oriented program, are not within the scope of this article and will be considered only briefly.[9]

I. The Family Assistance Plan: Legislative History and Mechanism of Operation

The Family Assistance Plan of 1970 was passed by the House of Representatives but met opposition and ultimately died in the Senate Finance Committee. A revised version of FAP was offered by the administration in 1971 and introduced in the House as Title IV of H.R. 1, the Social Security Amendments of 1971.[10] The new program, as embodied in H.R. 1, is an attempt to meet many of the objections raised in the 1970 Senate Finance Committee hearings,[11] and it is the result of considerable cooperation between the House Ways and Means Committee and the Department of Health, Education, and Welfare. By grafting the new program onto the 1971 Social Security Amendments, the House sponsors hope to obtain Senate acceptance of their controversial bill as a by-product of passage of the generally popular social security amendments. Although there was an attempt to eliminate Title IV from H.R. 1 in the House, H.R. 1 was approved in that chamber on June 22, 1971, without substantial amendment and was sent to the Senate Finance Committee. A first round of hearings, held on H.R. 1 in late July,[12] indicated that much of the opposition that killed the 1970 plan was likewise dedicated to stopping the revised plan.

The 1971 Family Assistance Plan of H.R. 1 provides for a basic payment to be made to each eligible family. The basic payment is computed as follows: $800 per year for each of the first two

---

requirements that were part of the 1970 version of FAP reappear in H.R. 1 as the separately titled program OFF and is included in sections 2111-18 of H.R. 1. *See* H.R. Rep. No. 92-231, 92d Cong., 1st Sess. 28 (1971) [hereinafter cited as *1971 Committee Report*]; *Hearings on H.R. 1 Before the Senate Finance Committee*, 92d Cong., 1st Sess. 32-33 (1971) [hereinafter cited as *1971 Senate Hearings*].

9 For a description of problems encountered in the Department of Labor's Work Incentive Program (WIN), see *1970 Senate Hearings* 840-61.

10 H.R. 1. The program is explained in a report of the House Ways and Means Committee, *1971 Committee Report*.

11 *1970 Senate Hearings*.

12 *1971 Senate Hearings*.

members of the family; $400 for each of the next three members; $300 for each of the next two members; and $200 for the next member.[13] The maximum basic payment is therefore $3,600 for family sizes of eight or more persons. A family is allowed to keep the first $720 of earned income per year without reducing the amount of its basic payment.[14] For every $3 of earned income above $720, the family's basic payment is reduced by $2.[15] This reduction of the basic payment with increases in earnings, referred to as the marginal rate of reduction or simply marginal tax rate, payment would be $2400 if it had earned income of less than $720. per year. Unearned income, such as interest, pensions, and social security payments, effects a reduction of the basic payment dollar for dollar,[16] a 100 percent marginal rate of reduction.

To illustrate the basic elements of the 1971 FAP, consider a family of four eligible for benefits under FAP. The family's basic payment would be $2400 if it had earned income of less than $720. For each dollar of earned income above $720, the basic payment would be reduced by 67 cents. It would take $3600 of earned income above $720, or $4320, to reduce the $2400 basic payment to zero. The point at which a family earns enough income to reduce its basic payment to zero is referred to as the break-even point. For a family of eight or more, the basic payment would be $3600, with a break-even point at earnings of $720 plus $5400, or $6120. Therefore, a family of 8 or more, assuming no unearned income, would be eligible for FAP payments so long as earned income did not exceed $6120 in any year.

Both the Family Assistance Plan of 1970 and its successor in H.R. 1, like other negative income tax plans, is designed to provide poor families[17] with the resources to make the freedoms rhetorically guaranteed to all Americans functionally available to them. By providing money, rather than income in kind, FAP tacitly assumes that poor families are as capable as any other families of

13 H.R. I § 2152(b).
14 *Id.* § 2153(b)(4).
15 *Id.*
16 *Id.* §§ 2153(a)(2), 2153(b)(4).
17 The poverty level is based on the Department of Agriculture measure of cost of a temporary, low budget, nutritious diet for households of various sizes. The poverty index is simply this food budget multiplied by three to reflect the fact that food is typically one-third of the expenses of a low income family.

making rational decisions which affect their happiness and well being. In addition, FAP assumes that the economic market will respond to the increased disposable income for the poor with increased goods and services, rather than with inflated prices for a static supply of goods and services. In general, although a negative income tax represents a departure from previous approaches to public welfare, the values it promotes are familiar and traditional. Although the Nixon proposal does not rely exclusively on a freely functioning market to induce the poor to work, it is aimed at promoting economic participation by the presently poor in an effectively operating market system.

The Family Assistance Plan embodies the conflicts and compromises inherent in any negative income tax plan. The competing considerations which must be balanced are:

1. The adequacy of cash supplements to the nonemployable poor.
2. Minimum disincentive effect on the employable poor.
3. Acceptable cost to the government.[18]

Analysis of the drafting and Congressional treatment of FAP reveals the constant tension among these criteria. Although most discussion has focused on work incentives for the employable poor, limiting cost usually has proved to be the most compelling consideration in policy decisions.

II. Work Incentive Provisions of the Family Assistance Plan

The Family Assistance Plan originally proposed by the administration was in President Nixon's words, designed to "assure an income foundation throughout every section of America for all parents who cannot adequately support themselves and their children."[19] As the statement suggests, only families with children are covered.[20] This limited coverage reflects an effort to minimize costs.

18 Surrey, *Income Maintenance Programs*, 24 Tax L. Rev. 305, 325 (1969).
19 N.Y. Times, Aug. 12, 1969, at 18, col. 3.
20 H.R. 1 § 2155.

The proposed Family Assistance Plan represents an important departure from the present welfare system by providing coverage for the working poor. This is an attempt to make benefits contingent on need alone, rather than need plus other criteria, such as disability or the lack of a male head to the family. The working poor are included, according to President Nixon, to encourage them to go on working and eliminate the "incentive to quit and go on relief where that would pay more than work."[21] The potential impact on the working poor is enormous. In no state at present does a family headed by a father working full time receive any welfare benefits, regardless of how little he earns.[22] Yet in 1966, one-third of the families in poverty were headed by full-time workers earning inadequate incomes.[23]

In addition, the Family Assistance Plan proposes an improvement over the present welfare system by offering benefits to all dependent families with children, whether headed by a male or female. Presently, in over half of the states families headed by unemployed fathers do not qualify for public assistance.[24] Failure to provide benefits creates a powerful financial incentive for a male to desert his family. FAP attempts to remove this incentive.

Under the Family Assistance Plan of H.R. 1 each family whose non-excludable income[25] is less than the family benefit level would be eligible for a payment after meeting the registration for work or training and other requirements.[26] The payment would be the difference between the income which is not excluded and the basic family benefit. There are two provisions for excluded income. The first $60 of monthly income, or $720 per year, is excluded[27] in recognition of the fact that expenses such as transportation, clothing, and social security taxes are incurred in going to work, and a family does not begin to add to its income until it surpasses the cost of working.[28] In addition, one-third of the amount earned

21 N.Y. Times, Aug. 12, 1969, at 18, col. 5.
22 *Id.* 18, col. 4.
23 C. GREEN, NEGATIVE TAXES AND THE POVERTY PROGRAM 318 (1967).
24 N.Y. Times, Aug. 12, 1969, at 18, col. 3.
25 Non-excludable income is defined in H.R. 1 § 2153(b).
26 *Id.* § 2111.
27 *Id.* § 2153(b)(4).
28 *1971 Committee Report* 177.

above $720 per year is excluded.[29] This is the key work incentive provision. It attempts to provide a work incentive by assuring that increased earnings result in substantially increased disposable income. Conceptually, this is a departure from traditional welfare programs, which substitute earnings for public payments dollar for dollar.

These work incentives are not the only inducements to work for the presently unemployed. H.R. 1 also requires all persons available for employment who accept payments to register for work or job training and accept work or training when it is offered.[30] If an employable person refused to register, train, or work, he would not be counted as a family member for purposes of computing the family's basic allowance, although his income would be counted in determining the amount of government payment.[31] Provisions exist to prevent payments from being used by the malingerer himself.[32]

Although H.R. 1 would enlarge the role of the federal government in the welfare system, it would not displace state participation completely. In many states the basic federal benefit level under H.R. 1 would be lower than the present combination of state and federal payments. In the 1970 version of FAP there was a requirement that states continue to supplement the federal payments up to January, 1970, levels, or the poverty level, whichever is lower, in order to obtain federal funds for Medicare and similar programs. Although that requirement was dropped in the version of FAP which appears in H.R. 1, thus creating the possibility that federalizing welfare under H.R. 1 will reduce benefits in some states, states are encouraged to supplement the federal payments by what is referred to as the "hold harmless" clause of H.R. 1. Under this procedure a state enters into an agreement with HEW whereby HEW administers the state's supplementary payments

29 H.R. 1, § 2153(b)(4).

30 A person is "available for employment" as defined in H.R. 1 unless he is unable to work or train because of illness, disability, or age; a mother caring for a child under six (three after July 1, 1974); a mother if the father has registered; a person caring for an ill member of the household; a child under 16, or under 22 if in school. *Id.* § 2111(b).

31 *Id.* § 2152(c).

32 *Id.* § 2171(a)(2)(c).

according to the same criteria as the basic federal payments,[33] and in return the states are protected against increases in expenditures caused by increases in case loads.[34] In effect, the states give up control over the disposition of the state supplementary payments in return for a federal guarantee against an increase in the state's share of welfare expenditures.[35]

III. The Impact of Work Incentives

A. *In General*

The Family Assistance Plan does not rely solely upon its marginal rate of reduction of benefits to induce people to begin work. As mentioned earlier, all employable recipients are required to register for and accept training or work. The desirability and feasibility of this approach can be questioned on several grounds. The registration process must include much of the probing and some of the discretionary decision making by minor functionaries which flaws the present welfare system. It was with this consideration in mind that the President's Commission on Income Maintenance Programs stated:

> We do not think that it is desirable to put the power of whether an individual should work in the hands of a government agency when it can be left to individual choice and market incentives.[36]

In addition, the experience of the Department of Labor's Work Incentive Program (WIN) demonstrates the great difficulty involved in training the unemployed and finding them jobs.[37] This problem becomes more acute as unemployment increases and the number of potentially productive jobs shrinks. Finally, because safeguards would prove difficult to enforce, the sanction of reduced payments for failure to register or work may ultimately punish the

33 *Id.* § 2156.
34 *Id.* § 503.
35 *1971 Senate Hearings* 117.
36 President's Commission on Income Maintenance Programs, Poverty Amid Plenty: The American Paradox, 59 (1969).
37 *1970 Senate Hearings* 840-61; *1971 Senate Hearings* 143-49.

children whom the program is designed to help, and more potent, criminal sanctions may be constitutionally impermissible.[38]

As a practical matter, however, the registration requirement has been deemed essential to the program's political acceptability. This seems to be an accurate estimate of present sentiment in Congress and throughout the nation.

The exclusion of one-third of earned income above $720 in computing Family Assistance payments represents a 67 percent marginal rate of reduction of benefits, or marginal tax rate, which is expected to provide an attractive work incentive. It could affect an individual's decisions on whether to work or not and how much to work once he has begun. In general, it is possible for the marginal rate of taxation to have conflicting impacts on these decisions. A tax on earned income reduces the cost of leisure, creating an inducement to substitute leisure for work. On the other hand, a tax on earnings also makes it more difficult for an individual to accumulate the amount of income he feels he needs, therefore encouraging more work.[39] This decision is also affected by the base level of payments. If it is relatively high, any marginal rate of taxation, however low, may be unable to increase work effort. If it is relatively low, increased work may be viewed as a necessity to subsist despite a high marginal tax rate.

A 50 percent marginal tax rate on earned income was relied upon in the 1970 FAP to induce the poor to work their way off the welfare rolls. Officials in HEW admitted that at the time this figure was rather arbitrarily chosen,[40] largely reflecting a compromise between 30 percent and 70 percent rates which had been widely discussed in academic circles.[41] Because of the presence of various in-kind benefits, most notably food stamps, which were reduced at rates higher than the 50 percent rate applicable to the FAP payments, the overall reduction of benefits with increases in earned income created a marginal tax rate on earned income much

38 *See* People v. Pickett, 19 N.Y.2d 170, 225 N.E.2d 509, 278 N.Y.S.2d 802 (1967). (New York Court of Appeals reversing a criminal conviction of welfare recipient who refused to accept work.)

39 Green, *supra* note 23, at 114.

40 Interview with Michael Mahoney, HEW official in charge of evaluation of FAP, January 21, 1971.

41 *See, e.g.*, authorities cited at note 3, *supra*.

greater than 50 percent. This constituted a great obstacle to favorable action by the Senate Finance Committee. In the 1971 FAP of H.R. 1 the reduction of benefits with increases in earnings is theoretically at a 67 percent level. This apparent increased tax rate on earnings reflects the Administration's attempt to solve the problem of an uneven marginal tax rate in the 1970 FAP by eliminating the food stamp program and increasing the basic payment accordingly (from $1600 to $2400 for a family of four). The increased tax rate was deemed necessary to keep the total cost of the program within the general area of the 1970 FAP plus the phased out food stamp program.[42]

B. *Erroneous Assumptions Underlying Importance Attached to Tax Rate*

Whatever the rate at which benefits are reduced with increased earnings, the importance attached to the tax rate reflects two assumptions. First, it assumes that a large number of the presently poor can respond to work incentives. Second, it assumes that at low levels of income a rather high (50-70 percent) marginal tax rate would have a special effect on work effort. Analysis indicates that both of these propositions are highly debatable.

1. Ability of the Poor to Respond to Work Incentives

Assuming that adequate job opportunities exist, the incentive effect of a particular plan on an individual depends on the reason for his poverty. If a person is non-employable because of age, disability, or the responsibility of caring for children, the marginal rate of taxation will have no impact on him. If the category of non-employable poor is relatively large, a higher guaranteed minimum and a higher marginal rate of taxation, reflecting less emphasis on work incentives would be a more efficient and equitable way to aid the nation's poor while limiting program costs.

It is crucial to understand that the Family Assistance Plan was never intended to provide for the specific needs of *all* the nation's poor. There are many poor, or those who would otherwise be poor, whose needs are provided for by other specific programs such as Old Age, Survivors, and Disability Insurance (OASDI) and

42 *1971 Senate Hearings* 37-38, 116, 233.

other Social Security programs. Payments under these programs, in fact, reduce, dollar for dollar, FAP payments for which a family would otherwise be eligible. The constituency for FAP, therefore, is that category of the poor who are assumed to be able as well as obligated to respond to work incentives and requirements. If the non-aged poor who are statistically employable are, in fact, unemployed only because of lack of training, then the Family Assistance Plan does seem to address itself to their problem, since FAP relies on definitions similar to those of the Treasury Department to determine whether registration is appropriate. However, the President's Commission on Income Maintenance Programs argued strongly against the assumption that a person who appears employable as a statistic is, in fact, employable as an individual. The Commission pointed out that "[e]mployment tests imposed by current programs are based on largely irrelevant criteria such as age, sex, and the like."[43]

Although relatively little empirical evidence on this subject exists, a study in Denver, Colorado supports the Commission's view.[44] Under an incentive budget plan, the Denver Department of Welfare allowed some families to keep the first $25 earned each month and 25 percent of the rest of its earnings. In the aggregate, however, the study found relatively little difference between the group receiving the special incentives and the group which did not. The study concluded regarding the incentive budgeting principle:

> [It] may be effective for a specified segment of the case load . . . but [it] failed to recognize that although desire, motivation, and concern is held by recipients, physical, social, and mental problems faced by these recipients are, in fact, the reasons for their inability to be self-sustaining.[45]

The Treasury Department and Family Assistance Plan definitions of employability do not reflect these social and mental disabilities. The draftsmen of FAP privately admit that there is no reliable method of defining employability and that the number of people who can realistically be expected to have the potential to

---

43 *Id.* 59.
44 *See* Green, *supra* note 23, at 120.
45 *Id.*

work their way off the welfare rolls is less than cold statistics imply.[46]

The fact that 40 to 50 percent of the heads of poor families may actually be non-employable suggests that greater attention should be paid to the level of the minimum guaranteed income. Although work incentives are important to many of the poor, incentives should not obscure the problems of those to whom such incentives are irrelevant. The adequacy of work incentives should not become an insuperable political obstacle to helping those who cannot respond to them. In attempting to improve work incentives, sponsors and critics should bear in mind that only a portion of the poor will benefit from this effort.

2. Effects of Different Marginal Rates of Reduction of Benefits

For the segment of the poor population which can respond to work incentives, two questions remain. First, can any marginal rate of reduction of benefits remove the potential disincentive to work which is created by a guaranteed minimum payment? Second, if some marginal rates of taxation provide work incentives, what rate would provide the maximum incentive while limiting cost to an acceptable level?

There is a general fear that under any guaranteed annual income those eligible for allowances will find that it takes less work to keep a previous income position and that income supplements will thus result in less work.[47] The Family Assistance Plan protects against this potential reaction in several ways. First, it requires recipients to register for work and accept it when offered. Second, it is designed to allow recipients always to increase their disposable income by increasing their earnings. The most powerful deterrent to recipients' choosing to live on their government benefits alone, however, is the low level of the federal guarantee. Since the Family Assistance Plan was never intended, according to President Nixon, to provide comfortably for its beneficiaries,[48] the basic federal guarantee of $2400 for a family of four is placed substantially be-

46 Mahoney, *supra* note 40.
47 Green, *supra* note 23, at 74.
48 N.Y. Times, Aug. 12, 1969, at 18, col. 3.

low the poverty line. Even with state supplements, total benefits generally remain far from filling the poverty gap.

The very nature of traditional welfare programs makes empirical evidence of the response of the poor to work incentives sketchy. Most welfare recipients now receive assistance under Old Age Assistance (OAA) and Aid to Families with Dependent Children (AFDC). Very few of these recipients could realistically be expected to work,[49] and most would be unlikely to increase their money income if they went to work full time.[50]

Studies have been made on the impact of high marginal rates of taxation on work effort among upper income groups. They all indicate that at high earnings levels the tax rate does not significantly affect work decisions. A recent summary of the literature on the effect of income taxation on incentives concluded that the effect was unclear and "may be weaker than popular discussions imply."[51] Arguably these results are not entirely applicable to the poor since they are likely to have less regular work habits and may derive less prestige and pleasure from their jobs than higher income earners. However, some prestige does attach to holding any job in comparison to being unemployed. In addition, the need for increased income among the poor is greater than among any other group since the poor must rely on it to provide basic necessities rather than luxuries. For these reasons it seems unlikely that high marginal tax rates which still allow recipients to improve visibly their purchasing power would deter work as much as is popularly assumed. This is most likely to be true at the lowest levels of earnings, where need is the greatest.

However, the few empirical studies which have involved the response of the poor to work incentives have reached mixed conclusions. One study examined the effect of different marginal rates of taxation in the Old Age Survivor Disability Insurance Program.[52] Prior to 1966 this program imposed no tax on earnings if

49 *See, e.g.*, Longcope, *Workfare? Who's Putting on Whom?*, Boston Globe, Apr. 17, 1971, at 8, col. 3. Longscope cites an HEW report indicating that 99.2 percent of present welfare recipients, including children, are not employable.

50 Green, *supra* note 23, at 119.

51 *Id.* 117.

52 Gallaway, *Negative Income Tax Rates and the Elimination of Poverty*, 19 NAT'L TAX J. 298 (1966).

the recipient was at least seventy-two years old or earned less than $1200 per year. For recipients between sixty-five and seventy-two years old the marginal rate of taxation was 50 percent for earnings between $1200 and $1700. The data gathered indicated that despite the 50 percent marginal tax rate in the $1200-$1700 range, the presence of a transfer payment had an adverse effect on work activity, including a decline in labor force participation and a decline in the level of earnings for those who continued to work.[53] Other studies[54] as well support the conclusion that the response of all age groups would be in the same direction as that of the aged, and that a negative income tax, even on a modest scale, would result in a substitution of leisure for work by the poor who are presently employed.

However, the general relevance of evidence acquired by examining the conduct of the aged is worth questioning. A younger person has greater psychological need for the prestige of employment than an older person, who perhaps has worked all of his life. In addition, a young worker at a low earnings level has some earning growth potential which an older worker could not expect. The President's Commission on Income Maintenance Programs concluded that although a negative income tax might result in some substitution of leisure for work, this is not a cause for concern. The Commission stated:

> Reduced work effort is likely to be concentrated among secondary family workers, female family heads, and the elderly, rather than among nonaged, male family heads. Thus, reduced work effort may be desirable for some of those affected.[55]

A study designed to develop evidence to clarify the ambiguities involved in the potential response of the poor to a negative income tax system is presently being conducted in New Jersey.[56] The experimental program is generally similar to the Family Assistance Plan. It differs in that it includes only the employable poor and

---

53 *Id.* 306.

54 Brehm & Saving, *The Demand for General Assistance Payments*, 1964 AM. ECON. REV. 1002 (1964). The authors also argue that the response to transfer payments is in the same direction for all recipients, regardless of age.

55 PRESIDENT'S COMMISSION ON INCOME MAINTENANCE PROGRAMS, *supra* note 36, at 8.

56 *See 1970 Senate Hearings* 905-75.

omits the work requirement. It does, however, test eight combinations of benefit levels and marginal rates of reduction. In addition, the experiment focuses on cumulative rates of reduction by imputing value to in-kind benefits received or lost and by including the impact of the federal income tax in its calculations.

The study is intended to last three years and the results of only one year's effort are presently available. Focusing on this tentative evidence, the study's director has commented on the effect of a guaranteed minimum and marginal tax rate of less than 100 percent, stating:

> I cannot definitely say that recipients will increase their work effort, but I will say that we have strong evidence they will not decrease it.[57]

Perhaps leisure does not substitute for work, because motivation to work exists in many recipients and because benefit levels are too low to allow others to feel they can afford not to work.

The study has not yet produced evidence on the incentive effect of various marginal rates of taxation or various benefit levels. Although the experiment has used rates of 30, 50, and 70 percent, their effects were not distinguished in reaching the conclusion that a negative income tax would not reduce work effort because thus far the plans have not had impacts that were different in a statistically significant fashion.[58]

This tentative result implies that the importance of the particular marginal rate of reduction may be exaggerated. As Senator Wallace Bennett has noted:

> If you find no difference in reaction to 25 percent tax, or 50 percent tax, or 70 percent tax, then it is logical to assume that there would be no reaction from a zero tax or a 100 percent tax.
>
> In other words, this whole process has no effect. You can't measure any effect that this process has on work attitudes of people. So we can assume that, if you give them no money, they work just as hard as if you double their income.[59]

The response to this comment has been that different plans are

57 *Id.* 950.
58 *Id.* 925.
59 *Id.* 959.

expected to produce statistically significant differences by the time three years' evidence is available. It remains to be seen, therefore, whether the conclusion that leisure will not be substituted for work is valid for programs with relatively higher guarantees and a 70 percent or 50 percent marginal tax rate.[60] In the meantime no one figure, it seems, should be invested with sacred importance. Paralleling the thinking of the drafters of FAP, however, the director of the New Jersey study articulated the general consensus of professionals interested in the problem when he stated:

> We do not have a sound basis for evaluating the effects of very high implicit taxes on motivation of self-support. Until we do, it seems prudent to avoid extreme levels.
>
> I would propose that an overall ceiling be included which would insure each family eligible for family assistance that the total benefits, both cash and in-kind, which that family would receive at zero income will never be reduced by an amount greater than half of the total income the family earns by its own efforts.[61]

Even if the evidence gained from studies clearly tended to establish the relative unimportance of high marginal tax rates, the political importance of creating marginal rates which appear to politicians to provide attractive work incentives would probably persist. Empirical evidence is not always persuasive or made known to legislators. The present political climate and public interest in developing a work-oriented plan encourage avoiding high marginal reduction levels, much as the prudence of experts expressed in the previous quotation does. Russell Long, Chairman of the Senate Finance Committee, which has jurisdiction over the Family Assistance Plan, made a representative comment when he said:

> My reaction is that you can't get the most successful and highly motivated people in America to do much if they are confronted with an 80 percent tax. And if they are confronted with a 100 percent tax, they will tell you to go and jump in the river.

---

60 A more recent study prepared for the Chamber of Commerce of the United States by Alfred and Dorothy Tellon concluded that "work reductions would occur primarily as the result of the high marginal tax rate on earnings imposed by the plans (50 percent or greater)." The study is presented in *1971 Senate Hearings* 493-531.

61 *1970 Senate Hearings* 1620.

> Now, there is just no reason to expect welfare clients to react any differently.[62]

If the Family Assistance Plan is to be politically viable, it seems that the marginal rate of reduction must be in the range of 50 percent, and in any event, no greater than the 67 percent now contemplated under H.R. 1. Failure to keep it in that range creates doubts among those who support a negative income tax in theory. More important, such failure provides a legitimate focus for criticism among opponents of comprehensive welfare measures who do not want their real views clearly exposed. When a decision is made regarding the institution of a negative income tax, it should be made on a proposal capable of performing that which it promises.

IV. Integration of the Family Assistance Plan With Other Programs

The work incentives which the Family Assistance Plan attempts to provide are affected by the existence of other federal and state welfare programs. Although the 1970 version of FAP would have replaced some categorical federal payment programs, it was intended basically as a supplement to programs which presently provide goods and services in-kind, including food stamps, public housing, and Medicare-Medicaid. These means tested, in-kind benefits are not imputed as income in determining FAP benefits, so FAP does not become a substitute for them. However, the integration of the Family Assistance Plan with other programs creates a higher cumulative rate of reduction of total benefits than exists for cash payments alone. Table 1 illustrates the problem under the 1970 FAP.[63] The highest rates under the 1970 FAP would have applied only to female head of household families receiving state supplements. As the chart demonstrates, the cumulative reduction of Family Assistance payments, state supplements, and other benefits may, over certain ranges of income, exceed in value the increase in earnings. Marginal reduction rates above 100 percent which are created have been called "notches."

The existence of notches, such as the one illustrated in Table 1,

62 *Id.* 966.
63 *Id.* 373.

TABLE 1

Combined Benefits and Reduction Rates under Selected Income-Tested Programs for a 4-Person, Female-Headed Family in Phoenix, Ariz.[1]

Earnings	FAP benefit	State supplement[2]	Total money income	Federal income tax[3]	State income tax[4]	Social security tax[5]	Food stamp bonus or surplus commodity value[6]	Average medical vendor payment per AFDC family[7]	Public housing bonus[8]	Total income: money and in-kind from all sources	Cumulative marginal reduction rate (percent)
0	$1,600	$404	$2,004				$441	(7)	$1,176	$3,621	
$720	1,600	404	2,724			$37	441		1,176	4,304	5
$1,000	1,460	357	2,817			52	441		1,176	4,382	72
$2,000	960	190	3,150			104	441		1,104	4,591	79
$3,000	460	23	3,483			156	441		1,032	4,800	79
$3,140 (State breakeven)	390		3,530			163	441		1,032	4,840	71
$3,920 (FAP breakeven)			3,920	$17		204			948	4,647	125
$4,000			4,000	28		208			936	4,700	34
$5,250			5,250	212	$18	273				4,747	96

[1]A woman with 3 minor children where state pays $2,004 to a family with no other income.

[2]Calculated according to the family assistance state supplementary formula, but assuming exercise of secretarial discretion to hold reduction rate to 67 percent, as authorized in sec. 452(b)(2).

[3]Federal income tax calculated on the basis of the tax provisions in effect in 1972, assuming no surcharge.

[4]Current state tax schedule.

[5]Social security tax of 5.2 percent will be in effect Jan. 1, 1971.

[6]Arizona has no food stamp program, but has a surplus commodity program with an income eligibility ceiling of $3,072 for a family of 4 with no earnings and $3,552 for a similar family with earnings. Not all eligible families participate in the commodities program. Such families' benefits and cumulative reduction rates would be lower.

[7]Arizona has no title XIX program.

[8]Public housing bonus is the public housing agency estimate of comparable private market rental ($1,680 yearly) minus amount of public housing rent paid. Calculated for 3-bedroom unit from data supplied by local housing authority, including any allowable deductions for employment costs and payroll deductions, but not including deductions for day-care costs, health-related expenses, earnings of minors, or any other deductions allowed. Maximum admission limit is $4,200 of countable income; for continued occupancy $5,250. These figures should be used with caution since the great share of AFDC recipients do not live in public housing, and hence would neither receive subsidized housing nor face the high cumulative reduction rate. Precise figures unavailable for Phoenix, Ariz. of number of AFDC recipients living in public housing.

constituted one of the most serious flaws in the 1970 FAP. Notches are considered to be crucial defects in negative income tax plans such as FAP for two reasons. First, such plans rely heavily on financial incentives to increase work effort among the poor. Notches create disincentives for increased work effort among a certain percentage of the working poor. Second, even if other methods could be relied upon to encourage an increased work effort, a tax rate in excess of 100 percent is simply viewed as unfair. Fairness would seem to demand that a person whose earned income is in excess of that of another similarly situated person, should also have net disposable income in excess of that other person.

High marginal reduction rates which may amount to notches are the result of the interplay among several types of programs. They may be produced by means-tested programs which provide uniform benefits to all earning less than a specified amount, but nothing to anyone earning more than that amount. The Food Stamp program in Table 1 is an illustration of this.

A notch may also be created when receipt of one type of benefit is tied to eligibility for benefits in another program. Eligibility for Medicaid, for example, is usually triggered by eligibility for Aid to Families with Dependent Children. When a family's earnings disqualify it for AFDC payments, it loses the value of Medicaid also. The dollar earned which ends eligibility may replace the lost AFDC payment, but does not cover the lost value of Medicaid, so the cumulative marginal reduction rate is above 100 percent. Finally, notches may be created by the simple "combination of benefit reduction formulae or income eligibility ceilings for cash, food, medical, public housing, and tax programs."[64]

The states providing the most comprehensive coverage for their citizens have the greatest potential for notches. For example, in New York City, under the proposed 1970 FAP, a family of four which raised its earnings from $6000 to $6279 would have its total income, money and in-kind benefits, reduced by $1656, creating a cumulative marginal reduction rate of 694 percent.[65] A seven member family receiving state supplements and earning $8658 in New

64 *Id.* 1207. The notch problem is described in detail at 1205-2148.
65 *Id.* 375.

York City would have had, under the 1970 FAP, less total income than a seven member family without any income.[66]

The Senate Finance Committee strongly protested the existence of notches in the 1970 Family Assistance Plan. The Administration responded with proposed amendments which require primarily that other programs have their benefits taper off as income rises, much as the FAP payments taper off. The amendments required, *inter alia,* a modest payment from families receiving medical vendor payments which would be scaled to increase with income, a taper off in the amount of food stamps for which a family is eligible as income rises and the payment by a family receiving a rent subsidy of 20 percent of its income under $3500 and 25 percent of its income above $3500 for rent, so that as income and rent increase, the housing subsidy steadily declines to zero without abrupt termination.[67]

These amendments reflected an inevitable trade off between eliminating a potential notch on the one hand and minimizing the cumulative marginal reduction at income levels below which the notch would occur on the other. Tapering off of benefits from other means-tested programs has the effect of raising the cumulative marginal tax rate at levels just below the potential notch. That is, as the family's annual income increases, each dollar of earned income displaces, not only 67 cents of FAP money, but in addition perhaps 20 cents of in-kind benefits. The family retains only 13 cents out of every dollar earned at this income level. With a further rise in annual income, the in-kind benefits taper off a bit more, leaving the family with still less money per dollar earned. Thus, although criticism by the Senate Finance Committee compelled an attempt to remove notches as a political matter, it is not clear that this was a necessary or worthwhile effort.

Although the proposed amendments smoothed the notches they did not eliminate them completely. Rather, they moved the notches to higher earnings levels. The marginal tax rates at the notches were reduced, but remained, by definition, above 100 percent. It is possible that fewer people are affected by notches at higher earn-

66 *Id.* 379.

67 *1970 Senate Hearings* 1224-27.

ings levels, but the problem persists in principle and as a political issue.

As mentioned above, in the 1971 FAP of H.R. 1 the problem of notches was attacked in two major ways. First, the food stamp program was "cashed-out," that is, an increase in cash payments was substituted for the food stamp program for those who are eligible for FAP. Secondly, the states were allowed to enter into an agreement with the federal government whereby HEW would administer the state supplementary payments according to federal criteria. The "hold harmless" clause ensures the states that their costs under FAP would not increase above 1971 levels. The result of these two changes in FAP is to raise the basic FAP payment for a family of four from $1,600 to $2,400, $600 of the increase being attributable to the food stamp cash-out, and $200 representing the amount of federal participation in matching of state supplements under present programs.[68]

As the Senate Finance Committee hearings on H.R. 1 pointed out, however, the problem of notches is still considered serious even with these revisions in FAP. A basic point of controversy between congressional critics and Administration sponsors arose in trying to determine what the effective marginal tax rate on various earnings was for families eligible under FAP. The Administration sponsors prepared charts[69] which showed that there would be no notches and that the actual tax rate on earnings would be close to the planned 67 percent. Included in the Administration's figures was the value of fringe benefits derived from earning a given level of income. Excluded from the figures was the social security tax. Secretary Richardson attempted to justify this treatment of the social security tax by arguing that the contribution to social security is more than offset by the value of the benefits to which the family is entitled because of the payment. "In other words, they are getting something for their money."[70] The Administration's charts also excluded the effect of reduction in payments for public housing rent as a consequence of increases in earnings. The justification for this treatment was that only 7 per-

68 *1971 Senate Hearings* 116-17, 31-32.
69 *Id.* 75-84.
70 *Id.* 235, 280.

cent of all AFDC families live in public housing. The charts relied on by Congressional critics[71] did not include the value of fringe benefits, nor did they exclude social security taxes and reductions in public housing rent paid. As a result, notches and probably unacceptably high tax rates appeared on these charts.

The practical importance of the notch problem was probably somewhat exaggerated even under the 1970 FAP, in the final analysis. As FAP's sponsors have persistently pointed out, not every needy family receives the in-kind benefits for which it is legally eligible. Less than 7 percent of all Family Assistance families in the nation live in public housing; less than 40 percent of the poor currently receive food benefits; and many poor receive no Medicaid payments because they have no medical needs.[72] Therefore, their work incentives will not be affected by earning amounts which make them ineligible for these benefits and notches will not exist, in fact, for many recipients of FAP payments.

It is very awkward for government officials to argue, however, that because other programs do not fulfill their promise to the needy, these programs will therefore not harm the ability of the Family Assistance Plan to provide the work incentives it promises. This argument makes FAP a substitute for programs it is designed to supplement. If FAP is to be a supplement for these other programs, they should be improved and fully funded. As this is done, the notch problem will become real for more families. Yet, as a present practical fact, relatively few families receive all the benefits for which they are eligible. Further, to the extent most families do not now perceive the deleterious effects of increasing their earnings, political criticism seems to have exaggerated the notch problem.

The notch problem may also be less important than has been assumed because a basic assumption made in posing the problem is highly debatable. Work incentives are not simply a matter of what is gained or lost by working. They are what people believe they gain or lose by working. Focusing on a notch created by the combination of reduced monetary benefits and reduced in-kind benefits implies that people perceive these two types of benefits to

71 *Id.* 52-61.
72 *1970 Senate Hearings* 1209.

be fungible. This may not be a valid assumption. It is likely that the discretion involved in having cash to spend makes it psychologically more attractive than an in-kind benefit. That is, cash provides a freedom of choice which in-kind benefits do not and is probably more highly valued. Furthermore, acceptance of in-kind benefits, such as public housing, may be regarded by many as a visible badge of poverty containing a stigma which receipt of aid in the form of money would not match. For these reasons there is an element of truth in the argument that "saying a person is worse off without public housing, for example, is like saying a former cripple is worse off without his crutch."[73]

Finally, the inclusion of contingent benefits, such as medical vendor payments, may exaggerate the notch problem. Since medical subsidies are not paid unless medical expenses are incurred, disincentives from loss of these benefits are likely to be real only for families with large and predictable future medical expenses.

The arguments against making any direct comparison between the relative advantages of in-kind benefits and cash should probably only reduce the weight which these benefits should be given rather than determine whether or not they should be included at all in measuring incentives. The same considerations, however, apply to the argument that trying to eliminate a notch creates a prohibitively high cumulative marginal reduction rate at levels of earnings below the potential notch. For example, the cashing-out of the food stamp program in the 1971 FAP led to the increased rate of 67 percent in an effort to keep the costs of the two FAP proposals relatively equal. When this higher rate of reduction of payment is added to the reduction of other in-kind benefits, the cumulative rate of reduction is well above 70 percent at many levels of earnings.[74]

Assuming the cumulative rate is of some importance, despite strong arguments to the contrary, the question is whether a marginal reduction rate well above 70 percent at the lowest levels of full-time earnings is too high a price to pay for smoothing and moving, but not eliminating, potential notches. At earnings of about $4000 for a family of four, the positive income tax becomes

---

73 Mahoney, *supra* note 40.

74 *1971 Senate Hearings* 57-61.

an added factor in the cumulative rate of reduction of benefits with earnings. Therefore, for a full-time worker earning just over the minimum wage, the cumulative reduction rate begins to increase with earnings to well above 70 percent. Thus, the work incentives of FAP decrease as earnings increase, at least to the break-even level when an individual has worked his way off the welfare rolls. This progressive tax structure seems to be at odds with the overall structure of FAP and its work registration requirement. Once a person is placed in a job through the work registration or Opportunities for Families Program of H.R. 1, the incentive of FAP is the prime device available to increase that individual's work effort and induce him to earn his way off the welfare rolls. Yet with a progressive structure the work incentives begin to decrease precisely at the point where an individual becomes a steady wage earner and incurs an income tax liability.

Since the jobs available to an unemployed person are likely to be at the minimum wage, the positions are less likely to produce steady work habits or promise much earnings growth. Despite the Family Assistance Plan's work requirement, cumulative marginal tax rates should not tempt recipients to avoid work. To succeed, FAP must offer an opportunity for the most needy recipients at the lowest earnings levels to improve visibly their economic status. Smoothing and moving of notches does not seem desirable if it stifles a feeling among the nation's neediest that increased work results in economic improvement.

The marginal rate of taxation could be reduced at upper levels by eliminating the flat $720 earnings exemption and replacing it with an exemption determined solely by the amount of earnings. A work expense exemption proportional to income reduces the reduction rate for earned income. If the exemption is 20 percent of earned income, a reduction rate of 50 percent would be reduced to 40 percent. However, the problem is that work expenses do not seem to be proportional to the income level, and therefore such an approach would not fulfill the purpose of roughly compensating for work expenses. It would be unduly harsh to those at the lowest income levels whose work expenses would be larger than their exemption, and for these reasons elimination of that flat $720 exemption does not seem desirable.

The simplest and most obvious way to reduce high cumulative marginal tax rates and eliminate notches would be to reduce sharply the rate of reduction of the federal Family Assistance Plan benefits below the 67 percent rate of H.R. 1. This would reduce the cumulative marginal rate by an equal amount. However, lowering the reduction rate would increase the number of recipient families and increase costs. Lowering the federal reduction rate from 67 percent to 50 percent would add 3.7 million families as recipients of FAP benefits, and increase costs $1.5 billion dollars.[75] Although adoption of a lower federal reduction rate is a logical approach to meeting reservations about high cumulative reduction rates, it has not been pursued because it has been deemed too costly.[76]

V. Co-ordination of the Family Assistance Plan and the Positive Income Tax

A. *In General*

As the previous section shows, the high cumulative reduction rates which may result from the implementation of the Family Assistance Plan are influenced by the burden imposed on the poor by state and local taxes, the social security tax, and the federal income tax. Taxation of welfare recipients seems objectionable for several reasons. At a minimum, it is administratively inefficient for government to give with one hand and take back with the other. The number and size of these transfers is great. In 1969, 4.4 million of the 27.8 milion poor paid federal income taxes.[77]

In addition, the present pattern of transfers to and from the government requires that those who have been legally defined as incapable of meeting their personal financial obligations pay part of their insufficient earnings for community needs. This situation makes it more difficult for a family to become self-supporting and, therefore, may provide a deterrent to work.

A Council of Economic Advisors study showed the following:

> [I]n 1965 people earning less than $2000 paid 44 percent of

75 *Id.* 233.
76 *Id.*
77 Surrey, *supra* note 18, at 308.

> their income in taxes, as compared to 38 percent for those earning $15,000 or more and 27 percent for those earning between $2000 and $15,000. . . . Of course many poor people get their taxes and more back through welfare and other payments, but still, in 1965, the total tax payments by the under $2000 group were higher than total national expenditures for public assistance.[78]

There have been recent developments designed to reduce the tax burden on the poor. Some states refund the amount of sales or property tax paid by the poor.[79] The Tax Reform Act of 1969 took a major step toward eliminating the federal income tax on the earnings of the poor by gradually raising the minimum standard deduction to 15 percent with a maximum of $2000 and by allowing families to choose to deduct instead a flat $1000 as a low income allowance in place of the old, variable minimum standard deduction,[80] which was $200 plus $100 for each exemption up to $1000. As will be discussed, the Tax Reform Act prevents a recipient eligible for only federal FAP payments from paying any federal income tax.

However, the importance of co-ordinating the Family Assistance Plan with the positive tax system persists. The pattern of taxing welfare recipients under the federal income tax does not seem to have been the result of an explicit choice. It was created because the positive tax system is based on income, or ability to pay. Eligibility for welfare payments, however, has been determined on a state by state basis, based not on a lack of income alone, but on economic need plus other criteria, such as old age or disability. As the welfare system becomes more comprehensive and uses lack of income alone to trigger benefits, as does the eligibility standard for federal FAP payments, it becomes more like the income tax system and the need to rationalize the two becomes increasingly apparent. The state supplement and work incentive aspects of FAP allow benefits to be received by some who are no longer poor. The transition of this class from FAP to the income tax system should be co-ordinated. Also, as long as FAP publicly appears to be a

---

78 Gans, *3 Ways to Solve the Welfare Problem*, N.Y. Times, Mar. 7, 1971, § 6 (Magazine), at 26, 96.

79 Surrey, *supra* note 18, at 308.

80 INT. REV. CODE of 1954, § 141(a)-(c).

negative tax system it will be compared to the positive tax system. For these reasons, attention must be paid to articulating the differences in the purposes of the two programs and to making conscious decisions as to which purpose to maximize when the programs conflict.

B. *Definitions of Income under the Family Assistance Plan*

One obvious area of comparison and conflict between a positive and negative tax system is in their definitions of income. The systems may justifiably differ on this issue because the Internal Revenue Code's definition is not sufficiently comprehensive for the purposes of the Family Assistance Plan. The positive tax system is not used to raise revenue alone. Various tax incentives, which are really tax expenditures, are incorporated in the code to promote public purposes. While the desirability of these tax expenditures is in dispute,[81] their impact is great. They create a national adjusted gross income of about $70 billion less than national personal income.[82]

Although arguments can be made to support an incomplete definition of income for the purposes of the Internal Revenue Code, such a definition is not appropriate for an income maintenance system for the poor. The purpose of FAP is to reduce economic need. Therefore, its definition of income must be, and is,[83] a comprehensive attempt to measure all family resources available for consumption. This broad definition is required to maximize the efficiency of the program in terms of making benefits to the truly needy while minimizing costs.

The broad definition of income in Family Assistance Plan may create political problems, particularly among recipients. It is seemingly inequitable to treat income from the same source differently for the poor than for others. Non-means tested public transfer payments, such as social security, would be counted as income to reduce FAP benefits,[84] but are not included as taxable income by the Internal Revenue Code. However, while social

81 Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison With Direct Government Expenditures*, 83 HARV. L. REV. 705 (1970).
82 Green, *supra* note 23, at 83.
83 H.R. 1 §§ 2153-54.
84 *Id.* § 2153(a)(2)(A).

security benefits clearly affect need and are an appropriate element of income under FAP, their exclusion from the definition of income in the Internal Revenue Code seems to be inappropriate. It is a "shot gun" approach to helping some of the poor by excluding social security benefits from the income of everyone. If treatment of this type of benefit in the separate programs is to be harmonized, introduction of an income maintenance system seems to make a change in the Internal Revenue Code most appropriate.

> Transfer payments, now excluded, could be included since the main reason underlying current exclusion — why tax the needy — would no longer be relevant.[85]

Unlike the Internal Revenue Code, the Family Assistance Plan makes an important distinction between earned and unearned income. FAP creates a 100 percent marginal rate of taxation on unearned income while excluding $720 plus one third the remaining earned income from its definition of income. No exclusion is allowed for unearned income[86] because no work is presently involved in generating it. Therefore, this approach promotes the efficiency of FAP in its effort to help the needy and limits costs without discouraging work effort.

However, the failure to exclude a portion of unearned income has some undesirable effects. A principal form of unearned income is any payment received as an annuity, pension, retirement, or disability benefit, including veteran's or workman's compensation and old-age, survivors, and disability insurance, railroad retirement, and unemployment benefits. Many of the people receiving these benefits are, by definition, unable to respond to work incentives. However,

> [t]hese sources of income generally are viewed as deferred compensation. They are a form of earning. To tax them at a 100 percent rate would have the undesirable effect of discouraging savings and the future development of social insurance and private pensions for lower income workers.[87]

---

85 Surrey, *supra* note 18, at 330 n.9.

86 H.R. 1 § 2153(a)(2).

87 PRESIDENT'S COMMISSION ON INCOME MAINTENANCE PROGRAMS, *supra* note 36, at 153.

In addition, the cumulative tax rate on these benefits may be more than 100 percent because the income represented in the annuity has been taxed twice: once when earned and contributed to the insurance fund and again when FAP benefits are paid. The effect of not excluding any part of these forms of unearned income from the definition of income may be to reduce benefits the most for those who are on inadequate fixed incomes and cannot work to improve their income position. This, again, suggests that a higher minimum FAP payment is desirable for those who cannot work.

The inclusion of social security benefits in the definition of unearned income in H.R. 1 also is inconsistent with the argument made by the Administration that social security taxes should not be considered in determining the cumulative reduction rate on earnings for FAP families. The Administration's argument for so excluding social security taxes is that these taxpayers "are getting something for their money."[88] Whatever they get, however, will be used to reduce, dollar for dollar, what they would be entitled to under FAP. In addition, these social security payments will be counted as income to reduce other benefits, such as public housing rent payments, thus creating a cumulative tax on the unearned income in excess of 100 percent.

Gifts, in the form of cash or otherwise, are also treated as unearned income and reduce Family Assistance benefits by their full value.[89] Once again, this is an effort to minimize the cost of the program without injuring work incentives. Although the Internal Revenue Code encourages giving by not taxing gifts as income to recipients, the effect of FAP's 100 percent marginal tax rate on recipients will be to deter charitable gifts because no benefit will accrue to the recipient if his FAP payment is as large as the gift. This seems inconsistent with the efforts of FAP to supplement programs designed to aid the needy. However, the inclusion of gifts as unearned income must be based on the assumption that gifts are not granted to the poor in a comprehensive pattern based on need. If this assumption is accurate, it can justify the treatment of gifts as unearned income. However, gifts to families with

88 See text at notes 69-70, *supra.*
89 H.R. 1 § 2153(a)(2)(D).

exceptional need should not be deterred by a 100 percent marginal tax rate. Allowing families who are more needy than the poor, disaster victims, for example, to derive some economic benefit from gifts would create an inequality among the poor, but one which seems desirable. In recognition of this, FAP proposes to give the Secretary of the Department of Health, Education and Welfare the discretion to fully exempt gifts based on need by private charitable organizations.[90]

The other elements of unearned income which reduce FAP benefits by 100 percent are prizes, awards, proceeds of life insurance, inheritance, alimony payments, rents, dividends, interest, and royalties.[91] The inclusions of dividends and interest might deter savings, but only slightly in comparison to the resource limitation of $1500.[92] None of these sources of income are likely to respond to work incentives and it seems appropriate to reduce FAP benefits by their full value.

The Family Assistance Plan attempts to avoid providing benefits to families with little income but with large assets by denying payments to families with over $1500 of "resources." Homes, household goods and personal effects are excluded from the definition of assets.[93] Although imputing an income value to homes would promote horizontal equity between home owners and renters, it would raise difficult valuation problems which it is desirable to avoid. Property which is essential to a family's means of self-support is also excluded.[94] It is wise not to include the gross value of these income-producing assets because their value to the family is reflected in the income they produce. To impute an added value to these assets would be to make complete self-reliance, which FAP encourages and these assets facilitate, more difficult to attain.

C. *Integration of Positive and Negative Tax Schedules*

Integration of the Family Assistance Plan with the positive tax schedule is necessary only when the break-even level is above the

90 *Id.* § 2153(b)(5).
91 *Id.* § 2153(a)(2).
92 *Id.* § 2152(a)(2).
93 *Id.* § 2154(a)(1).
94 *Id.* § 2154(a)(2).

minimum earnings at which the federal income tax must be paid. Only slight overlap exists between the federal income tax system and FAP for families receiving only federal payments under FAP without any state supplements. For example, for a family of four, the basic FAP payment would be $2400 and the break-even point $4320. The family would be required to pay income tax at earnings of $4000 and over by electing the $1000 low income allowance[95] and four personal exemptions of $750[96] (with the 1969 Tax Reform Act fully in effect). The overlap would, therefore, affect $320 of earned income, which would be taxed while the family was stil eligible for FAP payments. For a family of six, the basic FAP payment is $3100 with the break-even point at $5370. The point at which income tax liability begins, however, has now moved up to $5500, eliminating overlap between FAP and the income tax system.

However, when state supplements and state income taxes as well as social security taxes are also considered, substantial overlap may exist where a person is receiving payments administered through FAP while paying some amount of his earned income in taxes. For example, as shown in Table 2,[97] a family of four in New York City earning $7,000 would still be eligible for $156 in payments administered under FAP while paying a total of $974 in federal and state income and social security taxes. Since one becomes liable for social security taxes at virtually all levels of earned income, overlap between the positive tax system and the FAP payments exists at all levels of earnings up to the break-even level. Moreover, the extent of overlap will increase as the amount of federal and state supplementary payments under FAP is increased unless some method of integration is incorporated into the Family Assistance Plan. The President's Commission on Income Maintenance Programs has noted three ways of integrating positive and negative income tax systems.[98]

One means of co-ordination would be to have families pay the positive income tax at the standard rates with the effect of netting

95 INT. REV. CODE of 1954, § 141(c).
96 *Id.* §§ 101, 6013(b)(3)(A).
97 *1971 Senate Hearings* 60.
98 PRESIDENT'S COMMISSION ON INCOME MAINTENANCE PROGRAMS, *supra* note 36, at 153.

TABLE 2
Benefits Under H.R. 1 for Family of Four
in New York City

Earnings	Family Assistance H.R. 1	State Supplement	Total Gross Cash Income	Total Federal, State, Social Security Taxes	Net Cash Income Less Taxes
$ 0	$2,400	$1,944	$4,344	—	$4,344
720	2,400	1,944	5,064	$ 37	5,027
1,000	2,213	1,944	5,157	51	5,106
2,000	1,546	1,944	5,490	103	5,387
3,000	879	1,944	5,823	165	5,658
4,000	213	1,944	6,157	242	5,915
5,000	—	1,490	6,490	464	6,026
6,000	—	823	6,823	711	6,112
7,000	—	156	7,156	974	6,182
8,000	—	—	8,000	1,224	6,776
9,000	—	—	9,000	1,486	7,514

their income supplements against their federal tax liabilities. While this does create a smooth transition between the two programs in terms of a family's disposable income, it has distinct drawbacks. First, it adds the 14 percent income tax of the lowest tax bracket to the 67 percent marginal reduction rate involved in H.R. 1 to create a cumulative marginal reduction rate of 81 percent. When social security and state income taxes are considered, the cumulative reduction rate is even greater. For example, in Table 2, if a family of four in New York City raises its earnings from $4000 (the point at which it becomes liable for federal income taxes) to $6000, its net income increases from $5915 to only $6112, or an increase of only $197 for a $2000 increase in earnings. This represents a cumulative marginal reduction rate of over 90 percent. Finally, this method of integration requires that people who have been legally designated as unable to meet their personal financial responsibilities must pay part of their inadequate incomes for community needs.

A second approach is to have individuals pay no income taxes while they are receiving FAP benefits. This completely subordinates the income tax system to FAP, but is a simple method of meeting the objections to the first approach discussed. However, this method would create a notch at the break-even point where

FAP payments plus the state supplements end. For example, as shown in Table 2, a family of four in New York City earning $7000 would be eligible for $156 in FAP payments and, under this approach, would not be liable for any taxes. Thus, their net income would be $7156. A family earning $8000, however, would be liable for total taxes of $1224 while receiving no benefits, thus receiving a net income of $6776, $380 less than the family earning only $7000.

The third approach is to forgive part of the positive tax payments for some part of the income range above the break-even level to keep the effective marginal tax rate to the level existing before payments ended. The method of implementing this would be to allow "families either to pay ordinary Federal income tax or to accept a net allowance based on receiving a gross allowance and paying an offset tax"[99] equal to the marginal tax rate established in the income maintenance plan on all income, including income beyond the nominal break-even level. The family could choose whichever approach left it with the most money and a smooth transition between programs would exist. The cost of this approach would be measured in tax revenue lost. This method was developed by Professors Tobin, Pechman, and Mieskowski.[100]

Under the Tobin method, a family of four in New York City (see Table 2) would elect to pay no taxes until FAP payments end at the break-even level of earnings, $7236. For earnings above $7236, it would pay taxes at the rate of 67 percent until the family's aggregate tax payments exceed the amount for which it would have been liable under the positive tax system, at which point the family would elect to pay the positive tax. To illustrate, a family of four in New York City with earnings of $9,000 would elect to pay 67 percent of its income above the break-even point of $7236, or $1176, in lieu of the $1486 of taxes it would be liable for otherwise. However, if a family's earnings were $10,000, its tax bill would be about $1750 while its alternate payment of 67 percent of earnings above $7236 would come to approximately the same amount, $1743. Therefore, at earnings above $10,000 the family would elect to pay the positive tax rates.

99 *Id.* 154.
100 Tobin, *supra* note 3, at 6-7.

The Tobin method was endorsed by the President's Commission on Income Maintenance Programs.[101] It could be applied to the Family Assistance Plan and it appears to be the method which best promotes the purposes of FAP while co-ordinating it with the positive tax system. It does not require that those legally designated as incapable of meeting their own financial needs pay income taxes to meet community needs. In addition, this method does not allow the federal income tax to add to FAP's cumulative marginal rate of reduction or create a notch. However, the additional cost of this provision would be measured as a tax expenditure, in terms of tax revenue lost. Tax expenditures are often not as clearly perceived by the public and politicians as positive appropriations.[102] However, this approach would relieve a large number of families which are above the poverty level of the obligation to pay any federal taxes. This fact is likely to be visible and clearly understood. A welfare program which is costly and gives large benefits to many families who are not considered poor is likely to be politically unacceptable. This is a problem which already exists in FAP and which might become fatal to its chances of implementation if the Tobin method of treatment of the federal income tax is added.

Another problem with the Tobin method is that it extends benefits under FAP, in the form of reduced tax payments, far beyond the break-even level of earnings. In the example given, such benefits were available for a family of four in New York City up to earnings of $10,000. The median income for a family of four in New York City is probably below $10,000, which would mean that over half such families would be affected by FAP. The Administration has stated that at least one of its goals in this area is not to allow FAP to become so extensive as to cover large numbers of families who do not consider themselves to be poor or in need of assistance from what is basically a program designed to aid the poor.[103]

---

101 PRESIDENT'S COMMISSION ON INCOME MAINTENANCE PROGRAMS, *supra* note 36, at 153.

102 Surrey, *supra* note 81, at 728-31.

103 *1971 Senate Hearings* 233.

A compromise approach does exist which reduces the political liabilities of the Tobin method while retaining some of its advantages. Recipients could be required to pay standard taxes, leaving that system intact, but net income after taxes could be used to compute eligibility for a size of FAP payments. The incongruity of requiring families who receive income supplements to pay taxes would persist. However, using income net of taxes to compute benefits would, in effect, have the government pay a portion, 67 percent in the case of H.R. 1, of a family's income tax bill. From the recipient's point of view, however, paying a reduced tax bill presents a reasonable transition to the positive tax system, since none of the families paying taxes are below the poverty level. The payment of reduced taxes does raise the cumulative marginal tax rate, but only by 5-9 percent as compared to 15-27 percent under H.R. 1.

For example, a family of four in New York City earning $7000 would have a total tax bill of $974 and be eligible for FAP payments of $156 for a net cash income of $6182 (see Table 2). Under this approach, however, the family would report only $6026 (7000 − 974) of earnings net of taxes, and be eligible for $805 of FAP payments for a net cash income of $6831. A family moving from $6000 to $7000 of earnings under the present H.R. 1 provisions and in New York City would face a cumulative marginal reduction rate of 93 percent, since net cash after taxes would increase only $70 (see Table 2). However, under the proposed approach, as earnings go from $6000 to $7000, net cash after taxes goes from $6587 to $6831, an increase of $244 and a reduction rate of 76 percent or 9 percent greater than the 67 percent reduction rate applicable to the FAP payments alone.

This method is consistently more favorable to recipients than the method of operating the positive and negative systems independently, but less favorable to them than the Tobin method. While this would raise the amount of appropriations required to fund FAP above the level of H.R. 1, it avoids the politically damaging situation of having many families above the poverty line paying no federal income taxes. In addition, it allows the entrenched positive tax system to continue to function as it has

in the past, while requiring the government to acknowledge its impact on its welfare programs and to adjust them explicitly to that impact.

Co-ordination of the Family Assistance Plan and the Internal Revenue system, therefore, reflects the same tension between maximizing work incentives and limiting costs which have existed in almost every area examined. Using income net of taxes to compute FAP benefits is a simple compromise between ignoring the impact of the federal income tax on FAP's promises, as H.R. 1 does, and subordinating the federal income tax to maximize FAP's work incentive potential, as the Tobin method would. It is not, however, a logical or practical panacea for resolving the problems inherent in any attempt to co-ordinate the two systems.

Another method of integrating the Family Assistance Plan with the positive tax system would be to require that FAP payments themselves be included in the definition of income for tax purposes. This would simply reduce the amount of the FAP benefits by the amount of the tax so imposed. If the reduced benefits were considered insufficient, either the basic payment could be raised or, preferably, the marginal reduction rate could be reduced to perhaps 50 percent. Actually, it is preferable to leave the basic payment unchanged, because a family receiving the basic payment alone would not pay taxes in any event (since the basic payment would be below the amount of the family's low income allowance and personal exemptions). However, the family would begin to pay taxes at a lower level of earnings as a result of the basic FAP payments' being included in income. This increase in tax revenue would justify a lower marginal reduction rate applicable to the FAP payments thus keeping the cumulative marginal reduction rate, including all taxes on earnings, within acceptable levels of about 70 percent.

One advantage of this method of integration is that it leaves to the positive income tax system alone, with its combination of low income allowances, personal exemptions, and progressive tax rates, the problem of fairly distributing the tax burden among various income groups. If the positive tax system does not presently distribute this burden equitably, then this method of integration, of course, will only exacerbate the problem. However, by including

the FAP payments in the definition of income for tax purposes, the positive tax system is allowed to operate its collection of allowances, exemptions and tax rates under valid assumptions as to actual income available to an individual or family for their support. A change of FAP benefits would not necessarily dictate a change in the income tax system, and, similarly, a change in the tax system could not asume that any adverse effects on low income groups would be the responsibility of the welfare system to remedy. Thus, the goals of each system would remain intact.

VII. Conclusion

Examination of the Family Assistance Plan has demonstrated a persistent tension between providing adequate benefits for the poor who cannot work, maintaining work incentives for the poor who can work, and limiting the program's cost. Despite its sponsors' emphasis on the program's work aspects, conflicts seem to have been uniformly resolved in favor of minimizing costs. As analysis has suggested, if greater resources could be committed to the program, substantial improvements could be effected.

Since the non-employable poor cannot respond to work incentives and must rely on the government alone to improve their economic position, it seems fair to provide them with a larger basic allowance than the employable poor coupled with a high, perhaps 75 percent, marginal tax rate on any income they should earn. A much lower rate, perhaps 33 percent, should apply to reduce the earnings of the employable poor. There are grave objections, however, to distinguishing between the employable and non-employable poor.[104] It is difficult, at the outset, to determine who is employable, particularly if criteria were more detailed than simply excluding the aged, disabled and widowed from the definition. Moreover, if any subjective criteria are introduced, the opportunity for abuse of discretion by minor functionaries increases. In addition, if female-headed families with school-aged children were to be considered to be in the non-employable category the incentive for a male to desert his family would be great.

104 Comment, *A Model Negative Income Tax Statute*, 78 Yale L.J. 269, 284 (1968).

It must be realized, however, that all of these objections apply to the Family Assistance Plan's requirements for registration for work and training. If an elaborate effort is going to be made to distinguish the non-employable poor anyway, their special needs and limitations should be recognized once they are separated from the employable poor. A political liability is involved in making this distinction, however. Some legislators would support FAP as a measure to help the non-employable poor which incidentally aids those who can work, but would not support it if they felt a program could be devised which distinguished the non-employable and provided benefits to them alone.

As previously discussed in detail, there are other costly changes which could be made which affect work incentives. If empirical evidence developed in the future indicates that a marginal tax in the range of 50 percent is important, the reduction rate should be dropped for the employable poor below the 67 percent in the present bill. Although the cumulative marginal rate for benefits in cash and in kind does not harm work incentives as much as some have assumed, this could be reduced by replacing in kind benefits with cash or lowering the cash reduction rate. In addition, the impact of the federal income tax on work incentives of welfare recipients could be eliminated or reduced by exempting them from federal income tax in the manner which James Tobin suggests or computing FAP benefits on the basis of net income after payment of the income tax.

More money is not a panacea for problems of public assistance. Investing increased funds in the existing system would not be worthwhile. The Family Assistance Plan, as a negative income tax, presents a conceptually bold approach to alleviating poverty. Cumulative compromises to limit costs, however, undermine its potential effectiveness. While the approach to the problem of poverty is promising, costly improvements in the directions suggested must be made if the Family Assistance Plan is to achieve the goal it proposes.

FEDERAL CONSUMER CLASS ACTION LEGISLATION: MAKING THE SYSTEM WORK

HERBERT B. NEWBERG*

Introduction

Despite the admirable evolution of the common law toward increasing responsiveness in such fields of consumer law as product injury liability, it remains brutal fact that the consumer defrauded or cheated out of $10, $50, $100 — even $500 — no matter how clear and incontestable the legal wrong which he has suffered has only a paper right; he is virtually without enforceable remedy.[1]

Consumer fraud is an important cause of general unrest in our society.[2] It is generally recognized that there is no current effective remedy for consumers against big business.[3] It has been estimated that "at least 95 percent of illegal consumer abusers are never adjudged to be such by our legal system. The arm of the law . . . never reaches these abuses, thereby permitting an 'overworld' of corporate crime which reaps billions yearly from the defenseless consumer."[4] In most cases of consumer fraud, litigation on a one-to-one basis between the victim and the perpetrator is as a practical matter impossible. Thus there is no effective deterrent against the continuation of illegal practices. Because monetary claims for relief from consumer fraud are relatively small on a single claim basis, they cannot justify the initiation of litigation individually. The effect of the Supreme Court's holding in *Snyder v. Harris*[5] is that the claims of those similarly situated may not be aggregated

---

*B.S., 1958, University of Pennsylvania; LL.B., 1961, Harvard Law School; Member, Pennsylvania Bar.

1 S. REP. No. 1124, 91st Cong., 2d Sess. 5 (1970).

2 REPORT OF THE NATIONAL COMMISSION ON CIVIL DISORDERS (1967).

3 *See, e.g.*, Schrag, *Bleak House 1968: A Report on Consumer Test Litigation*, 44 N.Y.U.L. REV. 115 (1969).

4 Testimony of Ralph Nader, *Hearings on S. 1980 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 27 (1969).

5 394 U.S. 332 (1969).

in order to reach the $10,000 federal jurisdictional amount, even in cases of alleged consumer fraud on a regional or national basis.

The growing public demand for effective consumer remedies, spurred by the activities of local and national consumer groups, has led to the introduction into Congress of a host of consumer protection bills. A bill that creates a new private right of action automatically carries with it the potential of widening the availability of class actions.[6] Other bills have sought directly to overrule the effects of *Snyder v. Harris*.[7] Three bills were introduced in the current session of Congress with this in mind: the Eckhardt-Bayh bill,[8] the Magnuson bill,[9] and the Administration bill.[10] Whether these bills pass in their present form or are deferred in favor of other consumer legislation, an analysis of them may serve to demonstrate the vital role of federal class actions in affording effective relief for consumers.

I. Objections to Consumer Class Actions

A. *The Source of Consumer Fraud*

Representatives of the Administration and of businesses and trade associations who testified at the Commerce Committee hear-

6 Federal class action legislation has received considerable comment of late. *See, e.g.*, Eckhardt, *Consumer Class Action*, 45 Notre Dame Law. 663 (1970); Tydings, *The Private Bar — Untapped Reservoir of Consumer Power*, 45 Notre Dame Law. 478 (1970); Comment, *Consumer Protection — The Class Action Jurisdiction Act*, 44 Tulane L. Rev. 580 (1970); Tydings, *S. 1980 The Class Action Jurisdiction Act*, 4 New England L. Rev. 82 (1969); Dixon, *S. 1980 — The Class Action Jurisdiction Act*, 4 New England L. Rev. 82 (1969).

7 Bills introduced in previous years generally included both provisions to expand the powers of the Federal Trade Commission and to establish federal jurisdiction for consumer class actions. Current bills have separated these two categories, and this article concerns only bills relating to consumer class actions. *See generally, Hearings on H.R. 14931, H.R. 4585, H.R. 14627, H.R. 14832, H.R. 15066, H.R. 15655, and H.R. 15656 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 2d Sess., ser. 43 (1970) [hereinafter cited as *House Hearings*]; *Hearings on S. 1980, supra* note 4; *Hearings on S. 2246, S. 3092, and S. 3201 Before the Consumer Subcomm. of the Senate Comm. on Commerce*, 91st Cong., 1st & 2d Sess., ser. 48 (1970).

8 H.R. 5630, 92d Cong., 1st Sess. (1971) (introduced by Representative Eckhardt of Texas on March 4, 1971); S. 1378, 92d Cong., 1st Sess. (1971) (introduced by Senator Bayh of Indiana on March 24, 1971 as a companion bill to H.R. 5630) [H.R. 5630 and S. 1378 are hereinafter cited as *Eckhardt-Bayh*].

9 S. 984, 92d Cong., 1st Sess. (1971) (introduced by Senator Magnuson of Washington on February 25, 1971) [hereinafter cited as *Magnuson*].

10 S. 1222, 92d Cong., 1st Sess. (1971) (introduced by Senator Magnuson of Washington on March 12, 1971 on behalf of the Nixon Administration) [hereinafter cited as *Administration*].

ings uniformly singled out the unscrupulous "fly-by-night" merchant as the biggest problem in the consumer fraud area.[11] This assertion that the real source of widespread consumer fraud is the small-time "operator" merits examination.

Estimates from reliable sources indicate that consumers are losing more than $100 billion a year.[12] Senator Warren G. Magnuson, chairman of the Senate Banking Committee, estimates that several billion dollars is stolen annually from consumers through fraud — more than is lost through robbery, burglary, larceny, auto theft, embezzlement, and forgery combined."[13] Senator Philip Hart, Chairman of the Senate Antitrust and Monopoly Subcommittee, has concluded that 30 percent of all consumer spending does not buy product value. In other words, he explains, $174 to $231 billion is annually paid for no product value. Criminal price fixing has caused 15-35 percent over competitive pricing.[14]

This prodigious cheating is not the achievement of fly-by-nighters alone. This can be demonstrated by observing the antitrust laws,[15] an important tool for consumer protection.

Congress has declared that violations of the Sherman and Clayton Acts are so grave that both criminal[16] and civil[17] liability can result therefrom, and treble damages plus reasonable attorney's fees will be awarded to private parties who successfully prosecute such actions. Antitrust violations include hard core price fixing combinations or conspiracies, monopolies, coercive tying arrangements, and other unlawful restraints of trade. Under the Sherman Act, companies which have been criminally indicted from four to twenty times over the period 1955 to 1968 include

---

11 Testimony of Richard W. McLaren, Assistant Attorney General, Antitrust Division, *House Hearings* 200-27; testimony of Herbert H. Schiff of the American Retail Federation, *Id.* 259-86; testimony of Thomas A. Rothwell of the National Small Business Asociation, *Id.* 286-98; testimony of George W. Coch of the Grocery Manufacturers of America, *Id.* 299-304.

12 *Foreword*, 2 ANTITRUST L. & ECON. REV., No. 4, at 1 (1969).

13 W. MAGNUSON & J. CARPER, THE DARK SIDE OF THE MARKET PLACE 8 (1968).

14 Cited in BUREAU OF NATIONAL AFFAIRS, ANTITRUST & TRADE REGULATION REPORT, No. 452 (March 10, 1970).

15 15 U.S.C. §§ 1-31 (1958).

16 *Id.* §§ 1, 2.

17 *Id.* § 15.

many of our giant corporations which can hardly be characterized as disreputable or fly-by-night operators.[18]

On the civil side of federal government antitrust litigation, over 80 percent of all cases disposed of in the decade ending 1966 terminated in consent decrees.[19] These decrees affect many of the largest and most important segments of American business, "such as chemicals, clothing, construction, drugs, electrical products, film, food, lumber, metals, paper, petroleum, plumbing and heating, office equipment and machines and transportation."[20]

There are other indications that legitimate businesses, as well as fly-by-nighters, are involved in cheating the consumer. Such legitimate businesses, for example, manage to find their way onto the crowded dockets of the Federal Trade Commission.[21] State agencies have also found that to protect the consumer they must deal with more than just the fly-by-night operations. In the area of weights and measures, for example, *Consumer Reports* found that:

> [T]he Michigan Department of Agriculture checked 50,000 packages in 1968 and found shortages in 15 percent. New York State inspectors checked 1250 packages of meat last December in 23 stores in 14 cities and suburbs, and found shortages in 28 percent. Los Angeles inspectors at about the same time ran a concentrated check on fresh meat, fish, poultry and delicatessen items, and found shortages in more than 32 percent of prepackaged or cut-to-order purchases. In March 1969 state officials in Tennessee ran a state-wide check on packaged meats and found shortages in 50 percent of the stores serving upper-income families, shortages in 58 percent of the stores selling to families with moderate incomes, and shortages in 75 percent of the stores serving low-income consumers. Officials estimated that shortages in meat alone were costing Tennessee residents $16 million annually.[22]

---

18 CLABAULT & BURTON, SHERMAN ACT INDICTMENTS 1955-1965, A LEGAL AND ECONOMIC ANALYSIS (1966); *Id.*, Appendix J. (Supp. 1968).

19 AMERICAN ENTERPRISE INSTITUTE FOR PUBLIC POLICY RESEARCH, INTRODUCTION AND ANALYSIS TO ANTITRUST CONSENT DECREES, 1906-1966, COMPENDIUM OF ABSTRACTS xi, n.1 (1968).

20 *Id.* n.2.

21 *See generally*, TRADE REG. REP.

22 *One of Our Billion Cubes (Pizzas, Balloons, Giblets, Tea Bags) is Missing*, CONSUMER REPORTS 249-50 (1970).

One area in which large businesses are particularly capable of fraud is deceptive advertising, especially on television. The President's National Advisory Commission on Civil Disorders observed that pressure from continuous commercial advertising, especially on television, was a major factor in the exploitation of consumers by retail merchants.[23] Retailers merely pass on product design deficiencies, shoddy workmanship, and shortages of weights and measures in pre-packed items to the hapless consumer.[24] One commentator has noted:

> All the available evidence suggest very strongly that the loss to the consuming public from deception at the manufacturing level by these big TV advertisers greatly exceeds any losses caused by the petty retail crooks. . . . False advertising of soap, detergents, aspirin, bleach, and a half dozen other major products on TV doubtless inflates prices to the consuming public by more than all the retail frauds put together, at least from what data we now have available.[25]

There is little room for doubt, it appears, that reputable, well known national and regional manufacturers, by virtue of small frauds, are major causes of consumer losses in the United States.

B. *Abuse of Legitimate Businesses*

1. Manufactured Suits

Critics of the pending bills which would create a federal consumer class action without regard to jurisdictional amount or diversity of citizenship have claimed that the result will be harrassment of legitimate businesses by unscrupulous lawers. Speaking for the Administration, Assistant Attorney General Richard W. McLaren asserts:

> In many consumer class actions it is likely that the individual consumer's financial damage would be very small, perhaps too small to serve as an incentive to institute suit. In such a case, by far the largest single financial stake in a class action would be held by the attorney bringing the suit. The possi-

23 *See supra*, note 2.

24 Annot., 1 A.L.R.3d 500 (1969).

25 *Supra* note 12, at 13-14.

> bilities here may tempt an unscrupulous few to seek class action litigation.[26]

This criticism, which applies to all the pending bills, seeks to disparage all lawyer motivated litigation where the consumer does not find it economically feasible to vindicate his rights. This is contrary to the basic reasoning underlying the 1966 amendments to Rule 23. According to Professor Benjamin Kaplan, one of the principal drafters of new class action rule, Rule 23 was amended particularly to provide a means for vindicating the rights of groups of people who individually would be without effective relief.[27] The original framers of the new rule expected that claims of class members would be aggregated for all purposes.[28]

McLaren's criticism also contradicts the basic policy behind consumer protection legislation. The proposed legislation is designed to motivate the lawyer to initiate class actions when the small size of each individual recovery makes separate lawsuits economically unfeasible. This policy is neither startling nor new. On the contrary, the Supreme Court has held that private treble damage actions constitute one of the surest methods for enforcing the antitrust laws.[29] In such actions, the successful plaintiff is entitled to recover not only damages, but also reasonable attorney's fees and costs of suit.[30] The private litigant has been referred to by former Justice Fortas as a "private attorney general" for the enforcement of such laws.[31]

Private actions are specifically encouraged under the Truth-in-Lending Act, another consumer protection statute, which permits class actions to be filed without regard to jurisdictional amount for violations of that act.[32] The court is authorized to award

---

26 Letter from Richard W. McLauren to Congressman Clarence J. Brown, March 25, 1970, reprinted in *House Hearings* 222-26.

27 Kaplan, *A Prefatory Note*, 10 B.C. IND. & COM. L. REV. 497 (1969); *see also* Ford, *Federal Rule 23: A Device for Aiding the Small Claimant*, 10 B.C. IND. & COM. L. REV. 501 (1969).

28 Kaplan, *supra* note 27, n.31.

29 *See, e.g.*, Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969).

30 15 U.S.C. § 15 (1958).

31 Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968) (concurring opinion). Justice Fortas borrowed the phrase from Judge Frank. *See* Associated Indus. of N.Y. State, Inc. v. Ickes, 134 F.2d 694, 709 (2d Cir. 1943).

32 15 U.S.C. §§ 1640(e), 1681p (1970).

reasonable attorney's fees and costs to the successful plaintiff.[33] Similar provision for attorney's fee awards and costs have been allowed by the courts in civil rights actions[34] and in private shareholder actions brought under the securities acts.[35]

In all of these statutes the private attorney who brings the litigation should be commended for promoting governmental policy rather than branded as unscrupulous. Without the class action device, poor and middle income groups or consumers generally having claims too small to be pursued economically would be unable to obtain any relief at all. As one federal District Court judge has noted:

> In some areas of the law, society is dependent upon "the initiative of lawyers for the assertion of rights" . . . and the maintenance of desired standards of conduct. The prospect of handsome compensation is held out as an inducement to encourage lawyers to bring such suits. . . . The instant case presents a classic example of such a lawsuit. Quite obviously, a major incentive to forceful presentation is the substantial counsel fee plaintiffs' attorney believes he may be awarded if he is successful.[36]

Several antitrust class suit are currently pending in which the claims of the consumer plaintiffs can only be prosecuted economically by means of a class action. These cases involve classes of consumers who purchased antibiotics,[37] quinidine[38] and odd-lot securities.[39] Where the claims are small the need becomes greatest for class members to join with others similarly situated. Motivating the lawyer to initiate such litigation on his own is an indispensable part of any plan to provide effective relief to consumers.

It is also argued that lawyers for consumer class plaintiffs will

33 *Id.* §§ 1640(a), 1681n, 1681o.

34 Rolfe v. County Bd. of Educ., 391 F.2d 77 (5th Cir. 1968).

35 Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970).

36 Dolgow v. Anderson, 83 F.R.D. 472, 497-98 (E.D.N.Y. 1968). Considering the number of lawyers that would be needed to process the multitude of claims, consolidation of claims in one action becomes essential to effective relief.

37 In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, [1971 Transfer Binder] TRADE REG. REP. ¶ 73,481, at 89,954; ¶ 73,482 at 89,954 (S.D.N.Y. 1971).

38 Cusick v. Nederlandsche Combinatie Voor Chem. Ind., 317 F. Supp. 1022 (E.D. Pa. 1970).

39 Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968), *on remand* 52 F.R.D. 253 (S.D.N.Y. 1971).

have no inhibition against bringing strike suits against legitimate businesses. However, it has not been conclusively demonstrated that affording consumers a class action procedure in the federal courts will suddenly bring a flood frivolous actions against reputable businesses. There is a long tradition of class actions under the antitrust, securities, and civil rights laws, with no history of harassment.[40]

Frivolous suits can be dealt with by the bar and the legal system. Motions for dismissal and summary judgment are available to the defendants. In addition, defendants may bring actions for malicious prosecution, malicious abuse of process, and disbarment. Suits brought in various judicial districts for harassment purposes may be transferred and consolidated in a single district by a multidistrict panel.[41]

Another contention is that a lawyer who brings a class action where he could have easily brought a simple individual action is bringing a strike suit. On the contrary, however, the courts have held under Rule 23 that in a doubtful case any error should be committed in favor of allowing the class action.[42] Since a class action means that issues are consolidated, court time is reduced, and the need for local lawyers for business defendants in different districts is eliminated, the class action generally reduces rather than inspires any harassment.[43]

Philip Elman, Commissioner of the Federal Trade Commission, has noted that "[e]very right of action, every remedy in court, is capable of being abused. . . . We have to rely upon the courts to protect us against it and abusive judicial process. It is their process that is being abused."[44]

Another possible abuse suggested by critics of consumer class actions is the prospect of plaintiffs' lawyers engaging in soliciting

---

40 Statement of George Gordin, Jr., attorney for the National Consumer Law Center, Boston College Law School, *House Hearings* 231.

41 28 U.S.C. § 1407 (1970).

42 *See* Esplin v. Hirschi, 402 F.2d 94, 101 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969).

43 Testimony of Mary Gardiner Jones, Commissioner, Federal Trade Commission, *House Hearings* 98-99.

44 Testimony of Philip Elman, Commissioner, Federal Trade Commission, *House Hearings* 97.

clients for the class.[45] As support, persons advancing this argument point to Section 1.61 of the Manual for Complex and Multidistrict Litigation, which concerns the subject of potential abuse of the class action. This section suggests a form of order which might be entered in protracted class actions designed to prevent abuse of the class action. The inference is that such a rule was made necessary by abuses like solicitation. But those who point to this proposed order fail to mention that it is directed not only at plaintiffs but also at defendants who may try to dissuade potential class members from joining the class. Businesses, after all, are in a unique position to influence the decision of a potential class member since they often have regular customer relations with class members. Economic coercion through refusals to deal,[46] reciprocity pressures,[47] and unfriendly communications with class members may be an even more substantial abuse.

In the final analysis, allegations of potential abuse of consumer class actions must apply to the potential abuse of *all* class actions under Rule 23. The individual bringing the class action in Rule 23, however, does not have power to secure the involuntary joinder of everyone similarly situated. On the contrary, the ordinary consumer class action for damages brought under Rule 23(b)(3) is subject to Rule 23(c)(2) which requires that each member of the class be advised that he has the privilege of excluding himself from the class if he so requests by a specific date.

2. Economic Effects

Administration representatives and businessmen have argued that federal consumer class actions will only be brought against the solvent corporation, with the fly-by-night operator going free.[48] This argument is in reality a complaint by business against selective enforcement of consumer protection laws. As noted earlier, however, big business is the perpetrator of the overwhelming bulk of consumer fraud. One who has committed consumer

45 *Supra* note 26, at 226.

46 *See* Bergen Drug Co. v. Parke, Davis & Co., 307 F.2d 725 (3d Cir. 1962).

47 *See* Allis-Chalmers Mfg. Co. v. White Consol. Indus., 414 F.2d 506 (3d Cir. 1969).

48 Testimony of McLaren, Schiff, and Rothwell, *House Hearings* 201, 205, 261, 287.

fraud and has reaped illegal profits is hardly in a position to argue that he should not be sued because others are not being sued. It is true, of course, that in any litigation the solvency of the defendant is an important consideration in deciding whether a particular claim should be pursued. If there is no hope for recovery under any probable monetary judgment, it makes no sense to pursue the lawsuit. Where there are fly-by-night operators who practice consumer fraud, this may mean that the remedy lies elsewhere, such as with local prosecutors and Better Business Bureaus.

But apart from those actual fly-by-night operators who are difficult to locate, it is not true that only well-funded corporations will be sued, while smaller businesses will escape. It is more likely that all parties to the fraud will be joined in the action. Very often, smaller, less well-funded companies are joined in litigation once there is reason to believe that they participated in a fraud in conjunction with larger companies.[49] In one action, for example, two small salt companies were joined in a price-fixing conspiracy action brought against larger companies as a national class action. The Court upheld the class action over the objection of these companies that it was unfair to subject them to the burdens of defending a class suit which averred a national conspiracy.[50]

A more important assertion is that the existence of a class action threat will stifle competitive innovation.[51] Experience with a similar statute indicates that such fears are unwarranted. The Truth-in-Lending Bill was uniformly opposed by financial institutions, but it now appears that all of these financial institutions are comfortable with the legislation, having conformed their practices appropriately without any major disruption.[52] Accordingly, one may rationally conclude that a class action will not suppress competitive innovation, but will instead rechannel it along more constructive lines.

---

49 *See* Philadelphia v. Morton Salt Co., 248 F. Supp. 506 (E.D. Pa. 1965).

50 512; *see also* School District v. Harper and Row Publishers, Inc., 301 F. Supp. 484 (N.D. Ill. 1969), where the court upheld a national class action against 38 defendants who were large and small publishers and wholesalers of library books.

51 Testimony of Rothwell, *House Hearings* 288.

52 Address by Federal Trade Commissioner Mary Gardiner Jones, before the Baltimore Better Business Bureau.

Finally, a major concern of the critics of the proposed legislation is reflected in the following testimony to the House Committee:

> [W]e are concerned that unrestrictive class action would lead to many unfounded suits and only add to the overburdened court calendars, and finally we are even more concerned that unfounded class actions would harrass business and increase our operating costs and this would only result in the end in increased prices to the consumer.[53]

As noted above, motions for dismissal and summary judgment are available to protect defendants against frivolous or obviously unfounded suits. Defendants may be put to the expense of lengthy trials before prevailing, but there is not a large business today that does not have thousands of suits pending, both as plaintiff and defendant. Prosecution and defense of such suits is treated by management as a regular cost of doing business.

Statements like the one above seem to have another meaning as well. In effect, they are saying to the consumer — go ahead and sue me, it will be reflected in the price that I charge to you for my wares. This represents a not so veiled threat that business can bully the consumer even when business has been caught cheating.

In the final analysis, one may view the voiced fears of harassment by business arising from consumer class actions as being in reality the fear of the exposure to substantial liability. The real deterrent today against illegal activities by businesses is not government action, criminal or civil, but rather the threat of private class actions for restitution.

C. *Administrative Problems*

Once the opponents of the consumer class action bills have made their argument about the possibility of harassment of legitimate business, they assume the mantle of protector of the consumer and of the federal courts. In this respect, they contend that the courts are unable to fashion effective relief for consumer classes. They claim also that the costs of administering recovery distributions to individual class members will exceed the size of

53 Testimony of John F. McCarthy, Sales and Marketing Executives International, Inc., *House Hearings* 243.

their claims. Finally, it is asserted that general federal consumer class actions will create an undue additional burden on the congested federal courts and will disrupt the sensitive federal-state judicial relationship.

1. Effective Relief

A representative of the National Canners Association, a trade association with almost 600 members in all parts of the United States, encompassing 85-90 percent of the national production of canned foods,[54] has spoken out candidly about penny frauds:

> Even if it were shown that a deceptive practice, such as misrepresentation or short weight, caused a consumer to spend more than the product was worth, damages could not amount to more than a penny or two. Under such circumstances restituiton cannot seriously be considered as meaningful to the consumer.[55]

The spokesman for the National Canners Association suggests that Congress should consider limiting any private recovery to products whose value exceeds a minimal amount. Thus, suits would be contemplated only where the loss suffered by individual consumers was sufficient to justify participation in litigation looking toward restitution.[56]

A solution does exist to this problem — the consumer class action. The fact that there may be difficulties which make uneconomical the individual proof of claims or the administration of a recovery fund should not exonerate defendants from accounting for their wrongdoing. In the *Eisen* case,[57] the court, in upholding a class of 2,000,000 shareholders who were represented by a single plaintiff suffering damages of $70, approved the concept of a "fluid class recovery":

> Crucial also is the ability of the court to fashion a remedy, relying on its own and counsel's ingenuity, where a wrong has been done and where the consequences of not fashioning a remedy would permit avoidance of appropriate sanctions

54 Testimony of Edward Dunkelberger, National Consumer Association, *House Hearings* 247.
55 *Id.* 252.
56 *Id.*
57 *Supra* note 39.

> and the retention of illegal profits. . . . To emphasize individual recovery is to unduly stress considerations not totally relevant to the conditions of this case, especially the small amounts of potential recoveries by most class members, which, absent the class device, would effectively bar suit by the majority of odd-lot investors. . . . Plaintiff has suggested that a found equivalent to the amount of unclaimed damages might be established and the odd-lot differential reduced in an amount determined reasonable by the court until such time as the fund is depleted.[58]

Similarly, in upholding consumer class actions by seven states suing in a representative capacity for antitrust violations arising from sales of antibiotics, the District Court said:

> The court is confident that statistical and computer techniques can be successfully utilized in the courtroom and that their application will allow the consumers to protect their rights while freeing the court and the defendants of the specter of unmanageability. In these circumstances the court cannot conclude the defendants are constitutionally entitled to compel a parade of individual plaintiffs to establish damages . . . . It is obvious, however, that the only manner in which the plaintiff class can ever prosecute their claims is by a Rule 23 class action and the court cannot simply close the doors to these litigants because their actions present novel and difficult questions.[59]

Another case rejecting defendants' contention that a class action might involve insurmountable administrative difficulties, making settlement more difficult as the number of plaintiffs expanded has said: "Even with thousands of class members, however, the imaginative and resourceful attorneys handling these cases can undoubtedly devise workable settlement procedures."[60] The court also pointed out that a settlement arrangement was under consideration in antibiotic drug cases which involved national classes of individual consumers as well as classes of governmental bodies, wholesalers, retailers and hospitals.[61]

---

58 *Id.* 52 F.R.D. 257.

59 In re Consolidated Pretrial Proceedings in Antibiotic Antitrust Actions, Consumer Class Actions, Opinion No. 2 (S.D.N.Y., filed May 4, 1971).

60 Illinois v. Harper & Row Publishers, Inc., 301 F. Supp. 484 (N.D. Ill. 1969).

61 *Id.* 491.

Assuming that plaintiff succeeds in establishing defendants' liability to the class, relief to individual members of the class can be administered on a proof of claim basis at that time.[62] The proof of claim procedure is also being used to administer the consumer part of the settlement in the antibiotics cases,[63] and was used by Judge Fullam in the brass mill, tube, and pipe cases.[64]

The antibiotics settlement was subsequently approved by the court on the basis of permitting the governmental plaintiffs to apply unclaimed consumer settlement funds for the benefit of the public.[65] There are several cases where funds were distributed directly or for the benefit of large groups of persons. Where the fraud is so small on an individual basis so as to preclude individual distribution, another analogy to a shareholders derivative suit is useful. In meeting any $10,000 amount in controversy requirement for a derivative suit, it is not the individual plaintiff-shareholder's interest in the amount sued for or in the recovery but the interest of the corporation that is determinative. Since the action is a true class action, the primary right is that of the corporation and the shareholder's enforceable right is only derivative.[66] Any recovery in such an action goes to the corporation for the benefit of all shareholders indirectly, rather than being distributed to the shareholders directly. By analogy in a class action where the damage suffered by individual members of the class is too small to permit economical individual distribution of recovery proceeds, the proceeds should be extracted from the wrongdoer defendants, and put into an appropriate fund for the collective, though perhaps indirect, benefit of the victims of the fraud.[67] This is exactly what was done, for example, in *Bebchick*

---

62 *See, e.g.*, Union Carbide and Carbon Corp. v. Nisley, 300 F.2d 561 (10th Cir. 1961), *cert. denied*, 371 U.S. 801 (1963).

63 *Supra* note 37.

64 Philadelphia Electric Co. v. Anaconda American Brass Co., 47 F.R.D. 557 (E.D. Pa. 1969).

65 West Virginia v. Charles Pfizer & Co., 440 F.2d 1079 (2d Cir. 1971), *aff'g* 314 F. Supp. 710 (S.D.N.Y. 1970).

66 J. MOORE, FEDERAL PRACTICE § 23.1.21(2), n.90 (2d ed. 1969); Kalven & Rosenfeld, *Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941).

67 *See* Eisen v. Carlisle & Jacquelin, *supra* note 39; West Virginia v. Charles Pfizer & Co., *supra* note 65; Daar v. Yellow Cab Co., 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967).

v. Public Utilities Commission.[68] In that case the court held that the rate charged by the District of Columbia Transit System was too high. The following relief was provided:

> It is not feasible to require refunds to be made to individuals who paid the increase. Nevertheless, the amount realized by Transit from the increase must be utilized for the benefit of the class who paid it, that is, those who use Transit. . . . Since the actual amount received may have been utilized by Transit and hence is not presently available in cash, the District Court on our remand may require the establishment, to the extent the cash is not available, of a special account or reserve on the books of Transit . . . with the purpose of benefiting Transit users in any rate proceedings pending or hereafter instituted.[69]

Nor is it impossible to distribute a fund to over a million claimants individually. In *Illinois Bell Telephone Co. v. Slattery*[70] the plaintiffs attempted to prevent the Illinois Commerce Commission from enforcing a rate change. Before bringing the suit, the plaintiffs had to post a large fund as security in case the rate changes effected by the Illinois Commerce Commission were held to be legal. The court, after a hearing, decided for plaintiffs and ordered refunds. Approximately $18,798,000 was involved. Two thousand people were employed over a three year period to effect the refund, and the cost of refunding to the various subscribers was $2,700,000.[71]

The courts have long used the technique of finding liability and then devising some means of compensating the plaintiffs. In *Spiller v. Atchison Topeka & Santa Fe Railroad Company*,[72] the court reviewed an award pursuant to an ICC ruling that shippers had made illegal overcharges. The case was brought by one plaintiff as the assignee of all claims of persons who had used the various railroads. The total judgment was approximately $150,000. Many of the plaintiffs kept no books and there was no way of ascertaining the amounts of their respective claims. It turned out, however, that many of the claims were capable of being verified by the shipper's books. The court allowed the remedy and the rebate of rates.

68 318 F.2d 187 (D.C. Cir. 1967).
69 *Id.* 203-04.
70 102 F.2d 58 (7th Cir. 1939), *cert. denied* 207 U.S. 648 (1939).
71 *Id.* 61-62.
72 253 U.S. 117 (1919).

A per capita payment to each class member was made in *United States v. Old Settlers*[73] when the Cherokee Indians brought suit under certain treaties. The recovery was in the amount of over $200,000 on a suit brought by three commissioners purporting to represent all the Cherokees west of the Mississippi, who immigrated prior to the treaty of 1835, including those alive and the descendants of those who died as determined by Cherokee law. The Court of Claims found general liability and afterwards provided for a *per capita* payment to each individual, head of family or legal representative, the rights to a claim to be determined by a committee of five appointed by the President of the United States, including four Cherokees and a United States agent. The Supreme Court of the United States, treating this as a class action, approved not only the plan of distribution established by the Court of Claims but also the procedure of finding liability first, then the amount of the claim, and then the method of distribution to the individual claimants.[74] In conclusion, then, workable payment schemes can be worked out by courts which succeed in giving consumers effective compensation and relief.

2. Costs to Administer v. Benefits to Successful Plaintiffs

Opponents of class action also contend that where small claims of class members are involved, the relative costs of administering the distribution of recoveries running to specific class members will far outweigh the amount of the claims themselves. The costs of administering a distribution of litigation recoveries is indeed a valid consideration in class action situations. But this consideration does not go to the merits of whether a class action should be upheld. Rather it goes to the issue of whether individual recovery distributions are economically feasible, or whether means must be sought to apply the recovery fund indirectly for the benefit of the injured class members. Or there may be a combination of both approaches where individual distributions are attempted on a proof of claim basis but where there still remains a large unclaimed sum.[75]

73 148 U.S. 427 (1892).
74 *Id.* 481.
75 *See supra* note 39.

In any event, the courts are perfectly capable of estimating at the pre-trial stage, the mathematical prospects of the availability of a fund from which to distribute damages, after taking into account the cost of administration. The Court in the antibiotics case made the following determination:

> The estimated costs to the class members in submitting their claims under the suggested procedure are small, varying from $1.40 to $1.90 per claim, depending upon the verification procedure employed. It is thus clear that, should liability be established, each class member would receive a relatively large recovery with minimal cost.[76]

Similarly, in the *Eisen* case, the District Court found that costs of administration would be about $500,000 and that the minimum damages, if plaintiffs succeeded, would be $22,000,000.[77] In short, it is not accurate to state that the costs of administering a distribution recovered will exceed the amount of the claims themselves in a class action.

3. Adjudicative Costs

The argument that consumer class actions would create an additional burden on the congested federal courts is faulty in many respects.

When the Attorney General sues, for example, he must go to the same federal court where congestion lies for the private litigant;[78] thus the solution does not lie with granting only the Justice Department a cause of action. Moreover, the backlog in the state courts is even greater generally, than in the federal courts.[79]

Use of court resources does not necessarily increase sharply in consumer class litigation. A class action requires the court at an early stage to conduct proceedings leading to a determination of the validity of the class. Apart from that, however, pretrial dis-

76 *See supra* note 37.

77 *Supra* note 39, at 265.

78 *See* testimony of Jones, *House Hearings* 91. See also the conclusions of the Senate Committee regarding the incapacity of the courts as not being a reason for denying effective relief to consumers, *supra* note 1, at 7.

79 *See* 51 JUDICATURE 202-03 (1967); *see also* 53 JUDICATURE 112 (1969). Court congestion does not result in greater inefficiency in processing class actions, as some opponents of the proposed legislation have argued.

covery and basic proof of liability at trial are no more complicated by having a class action than by having only an individual action. In addition, plaintiffs in a class action benefit by the sharing of common litigation expenses. Representatives of the American Bar Association Committee which recommended that no general federal consumer class action be established agree:

> Abbreviated procedures are possible because of the simplicity of the issues in litigation involving widespread consumer frauds.
>
> Unlike antitrust litigation, where class actions are frequently employed, there are typically no complex economic issues requiring lengthy trial and highly sophisticated analytical techniques involving expert witnesses and lengthy discovery procedures. In establishing the right for consumer monetary relief, there are involved relatively simple procedures of showing injury which may, however, involve different specific elements as respects different consumers.[80]

The number of suits brought under new federal legislation will not necessarily be excessive. The consumer class actions will still be expensive, it is true. Class actions will involve some protracted proceedings and will be subject to Rule 23 for court discretion whether or not to uphold the class under the existing circumstances. Where there is a good case for liability with liquidated damages, however, the chances are good that litigation will be settled rather than remain in the court system. Possibly the fear of a flood of consumer class actions simply recognizes that there are a host of unsatisfied claims.

4. Federal-State Relationships

In addition to the burden of additional cases on the docket, critics of consumer class actions maintain that such actions may impose on federal courts the burden of interpreting state law. Section 4 of the Eckhardt-Bayh Bill, for example, bases an available cause of action for consumers on violations of state laws. Speaking for the administration, Richard McLaren has stated:

---

80 ABA ANTITRUST SECTION, REPORT AND RECOMMENDATIONS OF THE SPECIAL COMMITTEE ON CONSUMER PROTECTION LEGISLATIVE PROPOSALS, reprinted in *House Hearings* 353.

> As I pointed out in my testimony, cases under section 4(a)(2)(b) [of HR 14585, predecessor of HR 5630] need not stem only from state consumer protection laws analogous with section 5 of the FTC Act. As broadly phrased, the section could also encompass public utility laws, health and safety laws, usury laws, landlord-tenant laws and the like. It is unlikely that federal laws would cover all of this area. Thus, for most state statutes relating to consumer rights, federal courts would be obliged to interpret state laws.[81]

For most of the state statutes relating to consumer rights, however, federal courts would be able to rely on analogous federal law, or the provisions of the Uniform Commercial Code. In rare instances when the federal courts would be obliged to interpret other state law, usually the laws of only one or two states would be involved. In instances where there may be a possible conflict in state laws, the court may either create appropriate subclasses or deny class actions altogether if the problem of conflict is sufficiently serious. In any event, no new substantive rights are created. Instead a remedy is provided where now the remedy exists only for persons with a claim of more than $10,000 and diversity of citizenship.

The related argument that consumer fraud is primarily a local matter which should remain in the state courts is not sound. This argument has been made by Mr. McLaren as follows:

> I do not believe the federal courts should be used for redress of violation of all state consumer laws. In our federal system . . . federal courts are fully occupied with questions of diversity and those involving broad national or interstate interests. Local matters are, and should be, reserved for state courts. If local rights cannot be pressed effectively because of local judicial interpretations, the remedy as I view it must lie in large part in state legislative action.[82]

The American Bar Association Commission to study the Federal Trade Commission stated in its recent report, however, that state remedies for consumer fraud are wholly inadequate since most

---

81 *Supra* note 26, at 223.

82 *Supra* note 26, at 226.

fraud of any importance involves interstate commerce.[83] Moreover, in its report on S. 3201, the Senate Commerce Committee recognized that "many small claims courts [have not] evolved a capacity to treat such [relatively small consumer] claims competently, equitably or efficiently."[84] A general referral of so-called "local" consumer fraud matters to the state courts renders such actions ineffective. Again, the small amount of many claims, compared with an attorney's fee, leads most consumers to the conclusion that it is not worth the attempt at redress.[85]

Other state remedies are likewise inadequate. State classes are difficult to coordinate because of the increasing amount of the interstate consumer abuse.[86] Binding arbitration is also ineffective unless assurance is given that the wrongful merchant can be compelled to submit the dispute to arbitration, and that effective power exists to compel adherence to a judgment rendered.[87]

Once these facts are recognized, it becomes clear that consumer fraud generally is of broad interstate interest. Since there is no current effective means for relief, the federal courts should be available for this purpose.

II. Analysis of the Proposed Legislation

A. *Basic Differences: Eckhardt-Bayh and Magnuson Bills v. Administration Bill*

The difference in basic approach between the Eckhardt-Bayh and Magnuson bills on the one hand, and the Administration bill on the other, is pointed up by two differences of technique. First, while all the bills provide for an itemized list of "unfair consumer practices" which give rise to a federal action (the Eckhardt-Bayh bill lists 16 such practices, the Magnuson bill 15, and the Administration bill 14), the Administration's is an exclusive list which cannot be supplemented or amended in the absence

83 Report of the ABA Commission to Study the Federal Trade Commission 51-53 (1969).

84 *Supra* note 1, at 5.

85 Comment, *Translating Sympathy for Deceived Consumers into Effective Programs for Protection*, 114 U. Pa. L. Rev. 395, 409 (1966).

86 *House Hearings* 170.

87 Address by Mary Gardiner Jones, Program for Executives at Carnegie-Mellon University, February 27, 1970.

of new legislation; the other two bills, however, each provide mechanisms for supplementing their lists. The Eckhardt-Bayh bill includes as unfair consumer practices anything which gives rise to civil liability under state laws or Federal Trade Commission rules.[88] The Magnuson bill includes in its list any other unfair or deceptive practice which is prohibited by Section 5(a)(1)[89] of the Federal Trade Commission Act.[90]

The second difference is that the Administration bill provides for a private right of action only after a successful suit by the United States against the same defendants for the same violation.[91] Both the Eckhardt-Bayh[92] and the Magnuson bills,[93] on the other hand, provide for federal consumer class actions regardless of any prior government proceeding.

The Administration bill's requirement of a prior government proceeding rests on two propositions. First, the consumer will be allowed to use the fact of a previous governmental recovery as prima facie evidence of a violation. Second, businessmen will be protected from frivolous consumer class actions by the prior governmental screening of consumer complaints. Proponents of the Administration bill suggest also that specification of acts giving rise to civil liability is necessary in order for businessmen to be appropriately warned of potential violations for which they will be answerable in civil damages. The acts specified by the Administration, it is maintained, cover 85 percent of the existing fraud.[94]

None of these alleged advantages are able to withstand further examination, however. The listing of specified acts is so easily susceptible to evasion through loopholes and the existence of other non-specified practices as to render it essentially meaningless as a consumer protection device.[95]

88 *Eckhardt-Bayh* §§ 3(a)(4), 5.
89 15 U.S.C. § 45(a)(1) (1970).
90 *Magnuson* § 101(1)(P).
91 *Administration* § 6.
92 *Eckhardt-Bayh* § 5.
93 *Magnuson* §§ 102(a), 102(b)(1).
94 *House Hearings* 198, 212-13, 218. These hearings were held on an earlier version (H.R. 14931) of the Administration bill. The earlier version contained 11 specified acts. The Administration bill contains 14 specified acts. The Administration list includes all but one of the acts specified in H.R. 14931.
95 *Id.* 28, 55, 90, 165, 231-2. Neither the list of 11 acts specified in H.R. 14931

The government's resources are likely to be inadequate for the job of prosecuting consumer fraud, also. It is estimated that in the area of deceptive practices alone, the federal government would need $35 billion per year for the prosecution of legitimate complaints[96] and this is only one type of consumer fraud. With respect to litigated government action as prima facie evidence in a private civil damage action, the vast majority of all federal government actions by the Department of Justice and the Federal Trade Commission in the consumer-antitrust areas end in pleas of *nolo contendere,* or consent decrees.[97] It is clear that these conclusions deprive private plaintiffs of any prima facie evidence effect of the government proceedings.[98] Even where there is a legitimate prima facie evidence effect of a government judgment, the effect is actually not very helpful since often the same issues must be relitigated.[99]

There are other problems also with the government triggering device. Under the Administration bill, private litigants can only sue those parties named or referenced in the government suit and only on the subjects raised in those suits. This effectively substitutes the judgment of the government for the injured consumer in determining whether to seek relief. There is also the serious problem of delay in the government proceedings during which time the defendant may go bankrupt, out of business, reincorporate in another state or simply flee the jurisdiction. There is no need to put the federal bureaucracy between the consumer and his remedy.

In sum, the government triggering device will not represent a significant deterrent to business to refrain from continued consumer deception activities. On the other hand, the Eckhardt-Bayh and Magnuson bills seem to represent consumer protection statutes that will be truly effective. Accordingly, a section by section analysis of the various provisions of these bills follows:

---

nor the list of 14 acts in the Administration Bill is sufficiently exhaustive to provide complete protection for the consumer.

96 *Id.* 162.

97 *See* note 19 *supra.*

98 *Supra* note 26, at 226.

99 *House Hearings* 91.

B. *Key Definitions*

1. Unfair Consumer Practices

All pending bills set forth specific unfair consumer practices, violation of which are unlawful or otherwise give rise to a cause of action.[100] Under section 3(a)(5) of the Eckhardt-Bayh bill, the FTC is authorized to establish additional unfair consumer practices by rule or regulation.[101] Explaining a similar section of *S. 3201* which was considered by the Commerce Committee during the previous session of Congress, the Committee stated in its report, "The Committee considered it necessary to provide this power in the Commission in order to deal with the infinite variety of practices which sharp practitioners are unhappily capable of devising."[102]

The Committee itself recognized that any listing of unfair consumer practices cannot be sufficiently comprehensive to afford necessary consumer protection. This recognition is in line with views expressed by the FTC during the hearings on the bill parallel to *S. 3201* in the House of Representatives. Accordingly, as suggested by the FTC itself, and as now incorporated in the Magnuson bill,[103] it is suggested that the statute, if enacted, ought to define an unfair consumer practice as "[a]ny other act or practice which is unfair or deceptive to consumers and is prohibited by section 5(a)(1) of the Federal Trade Commission Act."[104]

This definition has the advantage of utilizing 56 years of judicial interpretation of the Federal Trade Commission Act, and it avoids the necessity of many years of additional litigation and judicial interpretation to establish with certainty the precise acts or practices included within the specific categories mentioned.

In any event, if the bills retain their listing of unfair consumer practices without also incorporating violations of section 5 of the Federal Trade Commission Act, then some provision would seem

---

100 *Eckhardt-Bayh* § 3(a); *Magnuson* § 101; *Administration* § 2(a).

101 In addition, § 3(a)(4) makes unlawful "violations which give rise to civil liability under state statutory or decisional law for the benefit of consumers."

102 *Supra* note 1, at 15.

103 *Magnuson* § 101(1)P.

104 15 U.S.C. § 45(a)(1) (1970).

essential to permit the FTC by rule or regulation to add to this list of practices.

2. Consumer

The Magnuson bill[105] and the Administration bill[106] define "consumer" as "any natural person who is offered or supplied goods or services for personal, family or household purposes." This definition of consumer, concentrating on personal consumption, appears to deny protection to potential victims of such "business opportunity schemes" as the vending machine, franchise, or pyramid selling rackets.[107] Practices involving such schemes are unlawful under section 5 of the Federal Trade Commission Act.[108] This deficiency is remedied under the Eckhardt-Bayh bill which expands the definition of "consumer" to include also anyone "who is offered a personal business or moneymaking opportunity."[109] It would seem appropriate that such deceptive practices be specifically provided for either in the definition of consumer or as a listed unfair consumer practice under the other two bills as well.

3. Services

The Magnuson bill[110] defines "services" as excluding credit transactions to the extent that credit is regulated under the Truth in Lending Act.[111] The inclusion of credit transactions except to the extent regulated in that Act is wise and an important part of the scope of this bill. Similarly, the Eckhardt-Bayh bill, being silent on whether "services" include credit transactions, presumably does include them without limitation. On the other hand, the Administration bill excludes credit transactions "to the extent that unfair consumer practices are prohibited with respect to these services under other federal law or regulations."[112] This ambiguous language may sweep in, for example, regulations by

105 *Magnuson* § 101(3).
106 *Administration* § 2(c).
107 *Supra* note 1, at 64.
108 15 U.S.C. § 45(a)(1) (1970).
109 *Eckhardt-Bayh* § 3(c).
110 *Magnuson* § 201(c).
111 15 U.S.C. § 1601 *et seq.* (1970).
112 *Administration* § 2(f).

the FTC governing credit transactions. Since there is not an established private right of action for a violation of FTC regulations, the Administration bill may effectively exempt all of these transactions as well as those specifically encompassed by the Truth-in-Lending Act, which independently provides for a private federal cause of action. Since credit transactions are a major source of consumer fraud, a wholesale exemption of transactions governed by FTC credit regulations would be unwarranted.

In addition, the Administration bill exempts "insurance services" from the definition of services, while they are included without limitation in the Eckhardt-Bayh[113] and Magnuson[114] bills. There is no sound reason why such an important area of consumer transactions should be insulated from private causes of action.

C. *Requirements for Maintenance of Action*

1. Knowledge by Wrongdoer

In both the Magnuson and Administration bills the majority of the listed unfair consumer practices require knowledge on the part of the supplier before a violation may be found. The bills define "knowledge" to include actual or constructive knowledge or negligence in using reasonable safeguards or care in ascertaining the truth of representations made.[115] Even with this liberal definition of knowledge, the requirement still sets forth an additional prerequisite to proving liability which is not found in the Eckhardt-Bayh bill. Under the Uniform Commercial Code, adopted in 49 states, material misrepresentations, whether negligent or not, are actionable, and those harmed thereby are entitled to relief.[116] It would seem therefore that since most state laws permit such actions, a harsh requirement may in some instances be added to deny relief in an action under the Magnuson and Administration bills unless the requirement of knowledge by the party asserting such representation is eliminated from the various definitions of the unfair consumer practices.

---

113 *Eckhardt-Bayh* § 3(e).
114 *Magnuson* § 101(6).
115 *Magnuson*, § 101(2); *Administration*, § 2(b).
116 UNIFORM COMMERCIAL CODE § 2-721.

2. Notice to FTC

The Magnuson bill requires that a consumer notify the FTC of his claim and wait 90 days before he files his civil complaint.[117] This requirement was taken verbatim from the earlier *S. 3201* as amended and as reported out of the Senate Commerce Committee during the prior session of Congress. This requirement under *S. 3201*, when read together with another requirement which barred private actions if the government timely filed its own action, was designed to permit the Federal Trade Commission and the Department of Justice an opportunity to study the practices complained of and to decide whether or not to bring an action. This worthy objective, however, has some deleterious side effects, and since the Magnuson bill does *not* contain any provisions for barring private actions pending governmental suits, the 90-day notice requirement in it is unnecessary and may have been inadvertently included in the bill when it was reintroduced in the current form.

If the Magnuson bill passes in its present form, Congress unwittingly may have closed the door entirely to the private consumer in his own action to seek preliminary injunctive relief to prevent immediate and irreparable harm. It is unrealistic to argue that a governmental agency upon receipt for the first time of notice of the existence of an alleged illegal practice will be in any position to take appropriate, immediate steps to obtain preliminary relief. Nor is it a realistic alternative to suggest that the private consumer resort to a state court action for his preliminary injunctive relief. First, it is probably not economical for an individual to bring such suit without the class action device, and second, this act is proposed in large measure for the express purpose of affording a federal class action procedure to supplement weak and ineffective state procedures governing class actions. In addition, without the liberal venue provisions of the act, the consumer may not be able to obtain necessary venue over the defendants in the state court, or, alternatively, the consumer may have to bring suit in a foreign state which would add considerably to the potential expenses of suit.

Actions where a preliminary injunction is sought should be

117 *Magnuson* § 102(b)(1).

allowed at any time without any requirement for advance notice of 90 days or any other time period to a governmental agency. The Eckhardt-Bayh bill recognizes this and omits any such notice requirement prior to the commencement of a private consumer action. Traditional doctrine amply insures that preliminary injunctive relief is granted only where the facts clearly so warrant. There would seem to be no basis for giving defendants in consumer cases additional and special protection against the consequences of improvidently granted relief. The Magnuson bill should be amended to make this clear. The 90-day waiting period can be applied once an action is filed to defer all proceedings therein except on the preliminary injunction motion. In cases where no preliminary relief is sought the waiting period can operate as presently provided in the bill.

The 90-day notice requirement also raises several other ambiguities. For example, what constitutes effective notice under this subsection? Would actual knowledge by the FTC suffice? Suppose, for example, that the Federal Trade Commission received notice of an unfair or a deceptive act or practice several years earlier — would this be sufficient notice for a consumer to initiate an action currently without giving further notice? Or suppose one consumer gives notice of an unfair consumer practice which the FTC determines it will not prosecute. If the initial consumer giving notice abandons his intention to file a private action, may another consumer affected by the same practice (*i.e.*, a member of the same class) commence such suit without being required to give separate individual notice? Does the consumer have to prove that the Federal Trade Commission actually received the notice in order to meet the requisites of maintaining a representative action under this subsection?

Will the notice under this subsection be sufficient where the notice identifies the supplier's name and address and the alleged unfair consumer practice by using the language of one of the definitions of such practices as set forth in the statute, or must the notice give specific details concerning supporting information of the charges? Suppose notice is given as to a specific unfair consumer practice under one of the definitions set forth, will such notice suffice to enable the consumer to bring an action under a

different definition of an unfair consumer practice set forth in the act? Would the court or the FTC judge the sufficiency of the notice?

All of the above questions are by no means trivial or an exercise in sophistry. They are mentioned here in order to illustrate the fact that in every private consumer class action brought under this act there is a potential threshhold issue concerning the right of the consumers to maintain such action only on condition that the notice requirement has been satisfied. Rather than affording an expeditious private right of action for the consumer, this requirement of a 90-day notice to the FTC greatly adds to the burdens on consumers in such actions.

In light of the potential adverse effects of the 90-day notice requirement, it is suggested that this requirement be eliminated or a requirement substituted that any consumer commencing a private class action under subsection 102(b)(1) of the Magnuson bill shall, simultaneously with the filing of the complaint in the District Court, file a copy of such complaint, with notice of the filing thereof, with the Federal Trade Commission. This suggestion will meet all the objectives of affording the governmental entities involved an opportunity to consider bringing a governmental action to seek redress for the consumer injuries. At the same time, it will afford the consumer the right to seek immediate preliminary relief and will avoid raising a serious threshhold issue concerning the right of the consumer to proceed in his action.

3. Notice to Defendants

Section 11 of the Eckhardt-Bayh bill provides:

> At least 35 days prior to instituting an action under this act, the prospective plaintiff or plaintiffs shall mail notice to the prospective defendants informing them, in general terms, of the nature of the alleged unfair consumer practice or practices. No action for monetary relief may be maintained if, within 30 days after the mailing of the notice, the prospective defendant or defendants —
>
> (a) Identify from business records all consumers similarly situated and notify them that appropriate refunds, credits, adjustments, replacements or repairs will be made within 30

> additional days; provided that where sales, leases, rentals or loans were effected through misleading statements, the defendants must notify affected consumers that their money will be refunded upon their tender of the merchandise or any unused portion of the services, and where consumer debts were collected through misleading statements, the defendants must notify the affected consumers that the money will be refunded upon request; *and*
>
> (b) Cease the alleged unfair consumer practice or practices. Evidence of compliance with this section shall not be construed as an admission of engaging in an unlawful practice.

This provision was inserted for the purpose of avoiding and barring litigation if the prospective defendants remedy and cease their unlawful ways within 30 days after they have been given notice of an unfair consumer practice. At first sight this provision appears to try to meet the arguments that federal consumer class actions will aggravate court backlog problems and that fairness to businessmen should give them an opportunity to cure technical or other violations prior to being exposed to class litigation. Even if it is assumed that there is merit to the above arguments, however, section 11 not only fails to meet either of these objectives, but it also contains several ambiguities, sets up unrealistic mechanisms and timetables for curing the practices, and raises a myriad of new problems.

Section 11 of the Eckhardt-Bayh bill is subject to at least the following deficiencies and ambiguities.

1. It bars private class actions for preliminary injunctive relief from immediate and irreparable harm for a period of 35 days which may be tantamount to precluding such relief entirely, resulting in irreparable harm.

2. It does not preclude individual actions for preliminary injunctive relief, but the doors to the federal court may nevertheless be closed for such actions: such action may not be economical to bring in the absence of a class; such action may have to be brought in a forum far distant from the plaintiff; such action, if brought in a state court, would have to be dismissed without prejudice in order subsequently to start a federal class action; and the complaint in such action, if brought in the federal court would have to be amended to allege class allegations after a lapse

of at least 35 days, which amendment would then probably require leave of court under Federal Rule of Civil Procedure 15(a) and raise the collateral issue of right to amend the complaint as well as the class action issues themselves.

3. It raises all the ambiguities of what constitutes proper notice, and this becomes another threshhold issue in every case. Suppose one notifies a prospective defendant and then subsequently decides to add another defendant. He may be barred from doing so without affording the new defendant a 35-day notice period, a delay that could be crucial if the matter has reached the trial stage or if the statute of limitations is about to expire. There is an additional problem in the length of the notice period if there are several 35 day periods running in staggered fashion when notices are mailed to different defendants at different times.

4. Under section 11, in any action under the act the 35-day notice must be given to the prospective defendants, while the second sentence of section 11 applies the "curing" or settlement provisions as a bar only to an "action for *monetary* relief" (emphasis added). Whether an action which asks for injunctive or equitable relief, such as for rescission, as well as damages, or an action for replacements or repairs is "an action for monetary relief" is problematical. Moreover, if the difference in language in section 11 between "an action" for the 35 day waiting period and notice purposes, on the one hand, and "actions for monetary relief" for settlement purposes, on the other, was really designed so as not to preclude preliminary injunctive, class action relief within the 35 day waiting period, then this should be spelled out clearly.

5. The prospective defendant may bar class actions for monetary relief against him under the Consumer Class Act for particular unfair practices if within 30 days after the mailing of the notice of the alleged violation, he (1) identifies from business records all consumers similarly situated and (2) notifies them that certain remedies will be made in an additional 30 days. The timetable of 30 days to identify and notify all consumers similarly situated is totally unrealistic where a product involved is nationally distributed. Simply identifying consumers similarly situated may easily consume well over 30 days. Compliance with these provisions

would be particularly difficult where a manufacturer defendant distributes his product through independent middlemen and therefore has no records of consumers purchasing his product. Whether he complies by simply stating he has no records, or must make inquiry of his intermediaries and give notice, individual or general, to consumers of his offer of settlement would make a great difference in the effectiveness of these provisions in satisfying consumer grievances.

Other examples of ambiguities are plentiful. What are "business records," "appropriate" refunds, "all consumers similarly situated" or "affected consumers," "misleading statements," "tender of the return of the merchandise," and a "ceasing" of the unfair consumer practice?

6. A fair reading of section 11 requires businessmen to furnish an appropriate remedy for the entire class for a violation of the act. In most cases this will involve considerable expense to the supplier and exposure to the risk of adverse publicity even though there is no admission of liability. Realistically, these provisions will rarely if ever be implemented unless the supplier receives for his trouble some assurance that after he remedies the situation, the claims of class members will be barred by res judicata principles or otherwise by a release from consumers, and that the suppliers' offered remedies will be reasonably secure from collateral attack from dissatisfied consumers. Only through the device of a class action under court supervision which binds all class members, can a supplier who offers a settlement hope to bar the further claims and collateral attacks of class members. In the absence of such a class action, one consumer after another may collaterally attack whatever the supplier has done to remedy the alleged violation and bring new class actions in the process. Even where the supplier receives a judicial determination that he has complied with the act, other consumers, who have not had their day in court under familiar due process concepts, will not be collaterally estopped from challenging or relitigating this issue in another court or even in the same court in the absence of a class action disposition.

7. In the frequent circumstance where the claims of the complaining consumer are not individually large enough to litigate

in the absence of a class action, it would be realistic to expect that evidence of purported compliance by the supplier with section 11 to afford relief to the entire class will be subject to challenge by counsel for the consumers on several basic grounds — the sufficiency of the notice to consumers, the reasonableness of the offered remedies, and the steps taken to implement those remedies and to cease the alleged violations. This will be true because where a class complaint is filed and the supplier moves to dismiss on the grounds that he has settled with the class, such settlement under Federal Rule 23(e) comes under the scrutiny of the court in all its aspects.[118] The result of section 11 is that it is unrealistic in its terms and may in fact serve to multiply litigation. It will not be of any material assistance to the businessman who seeks to avoid class actions for his alleged violations, nor to the consumer who seeks relief which he would consider appropriate. Section 11 thus should be deleted from the Eckhardt-Bayh bill.

4. Minimum Claim

Both the Magnuson[119] and the Eckhardt-Bayh[120] bills contain the requirement that the consumer must have a claim against the defendant in excess of $10 in order to maintain the authorized class action. Although not expressly stated in the previous Senate Commerce Committee Report on S. 3201, this $10 minimum purchase appears to have been inserted in order to avoid the bringing of de minimis claims.[121]

Unfortunately, this minimum $10 requirement in the current bills affords a license to cheat just a little and get away with it. But if ten million people are cheated out of three cents each the total becomes a relatively large sum of money that should not be disregarded.

There are natural and legal safeguards to protect against the de minimis claims without the necessity for establishing an enormous loophole in this bill which will encourage the commission of small frauds. Realistically, lawyers themselves will not bring de minimis law suits. If the sum of money involved in the aggregate

118 *See* J. MOORE, FEDERAL PRACTICE § 23.80 (2d ed. 1969).
119 *Magnuson* § 102(b)(1).
120 *Eckhardt-Bayh* § 7.
121 *Supra* note 1, at 319.

is sufficiently large, but where individual claims are small, Rule 23 is sufficiently flexible to permit appropriate relief. For example, in the antibiotics antitrust litigation, everyone who did not exclude himself from the class or did not file a claim for damages after receiving notice of the law suit, was deemed to have assigned his claim to the state or city of which he was an inhabitant or a resident. It is expected that most of the money allocated to consumers in that settlement will actually be paid to the states or to the cities who may then use the money for health or other public purposes.[122]

Even if Congress decides to maintain the $10 minimum as a prerequisite for the bringing of a private consumer class action, the language currently used in the Magnuson bill[123] is ambiguous. The words "in any transaction as a result of such practice" are troublesome. For example, two related transactions such as buying an item of clothing and accessories, may deserve to be treated as one transaction under this definition, if each transaction is under $10 but together they exceed $10. Another example might be a consumer with a chronic illness who is required to buy certain drugs periodically over an extended period of time. For any individual purchase, the price may be less than $10, but over a period of one month or several months, the price paid will exceed $10. The language of the Eckhardt-Bayh bill satisfactorily resolves this ambiguity: "No person shall be a member of a class in an action under this act unless the amount of his loss or claim exceeds $10."[124]

D. *Judicial Considerations*

1. Jurisdiction of the District Courts

The Magnuson bill grants jurisdiction in any district court in the United States for class actions to enforce liabilities created by the act, provided the plaintiff-consumer shall have paid or become obligated to pay an amount greater than $10 in any transaction as a result of such practice.[125] From the context, it appears clear that

122 *Supra* note 65.
123 *Magnuson* § 102(b)(1).
124 *Eckhardt-Bayh* § 7.
125 *Magnuson* §§ 102(a), (b)(1).

the $10,000 jurisdictional amount requirement is being waived in actions brought under this bill. Similarly the Administration bill provides that a consumer can sue without regard to jurisdictional amount.[126] In order to avoid any different interpretation, these sections might include the words "without respect to the amount in controversy," which is found in the jurisdictional section of the Clayton Act.[127]

On the other hand, the Eckhardt-Bayh bill, while retaining the $10 minimum claim requirement per consumer, also requires all class members in the aggregate to have claims totalling more than $25,000.[128] This additional jurisdictional requirement, which does not seem unduly burdensome, is designed to overcome preclusion of the aggregation of the claims of class members for jurisdictional purposes by *Snyder v. Harris*.[129]

The provision in all three bills is valuable which requires the application of Federal Rule 23 before a class action may be maintained under the subsection. Federal Rule 23 affords the court wide discretion in considering the maintenance of a class action. This Rule was carefully considered by the Supreme Court and others prior to its adoption, and it has built-in safeguards for determining the appropriateness of any action to proceed as a class action.

2. Voluntary Settlements

Substantially identical provisions in the Eckhardt-Bayh[130] and Magnuson[131] bills seek to facilitate voluntary settlements of class actions by authorizing court supervision over the submission to class members of reasonable settlement offers by the defendants. Under Federal Rule of Civil Procedure 23(e), settlements in class actions are subject to the approval of the court after such notice has been given to the class as the court shall direct. To the extent that the provisions in the proposed bills seek to assure court supervision over settlements negotiated between the parties, and notice

126 *Administration* § 6(a).
127 15 U.S.C. § 15 (1970).
128 *Eckhardt-Bayh* § 6(c).
129 *Supra* note 5.
130 *Eckhardt-Bayh* § 13.
131 *Magnuson* § 102(c).

thereof to the class, this objective is already taken care of through Rule 23(e).

The bills appear to go further, however, and to permit the defendants to submit a unilateral, non-negotiated settlement proposal to members of the class where that proposal is "reasonable." The Senate Commerce Committee of the last Congress suggested that a similar provision in S. 3201 was patterned after Federal Rule of Civil Procedure 68.[132]

The reliance on Rule 68 is misplaced and the evils inherent in authorizing the proposed procedure are grave indeed. Rule 68 was designed to encourage the parties in litagation to think realistically about settlement possibilities at an early stage and, thus, to discourage a common practice, especially in personal injury cases, of adding to court backlogs by waiting until the eleventh hour of trial before discussing settlement in practical terms. Rule 68 was never intended to inject the courts into this bargaining process nor to require the courts to prejudge lawsuits to determine the "reasonableness" of settlement demands or offers, nor to circumvent plaintiffs' counsel by permiting a defendant to communicate directly with the plaintiffs involved, albeit under court supervision. Yet this is exactly what these provisions permit.

Other provisions permit consumer class actions to be brought if they otherwise meet the requirements of the Federal Rules of Civil Procedure. Rule 23(a)(4) specifically requires that before any class action may be maintained, the court must satisfy itself that the representative plaintiff will fairly and adequately protect the interests of the class. Once this has been judicially determined, the judgment of counsel for the representative parties as to what constitutes a reasonable offer of settlement to the class must be given the same respect as if such counsel entered his appearance individually for each member of the class. This is an integral part of the concepts and spirit underlying all of Rule 23, as amended, which provides that judgments in class actions which are judicially upheld will be binding on all class members who have not excluded themselves.

The settlement procedures authorized under the proposed bills create several other serious problems. For example, if representa-

132 *Supra* note 1, at 19. See text following note 45.

tive plaintiffs' counsel rejects the settlement proposal by defendants to the class as being unreasonable, it is possible that the court might overrule plaintiffs' counsel and direct that the settlement be communicated to members of the class. The court cannot be burdened with the judgment as to the "reasonableness" of settlement offers made by defendants without its making a prejudgment of the matters in controversy. If members of the class cannot look to plaintiffs' counsel for legal advice in the litigation, they may be totally unrepresented by legal counsel advocating their interests. They certainly may not rely on the court for advice.

Additional problems arise where only one out of several defendants offers to settle, raising the question whether the suit against the others is unaffected thereby. Where some, but not all, of the class plaintiffs accept a settlement offer, does the suit by the rest continue as if nothing had happened? Under Rule 23, a court approved class-wide settlement binds all.[133]

The nature and content of the notice to the members of the class of a proposed settlement are, of course, crucial. If defendants are permitted, in a sense, to "go over the head" of plaintiffs' counsel and make a settlement offer directly to the class members individually, it seems only fair that the individuals receive in the notice, not only the defendant's offer, but plaintiffs' counsel's objections to it. Even then, the consumer is forced to choose, unaided, between the arguments of opposing counsel. If he is cautious, he may hire a third lawyer to help him to decide whether or not he should follow the advice of his own lawyer.

It is clear, then, that these settlement provisions are unnecessary and ill-conceived. The Code of Professional Responsibility requires attorneys to communicate all reasonable offers to their clients.[134] Federal Rule of Civil Procedure 16 provides for pretrial conferences and settlement conferences to be conducted under the supervision of the court. Rule 23(a) requires a finding that representative plaintiffs' counsel be fair and adequate to protect all the interests of the class. Rule 23(e) requires court approval before any settlement of a class action is permitted. Accordingly,

133 *See* Fox v. Glickman Corp., 253 F. Supp. 1005, 1013 (S.D.N.Y. 1966).

134 *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon No. 5, EC 5-1 (final draft, 1969).

existing rules and standards of ethical conduct fully cover the objectives sought by the proposed settlement provisions. To permit defendants, on the other hand, to dangle settlement proposals before members of the class, over the objection of representative plaintiffs' counsel, raises some serious constitutional issues,[135] as well as all of the other problems outlined above. These provisions relating to unilateral class settlement offers which are not recommended by counsel for the representative plaintiffs ought to be deleted.

3. Prima Facie Evidence

The Magnuson[136] and Administration[137] bills provide that the final judgments or decrees entered in any proceeding brought by the United States or the Federal Trade Commission under section 5 of the FTC Act shall be prima facie evidence against that defendant in any subsequent proceeding brought by any other person against him under the act. The Eckhardt-Bayh bill contains no comparable provision. It was thought that such a provision would enable a private litigant to bring suit following a final judgment or decree so rendered without further proof of liability being required, and that it would only be necessary for the private litigants to come forward and prove their damages or claims.

It is certainly laudable to achieve this objective. These provisions were modeled after similar ones under section 5(a) of the Clayton Act.[138] If this provision is enacted, however, it may work to the detriment of private litigants seeking to rely on judgments in favor of the United States and the Federal Trade Commission by virtue of the current strength of the concept of collateral estoppel as contrasted to "prima facie evidence."

At the time of enactment of the Clayton Act in 1914, the principle of collateral estoppel applied only where there was a mutual-

---

135 *See* Swarb v. Lennox, 314 F. Supp. 109 (E.D. Pa. 1970), where a three judge panel upheld a class of lower income residents of Pennsylvania who successfully challenged the validity of confession of judgment procedures on the due process grounds that such plaintiffs could not have understood the legal significance of their signing contracts which authorized judgments to be entered against them.

136 *Magnuson* § 103.

137 *Administration* § 7.

138 15 U.S.C. § 16(a) (1970).

ity of application as to all adversary parties involved.[139] Just as the Clayton Act venue statutes, which were passed at a time when such statutes were more favorable than the general venue statutes, have now been outpaced in liberality by the general venue statutes which expand antitrust litigation venue,[140] so too have the principles of collateral estoppel outpaced the earlier advantages of the concept of prima facie evidence.[141]

Prima facie evidence of liability simply means that a plaintiff may defeat a motion to dismiss for failure to state a cause of action. It does not mean, however, that once the defendant presents his evidence, the plaintiff is not called upon to prove his case affirmatively; he still must sustain his burden of proof.

It is now well established among decisions applying collateral estoppel principles that issues decided in prior government actions or other cases, where the defendant had been given an opportunity to defend as to those issues, would be regarded as conclusively determined for the purposes of the subsequent private litigation.[142] This rule has been applied with increasing frequency, and it is more consistent with the objectives of consumer class action legislation than use of the language affording prima facie weight to governmental decisions in subsequent private litigations. Accordingly appropriate amendments of this provision should be considered.

Under section 103 of the Magnuson bill, prima facie weight is given to decisions of the Federal Trade Commission only where orders by the Commission are based "upon a preponderance of the evidence entered after an evidentiary hearing." This standard seems to confuse the burden of proof standard to be applied by the Federal Trade Commission with the scope of judicial review.

---

139 Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111, 127 (1912).

140 City of Philadelphia v. Morton Salt Co., 289 F. Supp. 723 (E.D. Pa. 1968); School District v. Harper and Row Publishers, Inc., 301 F. Supp. 484 (N.D. Ill. 1969).

141 United States v. United Air Lines, Inc., 216 F. Supp. 709, 725-26 (E.D. Wash. and D. Nev. 1962), *aff'd sub nom.* United Air Lines, Inc. v. Weiner, 335 F.2d 379 (9th Cir. 1964), *cert. dismissed,* 379 U.S. 951 (1964); Zdanok v. Glidden Co., 327 F.2d 944, 954-55 (2d Cir. 1964), *cert. denied* 377 U.S. 934 (1964); Graves v. Associated Transp., Inc., 344 F.2d 894, 900 (4th Cir. 1965). *See also* Bernhard v. Bank of America, 19 Cal. 2d 807, 122 P.2d 892 (1942) *See also* In re Gypsum Cases, Civil No. 46414-A A5Z (N.D. Calif. Dec. 22, 1971).

142 *Supra* note 140.

The concept of limited review means that some agency errors may not be judicially corrected — that to a degree the agency itself must be relied upon to perform properly. Thus, agency decisions may be erroneous but still not reversible if there is substantial evidence in the record to support them.[143] In this context "erroneous" means unsupported by the preponderance of the evidence. The effect of section 103 of the Magnuson bill is to alter drastically the scope of review when FTC orders are collaterally reviewed in consumer suits. To determine whether an order is supported by the preponderance of evidence, a court must in effect review the order *de novo*.

Decisions of the FTC should not be judicially reviewable *de novo*. If such a change is nevertheless to be made, it should apply not only to collateral review proceedings in the district courts but also to direct proceedings for review of the FTC orders in the courts of appeals. Otherwise, only confusion and conflict can result. And more importantly, any such change should be made openly after full debate, not as a by-product of legislation on the admissibility of FTC orders as evidence in court.

4. Costs to Plaintiff

All the pending bills,[144] in order to encourage further the private enforcement of the consumer protection laws, provide for the allowance for counsel fees and the costs of suit to the consumer who prevails in an action brought under the act. Similar provisions may be found in the antitrust laws[145] and the Civil Rights Acts[146] and other statutes which also seek to encourage private attorneys to assist in the enforcement of the laws.

The Magnuson bill goes on to provide that upon the termination of every class action, "whether by judgment, settlement or compromise, the court shall inquire into the reasonableness of attorneys' fees charged and revise such fees where necessary to assure a reasonable relationship, taking into consideration the contingency of compensation between such fees and the actual time spent by attorneys in preparation and prosecution of the ac-

143 Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).
144 *Eckhardt-Bayh* § 14; *Magnuson* § 102(d); *Administration* §§ 6(a), (b).
145 *Supra* note 15.
146 42 U.S.C. § 2000a-3(b) (1970).

tion."[147] The Eckhardt-Bayh bill also requires mandatory inquiries by the court as to reasonableness of fees charged "taking into consideration, among other factors, the contingency of success, the actual time spent by attorneys in preparation and prosecution of the action, the difficulty of the case, the experience of plaintiffs' counsel, the amount recovered in the action, and the benefits to the public of the litigation."[148] The Administration bill similarly provides, "Irrespective of whether an attorney's fee is assessed against the supplier, the court may inquire into the reasonableness of the fee agreed upon between the consumer and his counsel, and revise that fee as the circumstances warrant."[149] These provisions were apparently added in order to bar fees based solely on the amount of the judgment or settlement,[150] presumably on the grounds that this might lead to excessive lawyers' fees to class representatives.

There are two basic concepts that must be separately considered when discussing legal fees for class representatives. On the one hand, when a class representative successfully produces a fund or a benefit to a class of parties, under general equitable principles counsel are entitled to a reasonable fee for the benefit produced.[151] On the other hand, either by statute or by judicial interpretation, a consumer plaintiff may be entitled to receive, in addition to an award for damages, an award for reasonable counsel's fees and costs of suit, such award being paid by defendants. This type of fee, which is expressly provided for under the antitrust laws and the Truth-in-Lending Act, is cogently discussed in a recent opinion.[152] Under either of these methods the court has control over awards of attorneys' fees so that there is an assurance that the plaintiff's lawyers will not receive excessive fees.

As a practical matter, where a settlement is reached before a final verdict is rendered, no occasion would arise for the court to award a counsel's fee over and above the settlement sum defendants have agreed to pay. In such circumstances the court, under the proposed bills, would only be concerned with the determina-

147 *Magnuson* § 102(d).
148 *Eckhardt-Bayh* § 14.
149 *Administration* § 6(b).
150 *Supra* note 1, at 19.
151 *Supra* notes 35, 64.
152 Trans World Airlines, Inc. v. Hughes, 312 F. Supp. 484 (S.D.N.Y. 1970).

tion of an appropriate counsel's fee for plaintiff's counsel out of the fund created for the benefit of absent class members with whom the plaintiffs' counsel does not have a contractual retainer agreement. The retainer between the representative plaintiff and his counsel is governed by contract law and ethical standards, and, contrary to the provision of the Administration bill should not be subject to court revision in the absence of extraordinary circumstances. This retainer agreement, of course, is not binding on the class.

On the other hand, where a suit does reach final verdict it would seem appropriate to provide for the consumer plaintiffs to receive an award of counsel fees and costs as an additional incentive to the plaintiffs for bringing suit, and as an additional deterrent to defendant's from continuing their fraudulent activities.[153] In such cases, the courts are perfectly able to see that the total fee for plaintiffs' counsel is a reasonable one, without rewarding the defendant fortuitously because of a contractual arrangement which plaintiffs' counsel may have made with the plaintiffs themselves.[154]

Finally, any undue reliance, as in the Magnuson bill, on time spent by attorneys may serve only to reward a lack of diligence in prosecuting or settling litigation, encouraging what is contrary not only to other provisions in the same bill but also to the broad social objectives sought to be achieved.

5. Costs to Defendant

In addition, after providing for the award of counsel fees to a successful plaintiff, the Magnuson bill provides:

> If the court determines that any class action brought pursuant to this section has been brought frivolously, with knowledge that the claim lacks probable cause and with intent to harass or intimidate the defendant, the court may in its discretion award the defendant the cost of defending the suit, including a reasonable attorney's fee.[155]

There is no comparable provision in the Eckhardt-Bayh or Administration bills, and rightly so. Whatever may have been

153 Farmington Dowel Prod. Co. v. Forster Mfg. Co., 421 F.2d 61 (1st Cir. 1969).
154 *Supra* note 152.
155 *Magnuson* § 102(d).

the intention of including a provision for the award of counsel fees for prevailing defendants — whether it was thought appropriate balance to award fees to whomever was the prevailing party; or to avoid abuse of class actions — this provision is ill-conceived and seriously undermines the objectives of the bill.

This provision gives the court discretion, and invites the defendant to request the court, to award counsel fees to the defendant in every class action where the defendant prevails. Probably few defendants can be found who will not publicly deny liability and announce that the suit is frivolous, has no merit, and was brought solely to harass or intimidate.

There already exist in every state clearly defined tort actions, by statute or common law, for abuse and misuse of legal process. These would cover any such claims of harassment by defendants. Likewise ethical standards and the Code of Professional Responsibility will act as a restraint on consumer's lawyers from bringing any frivolous actions. There certainly is no need in a consumer class action act for a special provision for the award to the successful defendant of the costs of defending the suit including a reasonable attorney's fee. Not only does the proposed provision diminish whatever deterrent value the possibility of large exposure to liability may have, but it turns the deterrent on the consumer, making him reluctant to bring suit against a corporation with high-powered legal counsel if he may be required to pay the defendant's costs. There is no need to unbalance the scales further in favor of business in relation to consumers. Thus, the provision in the Magnuson bill awarding costs and fees to a successful defendant should be deleted if the bill is not to be partially self-defeating.

6. Statute of Limitations

The Eckhardt-Bayh[156] and Magnuson[157] bills contain a statute of limitations of three years after the private claim arose. The three year period appears to be reasonable. The Administration bill[158] provides for a one year statute of limitations period after the termination of the prior government action which triggers the availability of the private action. In any event, the statute of

156 *Eckhardt-Bayh* § 15.
157 *Magnuson* § 102(e).
158 *Administration* § 9.

limitations in the Administration bill should not reduce the reasonable period for the commencement of suits, *e.g.*, four years under the UCC,[159] or three years as suggested by the other related bills. Any statute of limitations based on the termination of prior government litigation should, if anything, extend this basic reasonable period.[160]

III. Conclusion

The Eckhardt-Bayh and Magnuson bills help strengthen consumer protection programs under the control of the Federal Trade Commission and the Department of Justice and also provide for direct, effective relief to victims of consumer fraud and deception by means of class actions. Specific provisions should be considered for amendment as outlined above.

Federal class actions are not a panacea for the consumer. Litigation is still expensive and cumbersome, and it is directed against specific parties for defined fraudulent practices. Considering the volume of consumer fraud, it is clear that the judicial mechanism cannot remedy the problem alone. But federal consumer class actions represent perhaps the only realistic device to afford consumers access to judicial relief. Class actions also serve to correct some of the great imbalance in favor of business interests. It will also have the effect of creating an effective deterrent against others who might be tempted to engage in questionable practices.

The effective deterrence of fraudulent consumer practices which comes about through the availability of class actions benefits businessmen and consumers alike. This fact, combined with the liberal treatment now given by many courts in upholding class actions should contribute significantly to efforts to bring about social change in this important area.

159 Uniform Commercial Code § 2-725.

160 In this respect, see the limitations provisions in the Clayton Act, 15 U.S.C. §§ 15(b), 16(b) (1958).

STATUTE

A MODEL ACT PROVIDING FOR TRANSITIONAL BILINGUAL EDUCATION PROGRAMS IN PUBLIC SCHOOLS

JEFFREY W. KOBRICK*

INTRODUCTION

This draft presents a model state statute[1] requiring the establishment of transitional bilingual education programs in the public schools, and providing for state financial aid to help local school districts meet the "extra"[2] costs of such programs. The statute would apply to states in which substantial numbers of children come from environments where the dominant language is other

---

* A.B. 1966, University of Chicago; LL.B. 1969, University of Pennsylvania; attorney, Center for Law and Education, Harvard University.

Thanks are due to Stuart R. Abelson, an attorney at the Center for Law and Education who participated with Mr. Kobrick in the drafting of this model statute, and to Michael J. Daly, Alex Rodriguez, Sister Francis Georgia, Robert Crabtree, Tim Fidgeon, Chuck Alcala, Larry Brown, and numerous others in Massachusetts' bilingual communities for their invaluable assistance and advice.

1 The model statute grows out of the process which produced a bilingual education statute in Massachusetts. [1971] Mass. Acts & Resolves 943 (*adding* MASS. GEN. LAWS ANN. ch. 71A, §§ 1-9, ch. 69 § 35, and *amending* ch. 58, § 18A(b)(3)). [The bilingual statute itself, which will be codified in ch. 71A is hereinafter cited as Bilingual Statute.]

The Massachusetts legislation is the first comprehensive bilingual education law in the United States, requiring local school districts to provide at least three years of bilingual education to every child of limited English-speaking ability (provided there are twenty such children of one language group in the school district). The bill was sponsored by Representative Michael J. Daly, Chairman of the Committee on Education, House Speaker David Bartley and the Massachusetts Teachers Association. The governor, the state Commissioner of Education, and the Superintendent of Schools of Boston supported the bill. The real force behind the passage of the bill, however, came from community people and poor people, who organized, and sustained for two years, a state-wide lobbying campaign. The bill passed the House of Representatives on voice vote and the Senate by a vote of 34-0. The governor approved it November 4, 1971.

2 The state would reimburse only that portion of the cost of a bilingual program which exceeds the average per pupil expenditure in the school district as a whole.

than English. There are approximately three million "bilingual"[3] children in the United States who come from non-English-speaking homes,[4] and mounting evidence reveals an almost total failure of the public education system to provide for their educational needs.

A Spanish-speaking community worker conducted a door-to-door survey in 1969 of a ten block area in a heavily Puerto Rican section of Boston, for example. Of the 350 Spanish-speaking children of school age she found, 65 percent had never registered in school; many others rarely attended or had dropped out altogether.[5] A subsequent survey estimated that between 2,650 and 7,800 Spanish-speaking children of school age in Boston were not in school.[6] Other evidence indicated that between 1965 and 1969 only four Puerto Rican children graduated from Boston high schools.[7]

This educational disaster is nationwide. Two hundred and fifty thousand Puerto Rican children are enrolled in New York City's school system, 23 percent of the total school enrollment.[8] In 1966, 10,142 Puerto Rican children entered the tenth grade.[9] Two years later, there were only 4,393 Puerto Rican students in the twelfth grade.[10] In 1963 the system granted 21,000 "academic" diplomas—the traditional passport to further education in New York City. Only 331 went to Puerto Ricans.[11]

---

3 The term "bilingual" is, of course, technically inaccurate when used to describe children whose educational problems stem, in part, from the fact that they cannot adequately speak or understand a second language. Such children are only potentially bilingual, and indeed the very purpose of bilingual programs is to help them realize that potential. Nonetheless, it is common to refer to children as bilingual to avoid more cumbersome (and perhaps objectionable) phrases such as "children of limited English-speaking ability," "culturally different children," and "linguistic minority children."

4 T. ANDERSON & M. BOYER, 1 BILINGUAL SCHOOLING IN THE UNITED STATES (1970) [hereinafter cited as BILINGUAL SCHOOLING IN THE UNITED STATES]. This invaluable study was done pursuant to a contract with the U.S. Office of Education and can be obtained from the U.S. Government Printing Office, Washington, D.C.

5 TASK FORCE ON CHILDREN OUT OF SCHOOL, THE WAY WE GO TO SCHOOL 17 (1970) [hereinafter cited as THE WAY WE GO TO SCHOOL].

6 *Id.* 18.

7 *Hearings on Equal Educational Opportunity Before the Senate Select Committee on Equal Educational Opportunity*, pt. 8, at 3709 (1970) [hereinafter cited as *Puerto Rican Education Hearings*].

8 *Id.* 3726. There are approximately two million Puerto Ricans in the United States. *Id.*

9 *Id.* 3731.

10 *Id.*

11 *Id.* 3686.

There are 26,000[12] Puerto Rican students in Chicago's public schools; 60 percent drop out before they finish high school.[13] No one knows how many are out of school altogether or never attended school. In Newark in 1969-70 there were 7,800 Puerto Ricans in the public schools; only 96 of them were in the twelfth grade.[14] In Philadelphia, the dropout rate for Spanish-speaking students is approximately 70 percent.[15]

This pattern is the same if not worse for the approximately 1.4 million Mexican-American children who attend school in the Southwest:[16]

> Seventy-five percent of all Mexican-American children of school age are enrolled in school, but the number in high school is only one-third what it should be on the basis of population. In New Mexican schools, of 60,000 Spanish speakers enrolled, over one-third are in the first grade. (One wonders how many years they spend there.) More than one-half are in the first three grades and 55 percent of those above the first grade are more than two years over-age for their level. In Texas, among Mexican-American children entering the first grade, about 80 percent are not promoted. The average for Mexican-Americans 14 years of age and older in the Southwest is only about 8 years of schooling compared with 12 for the average Anglo-American. The drop-out rate is over twice the national average.[17]

In addition to Mexican-Americans and Puerto Ricans, the two largest linguistic minority groups, there are many other diverse cultural and linguistic groups in the United States.[18] It is clear that a substantial number of children from these families are also

12 *Id.* 3721.

13 *Id.* 3685.

14 *Id.*

15 *Id.*

16 Arizona, 71,748; California, 646,282; Colorado, 71,348; New Mexico, 102, 994; Texas, 505,214. UNITED STATES COMMISSION ON CIVIL RIGHTS, MEXICAN-AMERICAN EDUCATION STUDY 16 (1971).

17 2 BILINGUAL SCHOOLING IN THE UNITED STATES 108.

18 The United States has substantial numbers of native speakers of Spanish (Mexican-Americans, Puerto Ricans, Cubans, and others), Italian, German, Polish, French, Portuguese, Greek, Norwegian, Chinese, and Japanese. There are also many languages native to American Indians. For a comprehensive analysis of these linguistic and cultural groups, their educational needs, and the applicability of bilingual education to those needs, see 2 BILINGUAL SCHOOLING IN THE UNITED STATES 105-239.

non-English-speaking and experience varying degrees of difficulty in a monolingual, monocultural school system. In Massachusetts, for example, strong support for the recently enacted bilingual education law came from, among others, the Italian, Portuguese, Chinese, and Greek communities. The treatment of American Indians by our schools, which one congressional committee lamented as "a national tragedy and a national disgrace,"[19] is perhaps the worst case of all.[20]

The causes behind this shocking failure of educational policy are complex. They include factors of psychology, culture, language, and in many instances poverty and race. Moreover, the difficulties of, for example, Puerto Ricans are not identical to those of Chicanos; nor are those of Spanish-speaking children the same as those of Indian children. An in depth analysis of the problems confronting non-English-speaking children cannot be attempted here. A few general remarks, however, should be made.

During the first four years of life a child acquires the sounds, the grammar, and basic vocabulary of whatever language he hears around him.[21] For many Puerto Rican, Mexican-American, Indian, and other bilingual children the only language they hear prior to entering school is their native language. Yet when such children enter school they find that English is the sole medium of instruction. The children cannot understand what is going on in the classroom and fall progressively behind their English-speaking classmates. For many children this situation is hopeless and they drop out of school.[22] In other cases, believing the school system offers no meaningful program for their children, parents may fail to send the children to school at all.[23]

Perhaps even more serious than the language barrier, however,

19 SPECIAL SUBCOMM. ON INDIAN EDUCATION OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, S. REP. No. 501, 91st Cong., 1st Sess. x (1969) [hereinafter cited as INDIAN EDUCATION SUBCOMMITTEE REPORT].

There are an estimated 524,000 Indians and 29,000 Eskimos and Aleuts in the United States. 2 BILINGUAL SCHOOLING IN THE UNITED STATES 208. There are 160,000 Indian children in elementary and secondary schools. INDIAN EDUCATION SUBCOMMITTEE REPORT ix.

20 *See* text at notes 29-30 *infra*.

21 1 BILINGUAL SCHOOLING IN THE UNITED STATES 7.

22 The terrible frustrations children experience in such a system are poignantly described in testimony before the United States Senate. *Puerto Rican Education Hearings* 376-65, 3770.

23 THE WAY WE GO TO SCHOOL 17.

is the culture shock which bilingual children experience in schools whose emphasis on the dominant language leads them to ignore or denigrate the child's native lanugage and culture. Language, and the culture with which it is so closely connected, are basic manifestations of the human personality.[24] It is through language and custom that we understand and express all that is familiar and dear; language "carries all the meanings and overtones of home, family, love, friendship. It is the instrument of [our] thinking and feeling, [our] gateway to the world."[25] Language and culture form an integral part of how a child views himself, and the rejection of a child's language and cultural values implies a rejection of the child himself. In the Southwest, children are punished — sometimes physically mistreated[26] — for speaking Spanish in school; one teacher makes her children drop a penny in a bowl for every Spanish word they use. "It works!" she says. "They come from poor families, you know."[27] The result is that the child's concept of himself, his family, and whole way of life may be tragically affected; his motivation to learn seriously impaired if not destroyed. It is not difficult, therefore, to understand why Mexican-American, Puerto Rican, or Indian children fare so badly in the schools:

> They experience . . . a conflict with respect to education. They want to be educated; they realize its importance. But in order to achieve it they must reject themselves.[28]

Far from accomplishing its professed aim of integrating minorities into the mainstream, the monolingual, monocultural school system has succeeded only in denying whole generations of children an education and condemning them to lives of poverty and despair. No more tragic example of the fruits of such attempts can be found than that of the Cherokees.

In the 19th century, when the Cherokees had control over their own bilingual schools, they were 90 percent literate in their own

---

24 *Cf.* 1 BILINGUAL SCHOOLING IN THE UNITED STATES 45, 48.

25 *Id.* 8.

26 Conversation with Alfred Sigman, attorney, Mexican-American Legal Defense and Education Fund, August 10, 1971.

27 S. STEINER, LA RAZA, THE MEXICAN AMERICANS 209 (1970).

28 Ramirez, *Cultural Democracy: A New Philosophy for Educating the Mexican American Child*, NAT'L ELEMENTARY PRINCIPAL, Nov., 1970, at 45.

language, and Oklahoma Cherokees had a higher English literacy level than native English-speakers in either Texas or Arkansas. The Cherokees had their own constitution which provided for representative government, the right to vote for all persons over 18 years of age, courts and jury trials. A system of taxation supported road construction and education (including higher education). The Cherokees produced their own widely read bilingual newspaper.[29]

Today, after almost 70 years of white control over their affairs, the Cherokee Nation presents an entirely different picture. Cherokee dropout rates in the public schools run as high as 75 percent. The median number of school years completed by the adult Cherokee is only 5.5, and 40 percent of adult Cherokees are functionally illiterate. Ninety percent of the Cherokee families living in Adair County, Oklahoma are on welfare.[30]

Two things seem clear. There can be no equal educational opportunity[31] for bilingual children until they are permitted to learn in a language that they can understand. Second, it is essential that schools encourage children to take pride in their native language and culture. Bilingual education seeks to accomplish these goals and at the same time to teach children English. In a bilingual program the entire school curriculum is taught in the children's mother tongue and then, increasingly, in both the mother tongue and in English. The children are also taught to read and write their mother tongue and to understand, speak, read, and write English.

Because of a mistaken belief that learning in one's native language will somehow interfere with learning English, some educators have preferred to try to meet the needs of bilingual children with programs called English-as-a-Second-Language (ESL). ESL programs merely remove children from regular classes for a set number of hours a week for classes in which they are taught English. But such programs take little or no advantage of a child's

29 INDIAN EDUCATION SUBCOMMITTEE REPORT 19.

30 *Id.* In 1903 the federal government appointed a superintendent to take over Cherokee education and the Cherokee system was entirely destroyed when Oklahoma became a state in 1906. *Id.* 20.

31 The Massachusetts legislature, to its great credit, has recognized that bilingual education is necessary "to insure equal educational opportunity to every child." [1971] Mass. Acts. and Resolves 943.

ability in his native language, and most students of language teaching feel that a child can best learn a second language if he can first, or at the same time, come to grips with his own language.[32] Conceptual development in one language facilitates the learning of another.[33]

Bilingual programs, on the other hand, encourage children to develop their native language skills, and recent experiments in bilingual schooling have shown that such an opportunity may enhance the ability to learn English. A recent study of Indians in Mexico, for example, showed that children who learned to read and write their native Indian dialects before attempting to learn Spanish showed greater reading proficiency in Spanish than Indian children attending schools which concentrated solely on Spanish.[34] Another recent proof has been provided by the Navahos:

> On the Navaho Reservation when they finally set up their own schools, they set up a bilingual education program taught by Navaho teachers, after the second year the children were more proficient in both languages than they would have been if English language instruction had been conducted solely in English as before.[35]

Some ESL programs also cause damage by attempting to teach children to read and write English before they can understand or speak it. The best order of language learning requires that "[j]ust as a child first learns to hear, understand, and speak his own language and then learns to read and write it, so he should learn his second language in the same way."[36] When a child enters school already speaking and understanding another language, he is ready to learn to read and write it; he is not ready to learn to read and write English. A school that focuses solely on English not only misses an opportunity to teach the child to read and write his own

32 *E.g.*, "[E]ducators in recent years have come to agree that the best medium, especially for the initial stages of a child's learning, is his dominant language." 1 BILINGUAL SCHOOLING IN THE UNITED STATES 44.

33 *See generally*, testimony of Bruce Gaarder, one of the foremost experts on bilingual education, in *Hearings on S. 428 Before the Special Subcomm. on Bilingual Education of the Senate Comm. on Labor and Public Welfare*, pt. 1, 90th Cong., 1st Sess. 51-55 (1967) [hereinafter cited as *Bilingual Education Hearings*]; *see also* 1 BILINGUAL SCHOOLING IN THE UNITED STATES 4.

34 *Bilingual Education Hearings* 52-53.

35 *Puerto Rican Education Hearings* 3701-02.

36 1 BILINGUAL SCHOOLING IN THE UNITED STATES 45.

language, but it also impairs his later ability to learn English.[37] All too often such practices leave children illiterate in both languages.[38]

ESL programs are inadequate for other reasons as well. They entirely overlook the importance to the child of his language and culture and their relationship to his self-esteem and motivation to learn. Further, such programs, which typically involve only a few hours a week, provide too little English instruction, too late.[39] It takes years for a child unfamiliar with English to achieve proficiency comparable to that of children who have been brought up in English-speaking homes. In the meantime, strugling to understand academic subjects in the regular program, the children fall further behind their English-speaking contemporaries.[40]

In addition to facilitating the learning of English through education in the mother tongue, bilingual education has other benefits. It develops potential bilingualism into an asset rather than stigmatizing it as a defect. It helps to correct what one expert on bilingual education has called "an absurdity which passeth understanding" when over one billion dollars a year is spent on foreign language instruction, "[y]et virtually no part of it, no cent, ever goes to maintain and further develop the native language competence which already exists in American children. . . ."[41] Furthermore, in a two-way[42] bilingual program — i.e., one in which native-speakers of two languages participate — each group gets the chance to learn the other's language far more effectively than they could in foreign language programs in which languages "are not so much *learned* . . . as *studied* for two years."[43]

Most interestingly, there is even some preliminary evidence that children educated bilingually — including children who are native-speakers of the dominant tongue — learn academic subjects

37 *Id.* 3, 45.

38 *See Bilingual Education Hearings* 54; *see also* 1 BILINGUAL SCHOOLING IN THE UNITED STATES 3.

39 See the position paper of Mrs. Petra Valdes of New York City in *Puerto Rican Education Hearings* 3760; *see also* THE WAY WE GO TO SCHOOL 148.

40 THE WAY WE GO TO SCHOOL 147-48.

41 Quoted in Mondale, *Education for the Spanish-Speaking: The Role of the Federal Government*, NAT'L ELEMENTARY PRINCIPAL, Nov., 1970, at 118.

42 *cf.* T. CARTER, MEXICAN AMERICANS IN SCHOOL: A HISTORY OF EDUCATIONAL NEGLECT 188-203 (1970).

43 1 BILINGUAL SCHOOLING IN THE UNITED STATES 42.

better than children educated monolingually.[44] What otherwise might be a routine or boring lesson takes on life and interest because at the same time the children are also learning about a new language, and people of a different culture.

Despite the great promise of bilingual, bicultural programs, it is only very recently that the idea of bilingual education has gained even limited acceptance in the United States. Prior to 1968, when Congress passed the Bilingual Education Act,[45] there were only a handful of bilingual education programs in the United States[46] and both state and federal governments[47] either ignored bilingual education or were harsh and unfriendly towards it. Some 21 states, including California, New York, Pennsylvania, and Texas had laws which prevented local initiation of bilingual programs by requiring all instruction in public schools to be in English.[48] In seven states a teacher risked criminal penalties or revocation of his teacher's certificate for teaching in a language other than English.[49]

The psychological impact of the federal Bilingual Education Act, a landmark in education legislation, cannot be overestimated.

44 *See, e.g.*, An Analysis of the Effectiveness of a Bilingual Program in the Teaching of Mathematics in the Primary Grades, Ph.D. dissertation, University of Texas (1968). Cited in 1 BILINGUAL SCHOOLING IN THE UNITED STATES 56-57, 231.

45 20 U.S.C. §§ 880b to b-6 (1970).

46 For an historical sketch of bilingual education in the United States, *see* 1 BILINGUAL SCHOOLING IN THE UNITED STATES 17-20.

47 Prior to 1968, there was no state or federal legislation concerned with bilingual education. *But see* N.M. CONST. art. XII, § 8 (legislature shall provide for training of teachers in Spanish and English languages so that they can teach Spanish-speaking students).

48 ARK. STAT. ANN. § 80-1605 (1960); CAL. EDUC. CODE § 71 (West 1959); COLO. REV. STAT. ANN. § 123-21-3 (1963); CONN. GEN. STAT. ANN. § 10-17 (1958); IDAHO CODE § 33-1601 (1963); IND. ANN. STAT. § 28-5402 (1970); IOWA CODE 280.5 (1971); KAN. STAT. ANN. § 72-1101 (Supp. 1971); KY. REV. STAT. § 158.080 (1970) (for private and parochial schools); ME. REV. STAT. ANN. tit. 20, § 102(7) (Supp. 1971); MINN. STAT. § 126.07 (1969); MONT. REV. CODES ANN. § 75-7503 (1971); NEB. CONST. art. I, § 27; NEV. REV. STAT. § 394.140 (Supp. 1969); N.Y. EDUC. LAW § 3204(2) (McKinney 1970); OKLA. CONST. art. 1, § 5, OKLA. STAT. tit. 70, § 11-102 (Supp. 1969); ORE. REV. STAT. § 336.078 (1969); PA. STAT. ANN. tit. 24, § 15-1511 (Supp. 1971); S.D. COMPILED LAWS ANN. § 13-33-11 (1967); TEX. PENAL CODE ANN. art. 288 (1952); WASH. REV. CODE § 28A.05.015 (1970); WIS. STAT. § 40.46(1) (1969).

49 Arkansas ($25); Connecticut ($50-500 and/or max. six mos.); Indiana ($25-100 and/or max. six mos.); Iowa ($25-100); Nevada (max. $250 for first offense; max. $500 and/or max. six mos) (NEV. REV. STAT. § 193.150 (Supp. 1969)); South Dakota ($25-100 and/or revocation of teaching certificate); Texas ($25-100 and/or revocation of teaching certificate). Citations are the same as in note 48 *supra*, except as indicated.

Congress specifically recognized "the special educational needs of the large numbers of children of limited English-speaking ability in the United States"[50] and, by providing financial assistance to local educational agencies, sought to encourage them to meet those needs through:

> (1) bilingual education programs;
> (2) programs designed to impart to students a knowledge of the history and culture associated with their languages;
> (3) efforts to establish closer cooperation between the school and the home.[51]

The committment by the federal government to do something about the educational needs of bilingual children has slowly made itself felt in states and local communities. Since 1968 three states have repealed requirements that English be the exclusive medium of instruction in the public schools;[52] two states have repealed criminal penalties for teaching in a language other than English;[53] five states have modified the prohibition to allow an exception for programs serving non-English-speaking children;[54] and a total of 11 states have, in various forms, passed laws permitting or encouraging local school districts to provide bilingual education.[55] One state, Massachusetts, has passed a law requiring local school districts to provide bilingual education for non-English-speaking students.[56]

Thus some progress has been made. Nevertheless, even today, the surface of the problem has barely been scratched. In 1969,

---

50 20 U.S.C. § 880b (1970).

51 20 U.S.C. § 880b-2(c) (1970).

52 Texas (1969); Indiana (1971); Oregon (1971). For Texas and Oregon citations, see note 55 *infra*; IND. STAT. ANN. § 28-5402 (Supp. 1971).

53 TEX. EDUC. CODE § 11.11 (1971); S.D. COMPILED LAWS ANN. § 13-33-11 (Supp. 1971).

54 California (1968); New York (1968); Colorado (1969); Maine (1969); Washington (1969). For California, New York, Colorado, and Maine citations, see note 55 *infra*; WASH. REV. CODE § 29A.05.015 (1970).

55 ARIZ. REV. STAT. ANN. §§ 15-202, 15-1097 to 1099 (Supp. 1971); CAL. EDUC. CODE §§ 71, 6457 (West 1969), § 5766 (West Supp. 1971), and § 13273.5 (CAL. LEGIS. SERV. 1178 (Aug. 24, 1971)); COLO. REV. STAT. ANN. § 123-21-3 (Supp. 1969); ILL. REV. STAT. ch. 122, § 10-22.38a and § 34-18.2 (ILL. LEGIS. SERV. 2412, 2415 (1971)); ME. REV. STAT. ANN. tit. 20, § 102(16) (Supp. 1971); Mich. Pub. Acts No. 84 (1970); Laws of N.M. ch. 309 (1971); N.Y. EDUC. LAW §§ 3204(2),(2a) (McKinney 1970); Ore. Laws ch. 326, § 2-3 (1971); PA. STAT. ANN. tit. 24, § 15-1511 (Supp. 1971); TEX. EDUC. CODE § 11.11 (1971).

56 *See* note 1 *supra*.

Congress appropriated only $7.5 million under the Bilingual Education Act, "enough money to fund adequate programs for less than one percent of the 3,000,000 children who were estimated to be in need of special bilingual education programs."[57]

> For the fiscal year 1971, the program authorization increased to $80 million and the actual appropriation to $25 million — a considerable improvement but still a long way from overcoming the tradition of the dysfunctional education that we have offered our non-English-speaking population. . . . Congress [has been] appropriating "drops" when showers and even downpours are needed.[58]

Perhaps one of the major stumbling blocks to increased funding for bilingual education programs is the fact that existing legislation allocates the costs of such programs all to one level of government; there is no sharing of costs between levels. The federal act, for example, pays the entire cost of the programs which it supports. In the case of state legislation, the costs of programs are generally allocated entirely to the state government or entirely to local school districts.[59] Each agency of government thus becomes reluctant to provide the full amount necessary to support a comprehensive bilingual program because it fears an enormous cost which it alone must shoulder. If, on the other hand, costs were shared between local school districts, state governments, and the federal government, each level might be willing to make a greater contribution, and the total funds available might increase greatly.

In this respect the Massachusetts legislation has provided a badly needed innovation. The Massachusetts law requires local school districts to provide bilingual programs, but provides for state reimbursement of only that portion of the cost which "exceeds" the average per pupil expenditure in the school district as a whole.[60] If the average per pupil expenditure is $700 for the whole district,

---

57 Mondale, *supra* note 41, at 117.

58 *Id.* 117-18. The Bilingual Education Act originally authorized appropriations of $15 million for fiscal 1968, $30 million for fiscal 1969, and $40 million for fiscal 1970. In 1970 the Act was amended to authorize $80 million for 1971, $100 million for 1972 and $135 million for 1973. 20 U.S.C. § 880b-1(a) (1970).

For a list and description of existing local bilingual education programs in the United States, *see* 2 BILINGUAL SCHOOLING IN THE UNITED STATES 241-90.

59 *See* statutes cited in note 55 *supra*; *see also* Appendix I *infra*.

60 Bilingual Statute § 8.

and $850 for the district's bilingual program, only the $150 excess is eligible for state reimbursement; the district itself must shoulder the remaining $700, just as it does for all other students in the district. Massachusetts has authorized appropriations of up to $4 million a year for bilingual programs[61] — far more than any other state. Perhaps one of the reasons for the larger authorization is the fact that the funding formula allows the money to go much further than it could if the state alone bore the cost of bilingual education. Additionally, insofar as some programs in Massachusetts continue to receive federal funding,[62] the state funds can be spread even further; obviously a local school district will be reimbursed only for its own out of pocket costs.

The philosophy underlying the Massachusetts law is that a local school district has an obligation to spend at least as much for the education of a bilingual child as for the education of any other child. This is clearly a minimum requirement of the equal protection clause of the fourteenth amendment to the Constitution.[63] It is also expedient.

Up to now funds have been spent to educate bilingual children in a school district's regular program; but, as has been indicated, many bilingual children cannot benefit from a program in which all the instruction is given in English. The Massachusetts law, then, simply redirects money which would be spent on a child in a regular program into a program which better serves the needs of the child. The same money is put to a much more productive use and scarce resources are conserved.[64]

The model bilingual education statute which follows adopts these essential features of the Massachusetts law. The model statute requires a school district to provide a full-time bilingual education program whenever 20 or more children of limited English-speaking

---

61 *Id.*

62 *See id.*:

> Nothing herein shall be interpreted to authorize cities, towns or school districts to reduce expenditures from local or federal sources, including monies allocated under the federal Elementary and Secondary Education Act, for transitional bilingual education programs.

63 *See* Brown v. Board of Educ., 347 U.S. 483, 493 (1954), quoted at note 66 *infra.*

64 *See* Kobrick, *Bilingual School Bill Progress,* Boston Globe, Oct. 1, 1971, at 17, col. 1.

ability who speak a common native language reside in the district; a separate program is required for each such language group. The state reimburses only the extra cost of such programs. Each district has an obligation to enroll all non-English-speaking children in its bilingual programs (provided the requirement of twenty is met), and to enroll a substantial number of English-speaking children in bilingual programs. While the district's obligation to provide a bilingual program is mandatory, participation by the children is voluntary. The statute provides parents with a right to notification within 10 days of the enrollment of their child in a program, a right to visit classes and confer with school officials, and finally, a right to withdraw their child from bilingual education at any time. The statute also provides for substantial parent and community involvement in bilingual programs, for bilingual teachers' aides and "community coordinators," and for new procedures for state certification of bilingual education teachers. The other provisions are summarized at the beginning of the statute in the Table of Contents.

In turning to the text of the statute, the reader should proceed with some caution. The draftsmen are lawyers, not educators. The model statute grows out of the draftsman's experience in working with community leaders and bilingual educators who participated in the drafting and lobbying of the Massachusetts legislation. But the Massachusetts legislation is itself something of an experiment. It is the first comprehensive state bilingual education law; its effectiveness has yet to be tested. Moreover, the Massachusetts legislation may reflect a certain amount of geographic bias. Education, particularly bilingual education, is very much bound up with the differing social conditions in which it is found. It may be that in so sensitive a matter there is no such thing as a single "model" statute. Persons from different parts of the country and different linguistic communities should therefore carefully scrutinize this statute in the light of the particular conditions in their states and communities.

APPENDIX I

SUMMARY OF STATE BILINGUAL EDUCATION LAWS

Arizona — 1969 amendments to the Education Code permit local school districts to provide "bilingual instruction" for students from non-English-speaking homes "to the extent deemed necessary to improve or accelerate the comprehension and speech of the English language by such pupils." Bilingual instruction is limited to "the first three grades of any common school." ARIZ. REV. STAT. ANN. § 15-202 (Supp. 1971). Another 1969 amendment permits school districts to provide "English-as-a-Second-Language" classes (ESL) for students from non-English-speaking homes. ARIZ. REV. STAT. ANN. § 15-1097-99 (Supp. 1971).

California — Originally California law provided only that "all schools shall be taught in the English language." CAL. EDUC. CODE § 71 (West 1969). In 1968 California amended the law to say that English shall be the "basic" language of instruction and to allow any local school board to determine "when and under what circumstances instruction may be given bilingually." CAL. EDUC. CODE § 71 (West 1969). *See also* CAL. EDUC. CODE § 5766 (bilingual demonstration project) (West Supp. 1971), § 6457 (compensatory educational programs) (West 1969), and § 13273.5 (CAL. LEGIS. SERV. 1178 (Aug. 24, 1971)) (bilingual teachers).

Colorado — A 1969 amendment to COLO. REV. STAT. ANN. § 123-21-3 (Supp. 1969) provides that the public schools shall be taught "principally" (rather than exclusively) in the English language and declares a policy of the state "to encourage the school districts . . . to develop bilingual skills and to assist pupils whose experience is largely in a language other than English to make an effective transition to English, with the least possible interference in other learning activities."

Illinois — 1971 amendments to the Code allow school districts to "provide programs in a language other than English for those children whose first language is other than English." For 1971 $805,000 has been appropriated to provide financial assistance to local programs approved by the State Superintendent of Public Instruction. ILL. STAT. ANN. ch. 122, § 10-22.38a, 34-18.2 (ILL. LEGIS. SERV. 2412, 2415 (1971)).

Massachusetts — See note 1, *supra.*

Maine — A 1969 amendment provides an exception to the requirement that all subjects be taught in English in allowing the State Commissioner of Education to cooperate with HEW in carrying out bilingual programs under the federal Bilingual Education Act in local school districts. Such programs are limited to pre-school, kindergarten, first, and second grades. ME. REV. STAT. ANN. tit. 20, § 102(16) (Supp. 1971).

Michigan — A 1970 law authorizes the State Department of Education to fund "multi-lingual instruction" programs. Mich. Pub. Acts, Act No. 84 (1970). For these programs, $100,000 has been appropriated. The State Department of Education has also issued guidelines under the law requiring "bilingual-bicultural" programs, primarily for Spanish-speaking children.

New Mexico — In a 1971 law:

> The legislature finds that large numbers of children in New Mexico public schools have special educational needs because of their limited English-speaking ability. The legislature finds further, that these children have a limited English-speaking ability because they come from environments where the dominant language is other than English.

The law permits local school districts to provide bilingual education programs in grades 1, 2, and 3 for children from non-English-speaking homes; provides that

such programs "must use two languages as mediums of instruction . . ." and that "the history and culture associated with the students' mother tongue shall be an integral part of the instructional program." For 1971-72 $100,000 is appropriated to provide financial assistance to local programs approved by the State Superintendent of Education. N.M. Laws ch. 309 (1971).

New York — A 1970 amendment provides an exception to the requirement that all subjects be taught in English to allow non-English-speaking students to be instructed bilingually for up to three years from the date of their enrollment. N.Y. EDUC. LAW § 3204(2), (2a) (McKinney 1970). Also. N.Y. Laws ch. 967, § 1 (1970) provides that "In no event shall a bilingual program of instruction for any one student exceed three successive years."

Oregon — A 1971 law repeals the requirement that all subjects be taught in English and allows school boards to provide bilingual instruction for non-English-speaking students. Ore Laws ch. 326, § 1 (1971).

Pennsylvania — A 1968 amendment provides, as an exception to the requirement that all subjects be taught in English, that at the discretion of the State Superintendent of Education subjects may be taught in another language as part of a bilingual education program. PA. STAT. ANN. tit. 24, § 15-1511 (Supp. 1971).

Texas — A 1969 law repeals the provision in the penal code forbidding teaching in a language other than English, TEX. PENAL CODE ANN. art. 288 (Supp. 1971). The new Education Code provides that while "English shall be the basic language of instruction in all schools," bilingual instruction "may be offered or permitted in those situations when such instruction is educationally advantageous to pupils." TEX. EDUC. CODE. 11.11 (1971).

A MODEL ACT PROVIDING FOR TRANSITIONAL BILINGUAL EDUCATION PROGRAMS IN PUBLIC SCHOOLS

TABLE OF CONTENTS

Section 1. *Short title*

This act shall be known and may be cited as the [state] Transitional Bilingual Education Act.

Section 2. *Declaration of Policy*

The legislature finds that there are large numbers of children in the state who come from environments where the primary language is other than English, and that public school classes in which instruction is given only in English are often inadequate for the education of children whose native tongue is another language. The legislature believes that transitional bilingual education programs can meet the needs of these children and facilitate their integration into the regular public school curriculum. Therefore, pursuant to the policy of the state to ensure equal educational opportunity to every child, and in recognition of the educational needs of children of limited English-speaking ability, it is the purpose of this act to provide for the establishment of transitional bilingual education programs in the public schools and to provide for reimbursement to school districts of the extra costs of such programs.

COMMENT: This section, which is almost identical to the declaration of policy in the Massachusetts statute,[65] attests to the fact that classes in which English is the sole medium of instruction have proved inadequate to meet the educational needs of non-English-speaking children. Moreover, it contains an official recognition that bilingual education is necessary to "ensure equal

65 [1971] Mass. Acts & Resolves 943.

educational opportunity to every child."[66] The legislatures of New Mexico and New York have made similar findings.[67]

The federal government as well has recognized that bilingual education is necessary for equal educational opportunity for bilingual children. In 1967, Congress passed the Bilingual Education Act.[68] And recently the Department of Health, Education and Welfare, issued a Memorandum stating that compliance reviews under Title VI of the Civil Rights Act of 1964,[69] which prohibits discrimination on the basis of race, color or national origin in any federally assisted program, "have revealed a number of common practices which have the effect of denying equality of educational opportunity to Spanish-surnamed pupils. Similar practices which have the effect of discrimination on the basis of national origin exist in other locations with respect to disadvantaged pupils from other national-origin minority groups, for example, Chinese or Portuguese." The Memorandum, which was sent to all school districts, requires the following:

> Where inability to speak and understand the English language excludes national origin minority group children from the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.[70]

These findings by state legislatures and actions by the federal government lend support to efforts to persuade school districts, legislatures, and, as a last resort, courts, of the necessity for bilingual education in order to provide equal educational opportunity.

66 *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483, 493 (1954): "[I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the State has undertaken to provide it, is a right which must be made available to all on equal terms."

67 The New Mexico legislature has found that "large numbers of children in New Mexico public schools have special educational needs because of their limited English-speaking ability," N.M. Laws ch. 309, § 2 (1971), and the New York legislature has declared that "a serious educational problem results in this state wherein children of limited English-speaking ability have great difficulty in adapting to a school environment; that serious social consequences flow as a result of the inability of these children to communicate and assimilate knowledge with English as the dominant language; therefore, the legislature finds that new approaches should be undertaken to meet this acute educational problem." N.Y. Laws ch. 967, § 1 (1970).

68 20 U.S.C. § 880b *et. seq.* (1970).

69 42 U.S.C. § 2000d (1964).

70 35 Fed. Reg. 11595 (1970).

To date, only one case has been brought seeking to require a school district to provide bilingual education for non-English-speaking children. In *Lau v. Nichols*,[71] Chinese-speaking children brought a suit against the San Francisco Unified School District alleging that the failure to provide bilingual education denied them the opportunity of an education as guaranteed them by the equal protection clause of the federal constitution and by California law. The plaintiffs introduced in evidence a study of Chinese-speaking students by the school district which had concluded that "[f]or [these] children the lack of English means poor performance in school. The secondary student is almost inevitably doomed to be a dropout and become another unemployable in the ghetto."[72]

The federal district court, while recognizing the inability of non-English-speaking students to learn in a language they cannot understand, denied relief because "their special needs, however acute, do not accord them special rights above those granted other students." The court's argument is difficult to understand in light of the fact that California provides a whole spectrum of other programs to meet other kinds of specialized needs of children.[73] One may also wonder whether the court would have reached the same result if Chinese or Spanish were the sole medium of instruction in the public schools, and English-speaking children had brought the suit. An appeal in the case is now pending before the United States Court of Appeals for the Ninth Circuit.

Section 3. *Definitions*

(a) "Department" means the state department of education.

(b) "District" means school district.

(c) "School board" means the board of education of a local school district.

(d) "Children of lmited English-speaking ability" means children whose native tongue is a language other than English and who have difficulty performing ordinary classwork in English; provided that where a school district has made a judgment that a child is not of limited English-speaking ability, but his parent (or legal guardian) reasonably disagrees, the parent's judgment shall be conclusive.

71 Civil No. C-70-627 (N.D. Cal. May 26, 1970). The case is not officially reported but is described in a casenote in INEQUALITY IN EDUCATION, Nov., 1970, at 21.

72. Pilot Program, San Francisco Unified School District: Chinese Bilingual 3A (May 5, 1969).

73 *See* CAL. EDUC. CODE §§ 6750-6941 (West Supp. 1971).

COMMENT: The federal Bilingual Education Act defines children of "limited English-speaking ability" as children "who come from environments where the dominant language is other than English."[74] The definition in this model statute is somewhat narrower since it includes only those children who are actually having difficulty with English. The Massachusetts statute defines the term even more narrowly, as children who are "unable" to perform ordinary classwork in English.[75] This definition is too narrow and might tend to exclude some children who cannot function adequately in a regular classroom.

Section 4. *Census; classification; mandatory establishment of programs; discretionary establishment of programs*

The school board of every school district shall ascertain annually in a census, under regulations prescribed by the department, the number of school age children of limited English-speaking ability resident within the district. In making such census the school board shall seek the assistance and cooperation of any agencies, organizations or community groups, public or private, which might have information about children of limited English-speaking ability residing in the school district. The department shall cooperate with and assist school districts in takng the census.

The school board of each district shall classify the children of limited English-speaking ability within the district according to the language in which they possess a primary speaking ability. Whenever there are within a school district twenty or more children of limited English-speaking ability in any such classification, the school board of said district shall establish, for each such classification, a transitional bilingual education program (hereinafter, bilingual program) for all the children therein. A school board may establish a bilingual program with respect to any classification containing less than twenty children. In mandatory programs, children speaking diflerent non-English languages shall not be combined in the same program.

COMMENT: Statistics concerning the numbers of children of limited English-speaking ability are usually unavailable or unreliable. United States census reports on the Spanish-surnamed, Oriental, and American Indian populations of various regions are at best a

74 20 U.S.C. § 880b (1970).
75 Bilingual Statute § 1.

rough indicator. School systems which count non-English-speaking students within the public schools may be overlooking large numbers of children who, as in Boston, are out of school.[76] This section therefore requires school districts to take a census of all school age children of limited English-speaking ability *resident* in the district and to classify them according to their primary language.

Admittedly the census could be very expensive and might drain scarce resources that otherwise could be applied to the bilingual program itself. The Massachusetts legislature has limited the census to children "within [the] school system."[77] If, of course, a district provides a truly attractive bilingual program, there would be less need for the census. The very reason many children are out of school is that there is no meaningful program for them.

The second paragraph, which is the same as the Massachusetts statute, is the heart of the law: whenever there are in a school district 20 or more children of limited English-speaking ability who speak the same native language, the district must provide a bilingual program for all the children who speak that language. Moreover, a separate program must be provided for each such language group.

The figure of 20 is somewhat arbitrary and should be changed if experience indicates it is unworkable or unwise. The need for bilingual education is greatest when non-English-speaking children have little or no exposure to English-speaking children in school or in the community. It is least when non-English speakers are a very small minority in the school and the community.[78]

Section 5. *Enrollment of children of limited English-speaking ability; enrollment of other children; notification; parents' right of withdrawal*

Every school age child of limited English-speaking ability residing within a school district required to provide a bilingual program for his classification shall be enrolled in such a program. An examination

---

76 *See* text at notes 5-6 *supra.*

77 Bilingual Statute § 2.

78 *See, e.g.,* testimony of Bruce Gaarder, *Bilingual Education Hearings, supra* note 33, at 52:

> Retardation is not likely if there is only one or very few non-English-speaking children in an entire school. It is almost inevitable if the non-English language is spoken by large groups of children.

in listening comprehension, speaking, reading, and writing of English, as prescribed by the department, shall be administered annually to all children of limited English-speaking ability enrolled in a bilingual program. No school district shall transfer a child of limited English-speaking ability out of a mandatory bilingual program prior to his sixth year of enrollment therein unless the child has received a score on said examination which, in the opinion of the department, reflects a level of English language skills which will enable him to perform successfully in regular classes appropriate for his age. If later evidence suggests that a child so transferred is still handicapped by an inadequate command of English the child shall have the right to be reenrolled in the bilingual program for a length of time equal to that portion of the six year period which remained at the time he was transferred. A school district may allow any child to continue in a bilingual program for a period longer than that required in this paragraph.

School districts shall, to the fullest extent possible, enroll a substantial number of English-speaking children in bilingual programs, provided that priority shall be given to children of limited English-speaking ability.

No later than 10 days after the enrollment of any child in a bilingual program the school board of the district in which the child resides shall notify by registered mail the parents or legal guardian of the child of such enrollment. The notice shall contain a simple, nontechnical description of the purposes, method, and content of the bilingual program; it shall inform the parents that they have the right to visit the classes in which their child is enrolled and to come to the school for a conference to explain the nature of the bilingual program; and it shall inform the parents of their right to withdraw their child from the program as hereinafter provided.

The notice shall be in writing both in English and in the language of which the child of the parents so notified possesses a primary speaking ability.

Any parent whose child has been enrolled in a bilingual program shall have the right to withdraw his child from said program at any time by written notice to the principal of the school in which his child is enrolled or to the school board of the school district in which his child resides; provided that school districts shall make affirmative efforts to encourage the continued participation of both English-and non-English-speaking children enrolled in bilingual programs.

COMMENT: This section gives every child of limited English-speaking ability a legal right to participate in his district's bilingual program. While no particular English-speaking child has such a legal right to participate, the *district* is obligated to enroll English-speaking children to the "fullest extent possible." This ensures that bilingual programs will not be used to promote segregation.[79] Segregation is not only an evil to be avoided but "it is isolation from English-speakers that discourages [non-English-speakers] from learning English in the first place."[80] Finally, as has been pointed out earlier, bilingual education offers positive advantages to English-speaking as well as non-English-speaking children.[81]

This section also gives parents whose children have been enrolled in a bilingual program a right to prompt notice of such enrollment, a right to visit classes and confer with school officials and, finally, a right to *withdraw* their child from the program. Thus, while the program is mandatory for the school district, it is voluntary for the children and their parents. Such a guarantee is essential to protect children against "special education" programs which, though attractive on paper, are sometimes despicable in practice. If, for example, a program turns out to be a kind of dead-end "track" for non-English-speaking children, parents have the option to transfer their children back to regular classes. This provision, however, cuts two ways since the right of withdrawal makes it more difficult to achieve an integrated program. To overcome this difficulty school districts are also required to make every effort to encourage the continued participation of both English-speaking and non-English-speaking children. A school district which takes this requirement seriously and which is actually running a good

---

79 Section 7 *infra* prohibits school districts from using bilingual education as an excuse to "assign students to schools in a way which will have the effect of promoting segregation of students by race, color or national origin."

80 T. Carter, *The Way Beyond Bilingual Education,* CIVIL RIGHTS DIGEST, Fall, 1970, at 19.

81 While the Massachusetts statute is silent on the question of enrollment of English-speaking children, it was certainly not its intent to *prohibit* such enrollment. The legislature was, rather, concentrating on the children who most badly needed bilingual education. It wished to afford these children an absolute right to participate in the program and it was taken as a given that a school district could enroll other children if it so wished.

program should be able to achieve English-speaking enrollment.[82]

Under the Massachusetts statute every child of limited English-speaking ability has a right to participate in his district's program for up to three years;[83] the model statute extends this to a maximum of six years. Both allow a school district to transfer a child out of the program sooner than the maximum period if he achieves English language skills which will enable him to perform successfully in regular classes. This judgment, however, is not to be made by the local school district itself but by the state department of education under uniform testing standards that will apply to all school districts. Such a procedure is necessary because of a school district's possible tendency, especially in large cities, to move children out of programs prematurely in order to make room for other children.

The desire to move children along quickly and make room for others was, in fact, the rationale for limiting the child's right to participate to three years in the Massachusetts statute. It was thought by many that a child could function normally in a regular class after three years in a bilingual program. The experience of some of the best bilingual schools in the United States, however, indicates that for many children it may take up to six years[84] before they are ready to transfer to the regular curriculum; the model statute therefore proposes a six year program. This is, of course, only an outside limit. The statute permits a school district to transfer a

82 In the Coral Way Bilingual School in Miami, one of the most successful in the country, "At first, participation was made voluntary and a few parents chose to have their children follow the all English program. By the end of the first year, however, the bilingual program had won almost unanimous approval and it was no longer necessary to offer the unilingual option. . . . [T]here were equal numbers of English- and Spanish-speaking children in the Coral Way School." 1 BILINGUAL SCHOOLING IN THE UNITED STATES 18.

83 Bilingual Statute § 2.

84 P.S. 25 in New York City is a two-way bilingual school and perhaps one of the most promising in the country. Eighty-five percent of the students are Puerto Rican; 15 percent are black (and English-speaking). The school runs from kindergarten through sixth grade. The attendance rate is 90 percent. *Puerto Rican Education Hearings*, 3823-24.

P.S. 155 is another two-way school in New York City. The majority of the students are black; 40 percent are Puerto Rican. According to Luis Fuentes, the principal, "By the sixth grade, I am happy to tell you, they can communicate effectively in both languages." *Id.* 3785.

The Coral Way School in Dade County, Florida (*see* note 84 *supra*) has found that children can learn equally well through both languages by the fifth grade. 1 BILINGUAL SCHOOLING IN THE UNITED STATES 54.

child to a regular program as soon as the child is in fact prepared for such a transfer.

Finally, it is important to note that the statute permits but *does not require* a school district to transfer a child out of a bilingual program. On the contrary, both the model statute and the Massachusetts statute specifically provide that a district may allow a child to remain in the program beyond the period required by law.[85]Moreover, expenditures which are permitted by the statute are reimbursed by the state on the same basis as those which are required (see section 14). The statute thus reflects a belief that where compulsion of all school districts in the state is involved the state should require at least the minimum necessary for equal educational opportunity. At the same time the state can encourage school districts to go beyond this floor.

Section 6. *Enrollment of non-resident students*

A school board may allow a non-resident child of limited English-speaking ability to enroll in or attend its bilingual program and the tuition for such child shall be paid by the school district in which he resides. Such tuition payments shall be eligible for reimbursement in the manner provided in section 14.

COMMENT: This section is intended to provide for situations in which a child's district of residence is not required to provide a bilingual program. There is no obligation on the receiving district to accept a non-resident child. The Massachusetts statute contains a similar provision. It also contains a provision allowing districts to combine to give joint programs;[86] the model statute does not.

Section 7. *Content of programs and methods of instruction; non-verbal courses and extra-curricular activities; location of courses; class composition and size*

A bilingual program shall be a full time program of instruction (1) in all subjects required by law or by the school district, which shall be given in the native language of the children of limited English-speaking ability who are enrolled in the program, and the English language; (2) in the comprehension, speaking, reading, and writing of the native language of the children of limited English-speaking

85 Bilingual Statute § 2.
86 *Id.* § 4.

ability who are enrolled in the program, and in the comprehension, speaking, reading and writing of the English language; and (3) in the history and culture associated with the native language of the children of limited English-speaking ability who are enrolled in the program, and in the history and culture of the United States.

Bilingual programs shall be located in the regular public schools rather than in separate facilities; and no school district shall, in providing programs under this act, assign students to schools in a way which will have the effect of promoting segregation of students by race, color or national origin. In predominantly non-verbal subjects, such as art, music, and physical education, children of limited English-speaking ability shall participate fully with their English-speaking contemporaries in the public school classes provided for said subjects. Every school district shall ensure to children enrolled in a bilingual program a meaningful opportunity to participate fully with other children in all extra-curricular activities.

Children enrolled in a bilingual program shall be placed in classes with children of approximately the same age and level of educational attainment. Children of widely disparate ages or educational levels shall not be combined in the same classroom except as approved by the department; and no such combination shall be approved unless it is necessary to avoid hardship to the district or to the children and is found to be educationally sound. If, in accordance with the above, children of different ages or educational levels are combined, the district so combining shall ensure that the instruction given each child is appropriate to his level of educational attainment, and school districts shall keep adequate records of the educational level and progress of each child enrolled in a program. The maximum student-teacher ratio shall be set by the department and shall reflect the special educational needs of children enrolled in bilingual programs.

COMMENT: This section defines the basic elements or objectives of a bilingual program but leaves to the choice of the individual school district or school a wide variety of means for implementing them.

One method might gradually mix together non-English- and English-speaking pupils as they gained facility in each other's language. The goal would be a common education in academic subjects, taught in both languages. The scheduling of instruction can vary widely between programs. So can the kinds of teachers

used. Some programs may rely on truly bilingual teachers — *i.e.*, teachers fluent in both English and another language. Others may rely more on team teaching which utilizes non-English-speakers for some purposes and English-speakers for others. Most programs will probably utilize both bilingual teachers and team teachers.[87]

The second paragraph of this section attempts to provide further safeguards against the isolation of minority children in bilingual programs. By requiring that programs be in the regular public schools, and by prohibiting school assignment practices which promote segregation, this section would prevent school districts from drawing minority students out of the regular schools for placement in a special bilingual school composed exclusivley of non-English-speaking students, or from transferring non-English-speaking students from a relatively integrated school to a less integrated one. Nor could a school district use the statute as an excuse for redrawing attendance zones so as to create the same effect. The requirement that school districts enroll English-speaking students in bilingual programs becomes meaningless if there are no English-speaking students in the schools where the programs are located.[88]

This section also provides that non-English-speaking students must, at the least, participate fully with their English-speaking contemporaries in predominantly non-verbal subjects and in extracurricular activities. If, of course, there were a guarantee that English-speaking students would always be in the bilingual program itself this requirement would be unnecessary. It is primarily concerned with the situation in which English-speaking children are not in the bilingual program.

The last paragraph, while permitting the open or ungraded classroom, would prevent children of widely disparate age groups or educational levels from being combined in the same classroom except in very limited circumstances. There is little more humiliating to a student of high school age, or more self-defeating, than to place him with much younger children.[89]

87 For a description of methods that can be used in implementing a bilingual program, *see* Gaarder, *Organization Bilingual School*, J. OF SOC. ISSUES, Apr., 1967, at 110-20; 1 BILINGUAL SCHOOLING IN THE UNITED STATES 59-124.

88 For an analysis of the problems of achieving both bilingual education and integration, *see* Exelrod, *Chicano Education: In Swann's Way?*, INEQUALITY IN EDUCATION, Aug., 1971, at 28.

89 The Massachusetts statute is substantially similar to this section except that

Section 8. *Bilingual education teachers; certificates; exemptions*

The state board of education (hereinafter, the board) shall grant permanent teaching certificates in bilingual education to persons who present the board with satisfactory evidence that they:

(a) possess a speaking and reading ability in a language other than English, and communicative skills in English;

(b) possess a bachelor's degree or other academic degree approved by the state board;

(c) meet such requirements as to course of study and training as the board may prescribe, or possess such relevant experience as may be satisfactory to the board.

The requirements of [the general teacher certification law] shall not apply to teachers certified under this section.

For the purpose of certifying bilingual education teachers the board may approve programs at colleges or universities devoted to the preparation of such teachers.

A person holding a general teaching certificate who presents the board with satisfactory evidence of speaking and reading ability in a language other than English may be certified under this section.

Any person certified under this section shall be eligible for employment by a school board as a teacher in a bilingual program in which the language for which he is certified is used as a medium of intruction. A school board may prescribe only such additional qualifications for teachers certified under this section as are approved by the board. Any local school board upon request may be exempted from the certification requirements of this section in the hiring of one or more bilingual education teachers for any school year in which compliance therewith would in the opinion of the department create a hardship in the district in the securing of such teachers.

A bilingual education teacher serving under an exemption as provided in the preceding paragraph shall be granted a certificate as soon as he achieves the requisite qualifications therefor. Not more than two years of service by a bilingual education teacher under such an exemption shall be credited to the teacher for the purposes of [the state tenure law]; and said two years shall be deemed to precede immediately, and to be consecutive with, the year in which a teacher becomes certified.

---

it contains no explicit prohibition against school assignment practices which promote segregation, and it requires programs to be in regular public schools "whenever possible." Bilingual Statute § 5. The bill which was originally filed in the legislature contained no prohibition against segregatory practices.

A teacher holding a certificate or exemption under this act shall be compensated according to a schedule which is at least equivalent to that applicable to teachers holding general certificates. No person shall be denied a certificate or exemption under this act or denied employment or tenure as a bilingual education teacher because he is not a United States citizen.

A school district may, in circumstances to be prescribed by the department, employ in a bilingual program teachers holding certificates or exemptions under [the general teacher certification law].

In hiring teachers for a bilingual program who speak a language other than English, including certified teachers and teachers serving under exemptions, school districts shall give preference to, and make affirmative efforts to recruit, persons who are native-speakers of the language and share the culture of the children of limited English-speaking ability who are enrolled in the program.

No rules or regulations for certification of bilingual education teachers shall be issued except after notice to the public and hearings at which any person may testify; further hearings shall be held, not less than once every two years, to review and, if appropriate, revise such rules or regulations.

COMMENT: It is essential for a truly effective bilingual program that a substantial portion of the teachers speak the language and represent the culture of non-English-speaking children. Children are not failing in our schools solely because they do not speak the language, but also because there is nothing in the school which reinforces and speaks to their own identity. Section 8 attempts to deal with some aspects of this problem.

In most states a teacher must be certified by the state in order to be eligible to teach in a public school.[90] Almost every state requires an approved bachelor's degree and twenty or more hours of professional education courses for state certification.[91] Thirty states require United States citizenship.[92] In addition, many local school systems have their own requirements for teachers. Many districts,

90 *See generally*, T. STINNETT & G. PERSHING, A MANUAL ON CERTIFICATION REQUIREMENTS FOR SCHOOL PERSONNEL IN THE UNITED STATES, (1967).

91 *Id.* 17.

92. *Id.* 25. Among them are Arizona, California, Connecticut, Florida, Illinois, Michigan, New Jersey, New Mexico, Pennsylvania, Rhode Island, and Washington. In a recent case, Dougall v. Sugarman, No. 71 Civ. 992 (S.D.N.Y., Nov. 9, 1971) a three judge federal court held that New York's citizenship requirement for civil service jobs violates the equal protection clause of the fourteenth amendment.

for example, require all teachers to take the National Teachers Examination, and give priority in selecting teachers to those who achieve the highest scores. Since the test is given completely in English, a Puerto Rican or Mexican-American teacher, for whom English is a second language, is placed at a severe disadvantage when competing with native English-speakers.

The cumulative effect of these requirements has been to make it difficult or impossible for many persons who are native speakers of a non-English language to teach in American public schools. For persons who are foreign born, the United States citizenship requirement stands in the way, or their college degree may not be recognized as the equivalent of a United States bachelor's degree. Others may lack the appropriate number of professional education courses. Such persons are denied the right to teach even though they may have taught for years in the schools of another country or even though their background and references demonstrate experience and sensitivity in working with children.

The difficulty which native speakers of a non-English language have in qualifying to teach is reflected in a great underrepresentation of minority groups in the teaching profession. There are 250,000 Puerto Rican students in New York City's public schools, 23 percent of the total school enrollment. Only 350 of the 55,000 teachers in the system are Puerto Ricans, however, and of the 1,000 schools in the city only four have Puerto Rican principals, all of them "acting" principals.[93] In the heavily Mexican-American Southwest, only 12,000 (or 4 percent) of the 325,000 teachers in the public schools are Mexican-American.[94] Only one percent of Indian children in elementary schools have Indian teachers or principals.[95]

To minimize the harmful impact of the certification procedure, the Massachusetts legislature created a separate teacher certificate in its statute with separate requirements for bilingual education teachers.[96] At the same time the general certification law was made

93 *Puerto Rican Education Hearings* 3726, 3753.

94 UNITED STATES COMMISSION ON CIVIL RIGHTS, MEXICAN-AMERICAN EDUCATION STUDY 41 (1971). Mexican-American students comprise about 17 percent of total school enrollment in five Southwestern states. *Id.* 17.

95 INDIAN EDUCATION SUBCOMMITTEE REPORT, *supra* note 19, at ix.

96 Bilingual Statute § 6.

inapplicable to bilingual teachers. This approach has been adopted in the model act also.

The new certificate created by section 8 deletes some of the formal requirements that have prevented many qualified persons from becoming certified. Citizenship is no longer required, nor, necessarily, a bachelor's degree. A teacher who is fluent in another language need only possess "communicative skills" in English. (If the bilingual teachers in a program are not fluent in English, native English-speaking teachers can be utilized to teach the English component of the curriculum.) Requirement (c) provides that "relevant experience" may substitute for "courses of study and training" and the certifying agency must waive formal course requirements in appropriate cases. Several states have already begun, for example, to make special provision in their certification procedures for persons with experience in the Peace Corps, Vista, Head Start, and the Teacher Corps.[97] The same should be done for persons who have been certified as teachers in their country of national origin and who have had teaching experience. The provision for public hearings on teacher certification requirements and for periodic review and revision of them allows the agency to correct its own mistakes and protects against arbitrary decisions. Finally, the statute prohibits local school districts from imposing additional requirements on bilingual teachers unless they are specifically approved by the state board of education.[98]

Even under a liberal certification law, however, there will probably be a shortage of certified teachers for bilingual programs. The statute therefore allows the certifying agency to exempt from the certification requirements any school system which cannot meet the needs of its bilingual program with certified teachers. Before the passage in Massachusetts of a special certification procedure for bilingual teachers, most of the teachers in bilingual programs had

---

97 T. STINNETT & G. PERSHING, A MANUAL ON CERTIFICATION REQUIREMENTS IN THE UNITED STATES 30-31 (1970).

98 The Masachusetts statute does not have a provision allowing "relevant experience" to substitute for "course of study and training." However, the regulations which are presently being formulated under the law may allow such a substitution. The Massachusetts statute also does not specifically provide for public hearings, but Massachusetts law generally requires public hearings before state regulations are promulgated. MASS. GEN. LAWS ANN. ch. 30A, §§ 2-3 (1966).

been unable to meet the requirements of the general certification law[99] and were serving under exemptions to the general law.

Several problems had arisen with respect to such teachers. First, because Massachusetts law automatically grants tenure to any teacher employed by a school system for three consecutive years,[100] the state department of education had refused to allow teachers to serve under an exemption for more than two years. Second, some local systems were paying teachers serving under exemptions far less than other teachers. For these reasons it became difficult to attract qualified bilingual teachers, either from Puerto Rico or foreign countries, or from better paying jobs in the United States.

Section 8 attempts to solve these problems by allowing unlimited service by a teacher serving under an exemption; only two years of such service may be credited toward tenure. Local school systems must pay bilingual education teachers, whether serving under certificates or exemptions, no less than teachers certified under the general certification law. Although these provisions are designed to overcome specific problems in Massachusetts, the same types of problems probably exist in other states and can be dealt with by appropriate changes in state law.

Section 8 does not repeal the general teacher certification law; it merely provides a new certification procedure for bilingual education teachers. It also makes such a bilingual certificate a prerequisite to teach in a bilingual program. In some instances, however, teachers certified under the general law might be needed to teach in a bilingual program. The section therefore provides that a teacher holding a general certificate and who has a speaking and reading ability in a language other than English may be certified as a teacher of bilingual education. English-speaking teachers may also be needed to teach part of the English component of a bilingual program; this is also permitted.

To ensure, finally, that teachers who share the native language and culture of the non-English-speaking children enrolled in a program will be employed, section 8 requires that school districts

99 MASS. GEN. LAWS ANN. ch. 71, § 38G (1969). Of course this law is still in force in Massachusetts and applies to all teachers other than bilingual education teachers.

100 MASS. GEN. LAWS ANN. ch. 71, § 41 (1969).

prefer such teachers in hiring and make affirmative efforts to recruit them.

Section 9. *Teachers' aides; community coordinators*

A bilingual education teacher's aide shall be a person employed to assist a teacher in a bilingual program. Each school board providing bilingual programs under this act shall employ such teachers' aides to assist in teaching the programs; provided, however, that at least half the teachers' aides assigned to each program shall be native-speakers of the language and share the culture of the children of limited English-speaking ability enrolled in the program.

Any school board which conducts bilingual programs pursuant to this chapter shall employ, on a full or part time basis, one or more community coordinators for each program in which 100 or more children are enrolled. Community coordinators shall seek to promote communication, understanding, and cooperation between the public schools and the community, and shall visit the homes of children who are or could be enrolled in a bilingual program in order to convey information about the program. A coordinator shall be a native speaker of the language and share the culture of the children of limited English-speaking ability enrolled in the program to which he is assigned.

No person shall be denied employment as a bilingual education teacher's aide or community coordinator because he is not a United States citizen; nor shall the provisions of [the state civil service law] affect the hiring and employment of such aides or coordinators.

Section 10. *District directors*

The school board of any school district in which 200 or more children are enrolled in bilingual programs shall appoint a director of bilingual education for the district. The director shall be qualified as a bilingual education teacher and shall, under regulations prescribed by the department, supervise the operation of the district's programs. Districts shall make affirmative efforts to recruit directors who are native-speakers of a language other than English.

Section 11. *Parent and community participation*

School boards shall provide for the maximum practical involvement of parents of children enrolled in bilingual programs. Each school district shall, accordingly, establish a parent advisory com-

mittee for each program which affords parents the opportunity effectively to express their views and which ensures that a bilingual program is planned, operated, and evaluated with the involvement of, and in consultation with, parents of children served by the program. Such committees shall be composed solely of parents of children enrolled in bilingual programs, bilingual education teachers and teachers' aides, community coordinators, and representatives from poor peoples' community groups; provided, however, that a majority of each committee shall be parents of children enrolled in the corresponding bilingual program, and that the number of English-speaking and non-English-speaking parents shall reflect approximately the proportions of English-speaking and non-English-speaking students enrolled in the bilingual program.

The department shall promulgate rules and regulations to implement the requirements of this section.

COMMENT: Sections 9 (teachers' aides and community coordinators) and 11 (parent and community participation)[101] both seek to achieve parent and community involvement in bilingual programs.

Because a child derives his culture and values mainly from his parents, a school which fails to involve, or which excludes the parents from the educational process creates tension and conflict within the child. When, for example, and Indian child is at home he sees one world, one set of values; when he is at school he may see another kind of life which is very much different. Thus the school and the home, rather than reinforcing each other, may compete for the loyalties of the child.[102] Moreover, the parents themselves may experience negative feelings about the school, which in turn influence the child. They may see the school as turning their children against them, or causing their children to lose respect for them. The parents may even experience humilitation when their children turn to them for help in school and they cannot give it:

> You take a Puerto Rican child who comes from a family which speaks Spanish, learns his value and his self-worth from

101 The Massachusetts statute does not specifically require teachers' aides, community coordinators, or parent advisory committees. It does require the State Department of Education "to provide for the maximum practicable involvement of parents" in the local programs. Bilingual statute § 35.

102 Ramirez, *supra* note 28, at 45-46.

> his parents. When he enters the first grade in a public school where they speak only English, and teach a different culture, he is going to be totally frustrated.
>
> The second step is that he goes home seeking help from his parents. They cannot help him. So . . . what happens is that he not only loses respect for himself, but he quickly loses respect for his parents and the value system and the language they taught him.
>
> In other words, they have proved inadequate in his eyes, and he is left with nothing.[103]

Even a bilingual program will thus fail to achieve its objectives unless there is significant community involvement. If the child's parents and community regard the school as a positive force, so will the child. But this will not happen until the parents and the community are permitted to express their values in the educational process; in short, to feel that they take part in the education of their children.

One way of involving the community in bilingual education is to recruit teachers who share the native language and culture of the non-English-speaking children. Section 8 requires school districts to give preference to such persons in hiring teachers who speak a language other than English and to take affirmative steps to recruit such teachers. One way of involving parents is to employ them as teacher's aides to assist in the teaching of the program.[104] Section 9 requires that school districts employ teacher's aides in bilingual programs and that at least half[105] the aides assigned to

---

103 *Puerto Rican Education Hearings* 3710.

104 Ramirez, *supra* note 28, at 46:

> Parent participation is particularly indispensable in bilingual programs, for in most Chicano communities parents have considerable knowledge of language and heritage. Parents should be remunerated to serve as language and history teachers, both at home and at the school, and curriculum should be developed in such a way that parents can teach portions of it to their children at home. The Mexican-American parent will support the goals and values of the school when the school begins to recognize the worth of his culture and realizes that he can make unique contributions to the educational process.

105 Native English-speaking aides should also be utilized in a bilingual program. Just as a non-English-speaking aide can serve as a bridge between an English-speaking teacher and non-English-speaking children, so an English-speaking aide can do the same for a non-English-speaking teacher who is teaching English-speaking children. English-speaking aides can also be used to help teach English to non-English-speaking children.

any program share the culture of the non-English-speaking children enrolled in the program. Section 5 also attempts to involve parents by giving them a right to visit their child's classes and to confer with school officials. Finally, section 11, which is largely modeled after the parent participation regulations of Title I of the Elementary and Secondary Education Act of 1965 (Programs for Disadvantaged Children),[106] provides for the maximum practical involvement of parents in the planning, operation and evaluation of the bilingual education programs serving their children.

Section 9 requires school systems to employ "community coordinators" to serve as a link between the school system and the non-English-speaking community. Many non-English-speaking people, bewildered by a new culture and unable to speak the dominant language, have withdrawn into their own communities where they can feel at home and accepted. One of the most important functions of the coordinators is to gain the confidence of such people and, where their children are not in school, to encourage them to attend. They may also facilitate the taking of the census required by section 4.

Section 12. *Preschool and summer bilingual program*

A school district may establish on a full or part-time basis preschool or summer school bilingual programs, or join with other school districts in establishing such programs. Summer programs shall not serve as a substitute for bilingual programs required to be provided during the regular school year.

COMMENT: It has been estimated that about 50 percent of mature intelligence is developed by age four.[107] It is also thought by many educators that a child has a tremendous capacity to learn one or more languages when he is very young.[108] Indeed, the capacity to learn languages seems to decrease with age.[109] Preschool programs in bilingual education may therefore be the most productive.

106 20 U.S.C. § 1231(d) (1970); 45 C.F.R. § 116.18(f) (1971).

107 CARNEGIE Q., Winter, 1969, at 1.

108 *See, e.g.*, W. PENFIELD & L. ROBERTS, SPEECH AND BRAIN-MECHANISMS 253 (1959).

109 *See, e.g.*, Tomb, *On the Intuitive Capacity of Children to Understand Spoken Language*, 16 BRITISH J. OF PSYCHOLOGY 53-54 (1925).

Section 13. *Language studies*

Whenever in any junior or senior high school in the state twenty or more students who speak a language other than English apply for courses in the study of that language, the school board of the district shall provide such courses. The courses shall include instruction in the reading and writing of said language and study of the literature, history, and culture associated with said language. Any student in the school shall be eligible to participate in such courses.

Any school board may also provide in its elementary schools courses for the study of a language other than English which is spoken by a portion of the community. Any child shall be eligible to participate in such courses; provided, however, that in no circumstances shall such language courses be employed as a substitute for the bilingual programs required by this act.

COMMENT: The first paragraph of this section is very similar to a Rhode Island statute.[110] Section 5 gives every school age child of limited English-speaking ability the right to participate in the bilingual programs. A district must therefore take a child as it finds him and presumably children differing widely in grade levels will be enrolled in programs. The child who enters at the preschool level or first grade will no longer have the right to participate in a bilingual program when he reaches junior high school (unless the school district institutes a full bilingual program). It seems a shame to take a child this far in his native language and then to deny him the opportunity to develop it further. There may also be other children who speak English well enough to be in the regular curriculum but who also should have an opportunity to study their own language. The courses provided for by this section, therefore, are not bilingual programs. They are courses in the study of the non-English language itself, and the history, culture, and literature associated with that language. Any student may participate in such courses, including an English-speaking stu-

110 R.I. GEN. LAWS ANN. § 16-22-8 (1969):

> Whenever there shall be twenty (20) students who apply for a course in the Italian, Portugese or Spanish language in any high school of the state, the school committee of the specific town shall arrange a course in Italian, Portuguese or Spanish to be conducted by a competent teacher.

dent who has developed a capacity in non-English language by participation in a bilingual education program (or otherwise). Providing these courses will allow potential bilinguals to develop their important asset to the fullest.

The second paragraph may present certain hazards. Its purpose is to allow English-speaking children who do not participate in a bilingual program a chance to learn a language which is spoken by other children in the community. Not only would this help to promote understanding between different groups of children in the community but it might also serve to encourage English-speaking children to transfer to a bilingual program by developing their confidence and interest in a second language. The courses would also allow bilingual children who have chosen not to participate in a bilingual program a chance to develop their native language skills. The hazards in this paragraph, however, are that it may confuse the district's obligation to provide bilingual programs; and it may give English-speaking children who want to learn a second language a way they can do so without participating in a bilingual program, thus diminishing the participation of English-speakers in bilingual progams.

Section 14. *Reimbursement by the state*

The expenditures by local school districts for the bilingual programs required or permitted under this act, including amounts expended for pre-service or in-service teacher training programs which are approved by the department, shall, for the amount by which they exceed the average per pupil expenditure of the school district for the education of children of comparable age, be reimbursed by the state.

Every school district seeking reimbursement under this section shall submit a plan for bilingual education to the department before the beginning of each school year. The plan shall propose a bilingual education program or programs for the district and shall be in such form and shall set forth sufficient facts as the department finds necessary to determine whether the proposed program(s) conforms to the provisions of this act and the department's regulations hereunder. Nonconforming plans shall not be approved and shall be returned to the school district, with specification of the reasons for non-approval, in such time as will allow the school district a reasonable opportunity to resubmit an amended plan. Approval of a plan shall be a prerequisite to state reimbursement.

Reimbursement shall be made upon certification by the department that bilingual programs have been carried out in accordance with the provisions of this act, the department's regulations hereunder, and approved plans submitted earlier by school districts. Reimbursement for bilingual programs shall not exceed $____ for the first year, $____ per year for the second and third years, and $____ per year for the fourth and subsequent years. In the event that amounts certified by the department as eligible for reimbursement under this section exceed the available state funds therefor, reimbursement of approved programs shall be ratably reduced.

Participating school districts shall keep such records and afford such access thereto as the department finds necessary to ensure that bilingual programs are implemented in conformity with approved plans, this act, and regulations hereunder.

All expenditures for bilingual programs, other than those actually reimbursed under this act, shall be included in computing the total expenditures of the school district for purposes of [the general state aid to education statute].

COMMENT: This section is substantially the same as the corresponding provision in the Massachusetts statute.[111] The inclusion of maximum dollar limits, which are here left blank, may help to satisfy state legislators who worry lest the costs of bilingual programs get out of contol. In Massachusetts the limits are $1.5 million for the first year, $2.5 million per year for the second and third years, and $4.0 million per year for the fourth and subsequent years.[112] It has been estimated that there are close to 40,000 non-English-speaking children in Massachusetts; this means that by the fourth year the state will be supplying $100 per child. Since the state only supplies that portion of the cost of bilingual programs which *exceeds* the average per pupil expenditure in the school district as a whole, $100 per child may be enough to provide good bilingual programs for all the children who need them (provided, of course, that the school districts supply the rest). One suspects, however, that if another $100 per child were available under the federal Bilingual Education Act it would not be turned down.

The last paragraph simply allows all those costs of bilingual

111 Bilingual Statute § 8. For a discussion of the state reimbursement formula, see text at notes 59-65.

112 Bilingual Statute § 8.

programs which are not reimbursed under this statute to be included in the general expenditures of the school district for purposes of general state aid. In most states the amount of general state aid a local school district receives is determined, in part, by what it spends. If the costs of bilingual programs other than the excess reimbursed by this statute were not reimbursable on the same basis as all other local expenditures, it would be disadvantageous for a district to spend its money on bilingual programs.

Section 15. *Department of Education*

In addition to the powers and duties prescribed in previous sections of this act, the department of education shall promulgate rules and regulations and take any other actions which will promote the full implementation of all provisions of this act. A copy of the rules and regulations issued by the department shall be sent to all school districts in the state.

COMMENT: Like the Massachusetts statute, this provision requires the state department of education to issue regulations to implement all provisions of the statute. The language also implies strong enforcement powers for the department, but does not specify what those powers are. Clearly the department can withold reimbursement under section 14 for local programs which do not comply with the statute or regulations. But what about a school system which does not provide a program at all? Massachusetts law authorizes the state department of education to withold *all* state funds from a local system which fails to comply with *any* state law or lawful regulation relative to education,[113] but this power has rarely if ever been exercised and may not exist in other states. The language of this section requires the department "to take any other actions which will promote the full implementation of [the act]" and it would therefore be possible for the department itself to bring a court action against a local system. In the absence, however, of an explicit authorization such general language might not be sufficient in some states to authorize suit. This might depend very much on the structure of this area of law in each state, *i.e.,* on

113 MASS. GEN. LAWS ANN. ch. 15, § 1G (1966): "The board may withhold state and federal funds from school committees which fail to comply with the provisions of law relative to the operation of the public schools or any regulation of said board authorized in this section."

other related statutes and case law. Moreover, even if the department is explicitly authorized to bring suit, it might be difficult for individual parents to persuade it to do so.

Obviously the most effective enforcers of the statute are parents themselves. Granting parents a right to sue may be politically risky, however, and in considering whether to include such a provision, state law should be thoroughly examined to determine whether, in a statute such as this, parents may have implied standing to sue on behalf of their children.[114]

Section 16. *Division for bilingual education*

There shall be established within the department of education a division for bilingual education which shall be headed by an assistant commissioner. The assistant commissioner shall be appointed by the board of education upon the recommendation of the commissioner of education, and shall report directly to the board and to the commissioner. In selecting an assistant commissioner preference shall be given to persons who are native speakers of a language other than English in which bilingual programs are offered.

The division for bilingual education shall be charged with the following duties:

(1) to assist the department in the administration and enforcement of the provisions of this act and in the formulation of the regulations provided for herein;

(2) to study, review, and evaluate all available resources and programs that, in whole or in part, are or could be directed towards meeting the language capability needs of children and adults of limited English-speaking ability resident in the state;

(3) to gather information about the theory and practice of bilingual education in the state and elsewhere, to encourage experimentation and innovation in the field of bilingual education, and to make a regular report to the legislature, the governor, and the public;

(4) to provide for the maximum practical involvement of parents of children of limited English-speaking ability, bilingual education

114 Clearly children of limited English-speaking ability are the primary beneficiaries of the bilingual statute. In federal law the "primary beneficiaries" of a statute are generally held to have implied standing to sue. *See, e.g.*, Peoples v. United States Dep't of Agric., 427 F.2d 561 (D.C. Cir. 1970); Gomez v. Florida State Employment Service, 417 F.2d 569 (5th Cir. 1969); Colpitts v. Richardson, Civ. No. 1838 (D. Me. Oct. 20, 1970) (unreported), *noted in* INEQUALITY IN EDUCATION Nov. 1970, at 27 (parents of disadvantaged children have implied standing to sue to enforce Title I of the Elementary and Secondary Education Act of 1965).

teachers, teachers' aides, community coordinators, representatives of community groups, educators, and laymen knowledgeable in the field of bilingual education in the formulation of policy and procedures relating to the administration of this act;

(5) to consult with other public departments and agencies, including but not limited to the department of community affairs, the department of public welfare, the division of employment security, the commission against discrimination, and the United States Department of Health, Education and Welfare in connection with the administration of this act;

(6) to make recommendations to the department in the areas of pre-service and in-service training for bilingual education teachers, curriculum development, testing and testing mechanisms, and the development of materials for bilingual education programs;

(7) to undertake any further activities which may assist the department in the full implementation of this act.

COMMENT: This section recognizes the importance of the new bilingual program by creating a separate division to administer the law within the state department of education. The creation of a new division specifically devoted to bilingual education may help to ensure that bilingual education receives attention at the state level and may also avoid some of the bureaucratic tangles which often characterize old line divisions. The function of the new division will be to provide the necessary leadership in securing state-wide implementation of the statute. The division will draft the regulations required by other provisions of the statute and by section 15. Approval by the division of local programs will be a prerequisite to state reimbursement of local districts. In carrying out these functions the division is required to provide for the "maximum practical involvement" of parents of children of limited English-speaking ability, bilingual teachers and aides, community coordinators, representatives of community groups and others.[115] The statute thus provides for parent and community involvement at the state as well as local level. Moreover, in selecting an assistant commissioner, preference must be given to a native speaker of a language other than English.

115 Pursuant to this requirement, the Massachusetts Board of Education has already appointed a 40-member Advisory Board for Bilingual Education to advise and consult with state officials on the administration of the bilingual education statute.

NOTE

NEW YORK CITY'S ALTERNATIVE TO THE CONSUMER CLASS ACTION: THE GOVERNMENT AS ROBIN HOOD

Introduction

In the closing days of 1969, New York City enacted an ordinance entitled the "Consumer Protection Law of 1969."[1] Although notable for many reasons, the ordinance attracted greatest attention because of its remedial provisions. Specifically, section 2203d-4.0(c) of the act authorized the New York City Department of Consumer Affairs to sue an offending business on behalf of all consumers victimized by any large-scale wrongdoing, to obtain a gross recovery, and then to distribute the proceeds to the victims individually.[2] New York City was not the first jurisdiction to enact a remedy of this type for consumers.[3] It was, however, the first to face up to many of the problems posed by such a remedy — for example, defining the class of consumers on behalf of whom the suit is brought, allocating and distributing the recovery among the claimants, and describing the res judicata effect of any judgment handed down. In this fashion, New York City took a significant step toward insuring the effectiveness of the government in what one pair of commentators has called its role as "Robin Hood" — a role in which it is to be found "taking the profits away from the swindlers and returning them to the cheated consumer."[4]

Of course the government has not been the only party to bring mass remedy suits in the past. Anglo-American law has long permitted a representative plaintiff to initiate a class action on behalf of himself and others similarly situated.[5] In recent years the class action has become the standard means of redress for consumers

---

1 NEW YORK, N.Y., ADMINISTRATIVE CODE ch. 64, tit. A, §§ 2203d-1.0 to -8.0 (Supp. 1971).

Relevant portions of the Consumer Protection Law of 1969 are set out in the Appendix [hereinafter cited as Consumer Protection Law].

2 Consumer Protection Law § 2203d-4.0(c).

3 See part I B 2 b of this Note, *infra*.

4 W. MAGNUSON & J. CARPER, THE DARK SIDE OF THE MARKETPLACE 71-72 (1968).

5 For a discussion of the history of the class action see Z. CHAFEE, SOME PROBLEMS OF EQUITY 149-295 (1950).

victimized by a pattern of illegal conduct.[6] It is to this remedy — the consumer class action — that the New York ordinance presents an alternative.

This Note begins by examining the background of the New York ordinance, specifically the need for mass remedy actions in consumer law, prior attempts to provide for government suits, and the legislative history of the ordinance itself. After reviewing the provisions of the ordinance, it delineates the advantages and disadvantages of the New York City remedy compared with class actions. The Note concludes that the ordinance is valuable not so much as an alternative, but as a supplement to, the consumer class action.[7]

I. Background of the New York Ordinance

A. *Nationwide Inadequacy of Traditional Consumer Remedies*

By the middle 1960's, as lawyers throughout the nation focused their attention on the problems of the consumer, they realized that consumer remedies must be improved. A consumer remedy can be judged by its effectiveness in accomplishing two objectives. First, it must compensate those who have been injured by restoring to them the sum they have lost. Second, it must deter potential wrongdoers by removing the profit from the proscribed activity.[8] Traditional consumer remedies failed to achieve either of these ends.

The most notable failure was the inability of the individual

6 See part I B 1 of this Note, *infra*.

7 It is important to emphasize that some of the points made in this Note are applicable only to the particular laws considered here, while others are relevant to any class action or government restitution suit. Of general applicability are the comments favoring the ordinance because it utilizes the resources of the government as plaintiff. *See* part III A of this Note, *infra*. Of similar applicability are those favoring consumer class actions because of their reliance on the energies of consumers rather than the government to protect consumer rights. *See* part IV A of this Note, *infra*. All of the other comparisons made are most relevant to the particular statutes considered. *See* parts III B, C, D and IV B, C, D of this Note, *infra*. This is not to say that they are of any less value, since the discussions should serve to illuminate problems faced by any mass remedy statute, whether it be a class action or a government suit.

8 *Cf.* C. McCormick, Handbook on the Law of Damages § 137, at 560 (1935).

lawsuit prosecuted by a private attorney to help defrauded consumers. Because most consumer frauds involved only small amounts, even a successful plaintiff could expect that his total expenditures would exceed any possible recovery.[9] Counsel for defendant businesses were adept in running up their opponents' expenses through procedural delays.[10] Added difficulties occurred because many of those victimized by consumer offenses were poor. Consumers from low income groups were unlikely to seek an attorney on their own both because they lacked knowledge of their legal rights and because they were hesitant about becoming involved in the legal system.[11] Even if low income consumers did find a suitable attorney, they might have difficulty in advancing money to pay for the initial costs of the lawsuit.[12] Legal aid organizations offered potential solutions to part of the problem, both because they encouraged the poor to assert their rights as consumers and because they provided legal services free of charge. However, many defrauded consumers were too poor to afford private attorneys and yet had incomes too high to qualify for legal aid.[13] Furthermore, legal aid groups often suffered from low budgets and small staffs which prevented them from handling the consumer grievances of even those qualified for assistance.[14] As a result, injured consumers were deprived of compensation, while defrauding merchants continued their deceptive practices.

---

9 *E.g.*, Note, *Translating Sympathy for Deceived Consumers into Effective Programs for Protection*, 114 U. PA. L. REV. 395, 409 (1966) [hereinafter cited as Note, *Translating Sympathy*].

10 *See generally* Schrag, *Bleak House 1968: A Report on Consumer Test Litigation*, 44 N.Y.U.L. REV. 115 (1969).

11 Rice, *Remedies, Enforcement Procedures and the Duality of Consumer Transaction Problems*, 48 B.U.L. REV. 559, 567-68 (1968) [hereinafter cited as Rice, *Remedies*].

12 *Id.*; *cf.* Note, *Wrongs Without Remedy: The Concept of Parens Patriae Suits for Treble Damages Under the Antitrust Laws*, 43 S. CAL. L. REV. 570, 579 (1970).

13 Wade & Kamenshine, *Restitution for Defrauded Consumers: Making the Remedy Effective Through Suit by Governmental Agency*, 37 GEO. WASH. L. REV. 1031, 1048 (1969) [hereinafter cited as Wade & Kamenshine]; Note, *Translating Sympathy* 410.

14 Note, *Translating Sympathy* 409-10. "[I]n New York City, the OEO-funded legal services programs are reluctant to take on consumer suits, because the costs of preparation and trial are simply too great in relation to the anticipated recovery." *Hearings on S. 1980 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 51 (1969) (statement of Bess Myerson Grant, Commissioner, New York City Department of Consumer Affairs) [hereinafter cited as *Hearings on S. 1980*].

Similarly, individual consumers denied legal compensation seldom sought to prevent future fraudulent activity through injunctions. Not only were injunctive suits subject to the same costs as damage actions, but they also presented no prospect of a recovery from which legal expenses might be paid. Furthermore, potential standing problems existed: if a consumer had already been defrauded, he might not have standing to sue on behalf of those likely to be injured in the future by the same fraudulent activity.[15] Even if a proper plaintiff could be found and the costs of the lawsuit advanced, the injunction which was eventually issued would have only a limited deterrent effect. The addressee of the injunction would be prohibited from similar activity in the future, but the fact that he was keeping the proceeds from his wrongdoing could only encourage like ventures by others in the course of time.

Consumers also encountered formidable problems in the forums designed to give informal relief without counsel. Better Business Bureaus could establish voluntary guidelines for merchants and inform any consumer who inquired beforehand of a company's past fraudulent practices. However, they had no power to compel a business to restore money wrongfully taken.[16] Small claims courts were scarcely more effective. Some jurisdictions were totally without tribunals of this type. Others refused to hear cases where more than an unreasonably low amount was in controversy. Despite efforts at simplification, many such courts presented the unwary litigant with complicated procedures and legalistic pitfalls.[17] This only increased the alienation of low income consumers already imbued with a distrust of the legal system.[18] Ironically, small claims courts that were ideally responsive to consumer grievances ran the risk of being overwhelmed by claimants victimized by large-scale frauds.[19]

If private remedies failed to secure redress for the defrauded consumer, public officials provided scarcely more comfort. Al-

15 Rice, *Remedies* 577-78.

16 Wade & Kamenshine 1049-50; Note, *Translating Sympathy* 404-09.

17 *Hearings on S. 2246, S. 3092, S. 3201 Before the Consumer Subcomm. of the Senate Comm. on Commerce*, 91st Cong., 1st Sess. ser. 91-48, pt. 1, at 175-76 (1969) (statement of Bess Myerson Grant) [hereinafter cited as *Hearings on S. 2246*].

18 Rice, *Remedies* 568.

19 *Hearings on S. 2246*, at 176, 184.

though dishonest merchants were in theory subject to criminal sanctions, in practice they had little to fear. Prosecutors had difficulty proving that the businessman had acted with the requisite intent. Generally, prosecutors were hesitant in indicting, and juries in convicting, white-collar defendants. Prescribed penalties were too light to have much deterrent effect. Finally, prosecutors constantly found themselves under pressure to devote their limited resources to more violent types of crime.[20]

On the non-criminal side, the government could sue for a civil penalty. In that case, it avoided the heavy burden of proof and the intentional state-of-mind requirements of a criminal action. Although civil penalties could have a deterrent effect if invoked often, they provided no compensation to the injured consumer.[21] Government-obtained injunctions were only prospective in effect[22] and depended on a usually quiescent district attorney for enforcement. Although implying the sanction of business ouster, licensing was too crude a tool with which to deal with the wide range of deceptive and unconscionable practices that victimized consumers.[23] Government suits usually failed to deter future fraud; in no way did they provide monetary compensation to injured consumers.

B. *New Role for Mass Remedies*

The general response to the inadequacy of traditional remedies was three-fold. First, reformers attempted to facilitate individual lawsuits by private persons. This took the form of insuring that a consumer's recovery would cover litigation costs. Thus, statutes were recommended requiring a merchant who lost a consumer lawsuit to pay the plaintiff's attorney's fees and litigation expenses.[24] Laws providing for minimum and multiple damages were also enacted.[25] Second, reformers created new forums to deal

20 Rice, *Remedies* 584; Note, *State Consumer Protection: A Proposal*, 53 IOWA L. REV. 710, 716-18 (1967); Note, *Translating Sympathy* 426-27.

21 Rice, *Remedies* 585.

22 *Id.* 587-88.

23 *Id.* 585-86.

24 *See* Wade & Kamenshine 1049; Rice, *Remedies* 570-73; Note, *Translating Sympathy* 424.

25 Rice, *Remedies* 573-76.

The New York ordinance prescribes minimum damages in the form of a civil penalty for each violation of its substantive provisions. Consumer Protection Law § 2203d-4.0(a), (b).

with consumer grievances. Proposals were made to improve small claims courts and to publicize their availability.[26] Informal arbitration was also recommended.[27] Consumer protection offices were created within state and local governments to mediate grievances and to obtain voluntary consent orders.[28] As a third means of reform, mass remedies were made more available to injured consumers in the form of consumer class actions and government restitution suits.

1. Consumer Class Actions

Much has been written recently both on class actions in general[29] and on consumer class actions in particular.[30] This Note explores consumer class actions only as they compare to government mass restitution suits, and specifically to the suit provided for by the New York ordinance.[31] In theory a consumer class action will

26 Wade & Kamenshine 1048 n.110; Note, *Translating Sympathy* 436-38.

27 Jones, *Wanted: A New System for Solving Consumer Grievances*, 25 ARB. J. 234, 244 (1970); Wade & Kamenshine 1048-49 n.110.

28 Rice, *Remedies* 589-90; Note, *Translating Sympathy* 430-33.

29 *E.g.*, Dole, *The Settlement of Class Actions for Damages*, 71 COLUM. L. REV. 971 (1971); Homburger, *State Class Actions and the Federal Rule*, 71 COLUM. L. REV. 609 (1971); Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 390-93 (1968); Maraist & Sharp, *Federal Procedure's Troubled Marriage: Due Process and the Class Action*, 49 TEXAS L. REV. 1 (1970); Pomerantz, *New Developments in Class Actions — Has Their Death Knell Been Sounded?* 25 BUS. LAW. 1259 (1970); Note, *Class Actions under Federal Rule 23(b)(3) — The Notice Requirement*, 29 MD. L. REV. 139 (1969); Note, *The Cost Internalization Case for Class Actions*, 21 STAN. L. REV. 383 (1969); Note, *Federal Rules of Civil Procedure: Rule 23 — The Class Action Device and Its Utilization*, 22 U. FLA. L. REV. 631 (1970); Comment, *Adequate Representation, Notice and the New Class Action Rule: Effectuating Remedies Provided by the Securities Laws*, 116 U. PA. L. REV. 889 (1969).

Volume 10, Number 3 of the *Boston College Industrial and Commercial Law Review* was devoted entirely to the class action. See 10 B.C. IND. & COM. L. REV. 497 *et seq.* (1969).

30 *E.g.*, Dole, *Consumer Class Actions under Recent Consumer Credit Legislation*, 44 N.Y.U.L. REV. 80 (1969); Dole, *Consumer Class Actions under the Uniform Deceptive Trade Practices Act*, 1968 DUKE L.J. 1101; Jacobs, *Impact of Consumer Class Actions upon Confessed Judgments*, 88 BANKING L.J. 683 (1971); Kegan, *Consumer Class Suits — Righting the Wrongs to Consumers*, 26 FOOD DRUG COSM. L. J. 130 (1971); Kirkpatrick, *Consumer Class Litigation*, 50 ORE. L. REV. 21 (1970); Smit, *Are Class Actions for Consumer Fraud a Fraud on the Consumer?* 26 BUS. LAW. 1053 (1971); Starrs, *The Consumer Class Action: Considerations of Equity and Procedure*, 49 B.U.L. REV. 211, 407 (1969); Travers & Landers, *The Consumer Class Action*, 18 KAN. L. REV. 812 (1970).

For a comprehensive discussion of the present status of the consumer class action under federal Rule 23, see 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURES CIVIL § 1782 (1972).

31 Consumer Protection Law § 2203d-4.0(c).

attain both goals of an adequate consumer remedy: compensation of each consumer at very little individual expense (the lawsuit will be conducted by the attorneys of the party plaintiff and the costs of litigation will be distributed among the class members); and deterrence of both the specific defendant and any like-minded businessmen (consumer fraud will be made uneconomical by the high damage awards, heavy litigation expenses, and extensive unfavorable publicity).

2. Government Suits to Obtain Damages for Individual Consumers

a. *At Common Law.* — The idea of having a governmental body sue a defendant for injuries inflicted by him on a class of the public, to obtain a gross recovery, and then to distribute it to the individual class members is not a new one. Under common law the government was normally without standing to obtain redress for a group of citizens because of private wrongs done them. However, doctrines have arisen which allow the government to obtain injunctive relief for injured citizens in the absence of a statute granting standing.

The doctrine of public nuisance[32] has been interpreted to allow states to bring equity suits to protect the public health, safety, morality, peace, comfort, or convenience.[33] If the government has standing to seek an injunction, then it should also have standing to obtain restitution for the class it represents. An equity court traditionally has power to award complete relief once it gains jurisdiction over some portion or feature of the controversy.[34] As a result, a plaintiff who has already obtained an injunction is often granted restitution.[35] This principle might logically be extended to cases like government mass remedy actions where the plaintiff has sued and obtained an injunction on behalf of others. Unfortunately, the courts have been hesitant about extending the theory of public nuisance to commercial contexts, except in cases involving violations of usury laws.[36] Even if the courts found

32 Wade & Kamenshine 1064.

33 W. PROSSER, HANDBOOK ON LAW OF TORTS § 88, at 583-85 (4th ed. 1971).

34 1 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 231, at 410-15 (5th ed. S. Symons 1941).

35 *See, e.g.*, Porter v. Warner Co., 328 U.S. 395, 399 (1946).

36 *See* Note, *Commercial Nuisance: A Theory of Consumer Protection*, 33 U. CHI. L. REV. 590, 593-96 (1966).

standing to seek an injunction, they might balk at granting restitution where restitution loses its ancillary nature and becomes the most significant aspect of the suit.

Another method of conferring standing on the government at common law utilizes the doctrine of *parens patriae*. Traditionally states have had *parens patriae* standing to seek injunctions, but not damages, for harm to their independent quasi-sovereign interests.[37] A state's standing to sue under this theory might be extended to cases where citizens have been individually injured, but will not litigate their claims for one reason or another.[38] However, the *parens patriae* doctrine requires injury to the state apart from injury to its individual citizens.[39] Thus, a court will probably not rest its holding on this rationale in the near future.[40]

Recently a lower federal court produced a flurry of excitement by holding in *United States v. Brand Jewelers, Inc.* that the United States has standing under the commerce and due process clauses of the Constitution to secure an injunction against "sewer service" of process on consumers who default on their installment contracts.[41] The complaint also requested damages for consumers who had been injured by the defendants' practices.[42] Although it did not specifically deal with the point, the case may also stand for the proposition that the government has standing to obtain restitution

37 *See* Note, *State Protection of Its Economy and Environment: Parens Patriae Suits for Damages*, 6 COLUM. J. LAW. & SOC. PROB. 411, 419 (1970); Note, *Wrongs Without Remedy: The Concept of Parens Patriae Suits for Treble Damages Under the Antitrust Laws*, 43 S. CAL. L. REV. 570, 584-85 (1970).

38 *See* Note, *State Protection of Its Economy and Environment*, *supra* note 35, at 423-31.

39 *Id.* 412.

40 This theory is also defective because of its failure to provide for the eventual transfer of damages from the government to persons actually injured. *Id.* 428-29

41 318 F. Supp. 1293 (S.D.N.Y. 1970). *See* Note, *Sewer Service and Confessed Judgments: New Protection for Low Income Consumers*, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 414 (1971); Note, *Constitutional Law — Nonstatutory Standing to Sue on the Part of the United States Under the Commerce Clause and the Fourteenth Amendment*, 1971 WIS. L. REV. 665; Recent Case Notes, 84 HARV. L. REV. 1930 (1971); 46 N.Y.U.L. REV. 367 (1971); 24 VAND. L. REV. 829 (1971).

42 According to the opinion, the complaint specifically asked for "an accounting for sums realized upon such judgments, written notice of the judgment herein . . . to each alleged victim of an unlawful default judgment and 'restitution or compensatory or punitive damages, or both, and costs, including attorneys' fees, to any judgment debtor who appears within 120 days after receiving such written notice and establishes a right to such relief against defendants, or any of them.'" United States v. Brand Jewelers, Inc., 318 F. Supp. 1293, 1295 (S.D.N.Y. 1970).

as well as an injunction. The case should, however, be treated with caution. The Constitution can create standing in only a limited number of cases. *Brand Jewelers* involved a practice having the "broad impact" on interstate commerce required for governmental standing under the commerce clause.[43] Not all cases of consumer fraud could meet this strict test. Furthermore, *Brand* was concerned with the blatant misuse of a state's judicial apparatus to collect debts. Where, as in most consumer cases, the business confines itself to unfair trade practices, the due process clause would be of no use.

b. *By Statute.* — Statutory grants of standing to governmental bodies to obtain restitution for individual consumers are discussed at length elsewhere.[44] However, a summary of statutory standing is helpful at this juncture.

At the federal level, courts have interpreted some acts of Congress to authorize an administrative agency to undertake such suits. For example, different governmental bodies have sought recovery on behalf of damaged citizens under the Fair Labor Standards Act,[45] the Securities Act of 1933[46] and the Securities Exchange Act of 1934,[47] the Federal Housing and Rent Act of 1947,[48] and the Emergency Price Control Act of 1942.[49] On the other hand, standing has been expressly disallowed under the Federal Food, Drug, and Cosmetic Act.[50] Recently, the Federal Trade Commission asserted its power under the Federal Trade Commission Act[51] to obtain individual redress for consumers in-

43 *Id.* 1299.

44 See generally Wade & Kamenshine 1048-65; see also Rice, *Remedies* 593; Note, *Damages in Class Actions: Determination and Allocation*, 10 B.C. IND. & COM. L. REV. 615, 621-22 (1969); Note, *State Consumer Protection: A Proposal*, 53 IOWA L. REV. 710, 718-22 (1967); Note, *Translating Sympathy* 427-28.

45 29 U.S.C. §§ 216-17 (1970); Mitchell v. Robert De Mario Jewelry, Inc., 361 U.S. 288 (1960) (Secretary of Labor granted standing).

46 15 U.S.C. § 77t(b) (1970); Los Angeles Trust Deed & Mortgage Exchange v. SEC, 285 F.2d 162 (9th Cir. 1960), *cert. denied*, 366 U.S. 919 (1961) (Securities and Exchange Commission granted standing).

47 15 U.S.C. § 78u(e) (1970); Los Angeles Deed Trust & Mortgage Exchange v. SEC, 285 F.2d 162 (9th Cir. 1960).

48 Housing and Rent Act of 1947, ch. 163, § 206, 61 Stat. 193, 199; United States v. Moore, 340 U.S. 616 (1951) (Attorney General granted standing).

49 Emergency Price Control Act of 1942, ch. 26, § 205(a), 56 Stat. 23, 33; Porter v. Warner Co., 328 U.S. 395 (1946) (Price Administrator granted standing).

50 21 U.S.C. § 332(a) (1970); United States v. Parkinson, 240 F.2d 918 (9th Cir. 1956) (Food and Drug Administration denied standing).

51 15 U.S.C. § 45(b) (1970).

jured by practices declared unlawful in Commission proceedings.[52] Finally, the United States Postal Service frequently seeks restitution on an informal basis for persons harmed by mail fraud.[53]

At the state level, the Uniform Consumer Credit Code allows the Code's administrator to bring a civil action against a creditor making excessive charges and to force him to refund the excess to the debtor.[54] A substantial number of states[55] allow their attorneys general to bring actions against violators of their business codes for injunctions and orders restoring money to victims of illegal practices.[56] Both the Uniform Consumer Credit Code and the state business codes seem to contemplate restitution to a class as well as to single individuals.[57] None of the statutes, however, deals with the peculiar problems raised by mass restitution suits.[58] This is probably because the restitutionary aspects of the remedy are considered minor when compared with the injunctive aspects. Furthermore, all of the above statutes prescribe lawsuits

---

52 *See* Curtis Publishing Co., 3 TRADE REG. REP. ¶ 19,719 (FTC 1971); Windsor Distributing Co., 1971 TRADE CAS. ¶ 73,433 (FTC 1970), *aff'd* 437 F.2d 443 (3d Cir. 1971); Universal Credit Acceptance Corp., 3 TRADE REG. REP. ¶¶ 19,340, 19,371 (FTC complaint issued on October 6, 1970).

53 Wade & Kamenshine, 1058-59.

54 UNIFORM CONSUMER CREDIT CODE § 6.113(1).

55 ARIZ. REV. STAT. ANN. § 44-1528 (1967); COLO. REV. STAT. ANN. § 55-5-7(1) (Supp. 1969); DEL. CODE ANN. tit. 6, § 2533 (Supp. 1971); ILL. REV. STAT. ch. 121½, § 267 (1969); IOWA CODE ANN. § 713.24(7) (Supp. 1971); KAN. STAT. ANN. § 50-608 (Supp. 1970); MD. ANN. CODE art. 83, § 22 (1969); MO. REV. STAT. § 407.100 (Supp. 1970); N.J. STAT. ANN. § 56:8-8 (1964); N.D. CENT. CODE § 51-15-07 (Supp. 1970); WASH. REV. CODE ANN. § 19.86.080 (Supp. 1971).

56 The Washington statute is typical:

> The attorney general may bring an action in the name of the state against any person to restrain and prevent the doing of any act herein prohibited or declared to be unlawful; and the prevailing party may, in the discretion of the court, recover the costs of said action including a reasonable attorney's fee.
>
> The court may make such additional orders or judgments as may be necessary to restore to any person in interest any moneys or property, real or personal, which may have been acquired by means of any act herein prohibited or declared to be unlawful.

WASH. REV. CODE ANN. § 19.86.080 (Supp. 1971).

57 The Uniform Consumer Credit Code allows refunds to "the debtors or debtor." UNIFORM CONSUMER CREDIT CODE § 6.113(1). Furthermore, the appended comments indicate that the drafters contemplated mass restitution suits. *See* UNIFORM CONSUMER CREDIT CODE § 6.113, Comment 1, § 6.115, Comment 1.

The state business code provisions usually speak in terms of restoring damages to "any person" injured. *E.g.*, WASH. REV. CODE ANN., *supra* note 56. This should be interpreted to allow restitution either to individuals or classes of citizens.

58 See parts II, III, IV of this Note, *infra*.

by agencies of the state, rather than the local, government. Given their limited resources, state agencies appear more likely to concentrate on fraudulent practices that are statewide rather than local in nature.[59]

C. *Legislative History of the New York Ordinance*

The restitution provision of the New York Consumer Protection Law of 1969 was a product of the previously outlined heritage — a heritage which at once left the defrauded consumer without practical legal remedy and indicated that the solution lay in greater utilization of mass damage suits. But the ordinance was also the result of two more immediate events. The first was the creation of the New York City Department of Consumer Affairs in September, 1968.[60] Assuming the functions of the old Markets and Licenses Agencies, the Department gradually gained national recognition for its vigorous advocacy of consumer interests and its aggressive program for consumer protection.[61] Because its area of responsibility is limited to New York City, the Department has been able to concentrate its enforcement activities on local frauds that might otherwise escape the attention of a state or federal agency.

The second reason for the enactment of the mass restitution provisions of the Consumer Protection Law was the decision of the New York state courts in *Hall v. Coburn Corp.*[62] In that case, the New York Court of Appeals eventually held that consumers who had been charged excessive interest rates by the same business using an identical form contract did not have sufficient "common interest" under New York law to bring a class action.[63] The practical effect of *Hall* was to bar all consumer class actions from

---

59 See part IVA, B of this Note, *infra.*

60 NEW YORK, N.Y. CHARTER ch. 64 (Supp. 1971).

61 *See Hearings on H.R. 14931, H.R. 14585, H.R. 14627, H.R. 14832, H.R. 15066, H.R. 15655, H.R. 15656 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce,* 91st Cong., 2d Sess. ser. 91-43, at 183 (1970) (statement of Representative Eckhardt) [hereinafter cited as *Hearings on H.R. 14931*]; Klemesrud, *Where Will Bess Myerson Grant Strike Next?* N.Y. Times, Oct. 12, 1969, § 6 (Magazine), at 37; *New York Leads the Consumer Crusade,* BUSINESS WEEK, Jan. 31, 1970, at 50; Wingo, *Consumer Champion Lays Down the Law,* LIFE, July 16, 1971, at 22.

62 26 N.Y.2d 396, 259 N.E.2d 720, 311 N.Y.S.2d 281 (1970).

63 *Id.*

New York courts.[64] Previously, the United States Supreme Court had effectively closed federal courts to consumer class actions by holding that a class could not aggregate its damages in order to satisfy the federal jurisdictional amount,[65] but rather must be represented by a party plaintiff with above $10,000 in controversy.[66] As a result, consumers in New York were effectively deprived of all mass remedies.

The *Hall* decision was handed down on May 13, 1970. Well over a year before, however, it had become clear that New York courts were tending toward a strict interpretation of the class action rule.[67] In response, the Department of Consumer Affairs began drafting a statutory provision to provide New York City consumers with a mass remedy.[68] This provision was subsequently incorporated into the Consumer Protection Law of 1969, which was approved by the City Council on December 11 and signed by the Mayor on December 29, 1969.[69]

II. The New York Consumer Ordinance

A. *Defining the Class Benefited*

The mass restitution provision of the Consumer Protection Law of 1969 begins by defining the class on behalf of whom the Department can sue and obtain recovery. That class consists simply of any group of wronged consumers created by "repeated, multiple or persistent violation of any provision of [the Consumer Protection Law] or of any rule or regulation promulgated thereunder."[70]

64 *See generally* Recent Case Notes, 20 Am. U. L. Rev. 207 (1970); 39 Fordham L. Rev. 765 (1971). "This unfortunate decision means that consumers victimized by a pattern of abuse have no real remedy in the courts, except in California, which has a good class-action law." Wall St. Journal, May 14, 1970, at 10, col. 2 (statement of Philip G. Schrag, Consumer Advocate and Chairman, Consumers' Advisory Council, New York City Department of Consumer Affairs).

65 *See* 28 U.S.C. §§ 1331(a), 1332(a) (1970).

66 Snyder v. Harris, 394 U.S. 332 (1969).

67 The trial court had denied the *Hall* class action on August 28, 1968 (No. 5604/68 Sup. Ct., Bronx County), and the New York Supreme Court, Appellate Division had affirmed on February 6, 1969 (31 A.D.2d 892, 298 N.Y.S.2d 894).

68 *See Hearings on H.R. 14931*, at 183 (statement of Philip G. Schrag); *Hearings on S. 2246*, at 188 (statement of Bess Myerson Grant); *Hearings on S. 1980*, at 52-53, 56-57 (statement of Bess Myerson Grant).

69 New York, N.Y., Charter ch. 64, § 2203(e) (Supp. 1971); New York, N.Y., Administrative Code ch. 64, title A, §§ 2203d-4.0 to -8.0 (Supp. 1971).

70 Consumer Protection Law § 2203d-4.0(c).

As this language indicates, the mass remedy provided by the ordinance is designed to enforce only those substantive rights created in previous sections of the act.[71] Those sections prohibit certain enumerated "deceptive"[72] and "unconscionable"[73] trade practices. Although an examination of these substantive provisions is beyond the scope of this Note, their importance must not be underestimated. A practice must come within their prohibitions before it can even be considered the subject of a mass restitution suit.[74]

Turning to the definition of the class itself, one is immediately struck by the vagueness of the language used. The sole requirement is that there be "repeated, multiple or persistent violation" of a provision of the ordinance. In other words, a class may consist of individuals victimized by violations of the same substantive provision of the ordinance. Thus, the ordinance appears to create a consumer remedy more expansive than even federal Rule 23(b)(3),[75] one of the most liberal class action rules. Most notably, Rule 23(b)(3) requires not only that there be questions of law and fact common to all class members,[76] but that those questions predominate over any issues affecting only individual claimants.[77] The New York ordinance is satisfied, however, if there are questions of law common to persons on whose behalf the Department is suing.

A simple series of illustrations should suffice to show the effect of this difference. First, suppose a jeweler sells rings made of brass to one hundred customers, claiming in each case that the ring is gold. A class action presumably could be brought on behalf of the hundred consumers under Rule 23(b)(3).[78] Similarly, a restitution suit by the Department would seem appropriate under the New York ordinance since the jeweler's conduct constituted a "repeated, multiple or persistent violation" of the provision prohibiting deceptive trade practices. Second, suppose the same jeweler

71 *Id.* §§ 2203d-1.0 to -2.0.

72 *Id.* § 2203d-2.0(a).

73 *Id.* § 2203d-2.0(b).

74 Among other things, these provisions do away with the need to prove individual reliance by consumers on an unfair trade practice. The impact of this change on mass remedy suits is discussed below. See part III D of this Note, *infra*.

75 FED. R. CIV. P. 23(b)(3).

76 *Id.* 23(a)(2).

77 *Id.* 23(b)(3).

78 *See* Note of Advisory Comm., *Proposed Rules of Civil Procedure*, 39 F.R.D. 69, 103 (1966) [hereinafter cited as Note of Advisory Comm.].

sells rings to one hundred successive customers, making a different deceptive statement to each one — he tells one falsely that the ring is gold, he tells a second falsely that it is over a century old, he tells a third falsely that it is worth three times the price he is charging, and so forth. A Rule 23(b)(3) class action would probably not be allowed under these circumstances; although questions of law are common to each case, the facts differ with respect to each.[79] However, once again a "repeated, multiple or persistent violation" of the ordinance's deceptive trade practices provision has occurred. Third, suppose a jeweler sells a necklace to one customer under a false brand name, a brass ring to a second saying that it is gold, a watch to a third one saying that it is self-winding, and so forth. Certainly a class action could not be brought under Rule 23(b)(3) since the various cases have no facts in common.[80] But the New York ordinance appears to allow a Department suit for restitution.

In spite of its broad language, however, the ordinance will probably not in fact create a class much more expansive than that allowed by Rule 23(b)(3). A mass remedy action must observe certain internal limits if it is to avoid collapsing under its own weight. Unless significant issues of both law and fact are common to all class members, the suit may break up into as many actions as there are claimants. Thus, it is unlikely that the Department would bring a mass restitution suit in the third situation posed above, and very doubtful that a court would allow such a suit to be litigated to a conclusion as a group action. The New York ordinance may, therefore, in the end allow no broader a class than Rule 23(b)(3). But the Department of Consumer Affairs must itself exercise discretion in defining the class on whose behalf it is suing. Otherwise, much judicial time may be wasted in separating out individual issues in an attempt to reach a common core of law or fact which is in reality non-existent.

B. *Calculating Total Damages*

Once a class has been defined, the damages owed to it must be calculated. The total damages for which a merchant is liable under the ordinance are calculated by adding together: (1) money re-

79 *Id.*

80 *Cf.* FED. R. CIV. P. 23(a)(2).

ceived by the merchant pursuant to the unlawful contracts,[81] and (2) costs incurred by the city in bringing the mass action.[82] The former sum is eventually restored to the injured consumers; the latter amount goes to the Department of Consumer Affairs.

1. Remedy of Restitution

When the ordinance speaks of restoring to the damaged consumer the money received by the business under the unlawful contracts the language is in terms of restitution. This approach is doubtless taken because the mass remedy provision is tied to the substantive offenses of fraud and unconscionability, for which restitution has always been considered the proper redress.[83] Under the theory of restitution, a contract may be so infected with the tortious conduct of one of the parties that a court will not enforce it, but will invalidate it and require the guilty party to restore the plaintiff to the position he occupied before the contract was made.[84] Thus, when a consumer contract is involved, the merchant guilty of a deceptive or unconscionable trade practice must return any prior payments under the contract to the injured consumer.

Usually, damages given pursuant to restitution must be set off by the value of any benefit actually received by the consumer.[85] The reason lies in the goal of the restitution remedy: to return each party to the position he occupied before the contract was made. However, no such provision for set-off is contained in the New York ordinance. A defeated defendant must return to consumers everything paid by them under the contract, even if he conferred some benefit in return. Therefore, a business violates the law at peril of losing both what it gave and what it received under the contract; an injured consumer, on the other hand, is

81 ". . . an action to compel the defendant or defendants in such action to pay in court all monies, property or other things, or proceeds thereof, received as a result of such violations;" Consumer Protection Law § 2203d-4.0(c).

82 ". . . [an action] to direct the defendant or defendants, upon conviction, pay to the city the costs and disbursements of the action and pay to the city for the use of the commissioner the costs of his investigation leading to the judgment;" Consumer Protection Law § 2203d-4.0(c).

83 *See* RESTATEMENT OF CONTRACTS §§ 476-77, 488 (1932) (misrepresentation); *see also* UNIFORM COMMERCIAL CODE § 2-302 (unconscionability).

84 *See* RESTATEMENT OF RESTITUTION, Introductory Note §§ 150-59, at 595 (1936).

85 *Id.* 594-95.

allowed to keep each of these things. The merchant is left in a position worse than the one he occupied before the contract was made, and the consumer in a better one.

Two possible reasons may explain the ordinance's departure from pure restitution. First, the process of calculating benefits received by consumers and deducting it from their recovery may add somewhat to the administrative burdens of damage distribution. Second, and more important, making the business worse off than before its illegal acts adds a punitive dimension to the remedy. Not only will injured consumers be compensated, but the defendant and other likeminded businesses will be deterred from similar conduct in the future.

2. Payment of Department's Costs

In addition to restoring all money received under the unlawful contracts, the defendant must, upon conviction, "pay to the city the costs and disbursements of the action and pay to the city for the use of the commissioner the costs of his investigation leading to the judgment."[86] Presumably the former reference is to the usual court costs (for example, filing fees) and to expenses such as expert witness fees. This portion of the provision will also include the costs of notifying claimants of the creation of a fund if the Department is successful in its suit. The language concerning investigation costs would seem to include the salaries of the investigatory personnel, but not attorney's fees. The ordinance thus goes most of the way in assuring that the dishonest merchant, rather than the Department or injured consumers, bears the costs of righting the wrong done.[87]

C. *Allocating Damages*

In any mass remedy suit, the danger always exists that the amount recovered from the defendant and the amount claimed by the plaintiff class will not be equal. If the recovery is less than the total claims, then some way must be devised to prorate it among the claimants; if the recovery is greater than the claims, then a method must be found to dispose of the unclaimed sum.

---

86 Consumer Protection Law § 2203d-4.0(c).

87 See part I B, note 24 of this Note, *supra*.

1. Recovery Less Than Claims

Under the New York ordinance the total amount recovered and placed in the fund will probably be less than the sums claimed. In fact, even in the normal situation, when a defendant is able to refund to consumers the full amount paid under the contracts and to repay the city for its litigation expenses, the recovery will still be smaller than the claims. This result occurs because the ordinance permits class members to recover from the fund not only their disbursements under the contract, but also their costs "in making and pursuing their complaints."[88] Because the fund will consist solely of consumers' disbursements under the contract, the addition of claimants' costs will cause the claims to exceed the recovery. These costs might become substantial, depending on the methods adopted by the court for distributing the damages.[89] If formal proof is required, final costs might include attorney's fees. At the very least these costs should include loss of wages from time taken off work.

It is puzzling that the drafters of the ordinance allowed class members to collect costs of this type, while not making the defendant directly liable for them. Perhaps the drafters reasoned that the defendant would be punished sufficiently if deprived of any set-off and made to pay the government's expenses. But in that case they should have let the claimants' costs lie where they fall; taking individual costs directly from the fund effectively forces consumers with lower expenses to subsidize those with higher expenses. A more likely explanation is that the drafters believed that not all class members would actually make claims against the fund. In that case, the costs of claimants who did appear could be paid out of the sums due to those who did not appear.[90] The

88 ". . . [an action] to direct that the amount of money or the property or other things recovered be paid into an account . . . from which shall be paid over to any and all persons who purchased the goods or services during the period of violation such sum as was paid by them in a transaction involving the prohibited acts or practices, *plus any costs incurred by such claimants in making and pursuing their complaints*;" Consumer Protection Law § 2203d-4.0(c) (emphasis added).

89 See part II D 4 of this Note, *infra*.

90 This result may have been inadvertent rather than intentional. The settlement provisions of the ordinance, which seem to allow damages equivalent to those obtainable through litigation, require the defendant to pay the costs of individual claimants directly: "Such assurance may include a stipulation for voluntary payment by the violator of the costs of investigation by the commissioner and may also

recovery will also be less than the total claims if the defendant is unable to return the total sum he received from the injured consumers. This result is most likely to occur when the defendant is a transient business or one that goes into bankruptcy as soon as the mass restitution suit is filed.

Of special importance is the provision of the ordinance which allows the Department to deduct from the recovery due to the class any government costs which the defendant is unable to pay.[91] In other words, the city may be repaid at the expense of class members. The effect is to sacrifice the compensation goals of the ordinance to the need to have the suit finance itself. If class members did not pay the Department's costs when the defendant was insolvent, then the action would have to be financed out of taxes paid by the general public. Apparently the drafters of the ordinance preferred that in such a case those directly benefited by the lawsuit pay the costs of bringing it.

2. Recovery Greater Than Claims

Once the defendant pays the judgment to the Department, the class members have one year in which to make their claims against the fund. After that period, any amount remaining in the fund is turned over to the city to be used by the Department of Consumer Affairs for further enforcement activities.[92] This method of disposing of uncollected damages is analyzed below in comparison to methods used in various class action suits.[93] The point at this juncture is that the Department serves as a convenient and worth-

include a stipulation for the restitution by the violator to consumers, of money, property or other things received from them in connection with a violation of this title, *including money necessarily expended in the course of making and pursuing a complaint to the commissioner.*" Consumer Protection Law § 2203d-5.0 (emphasis added).

91 ". . . or if not recovered from defendants, such costs [incurred by the Department of Consumer Affairs in bringing suit] are to be deducted by the city from the grand recovery before distribution to the consumers;" Consumer Protection Law § 2203d-4.0(c).

92 ". . . [an action] to direct that any money, property, or other things in the account and unclaimed by any persons with such claims within one year from the creation of the account, be paid to the city, to be used by the commissioner for further consumer law enforcement activities." Consumer Protection Law § 2203d-4.0(c).

93 See part III A 3 of this Note, *infra*.

while receptacle for the unclaimed funds: presumably it will use them to benefit consumers in general.

D. *Distributing Damages*

Allocation of the damages to the injured class is only the first step. Any mass remedy statute must also provide procedures for damage distribution to the class members. There are four important aspects: (1) the creation of the account into which the defendant will deposit the gross recovery, (2) the identification of individual class members who may have claims against the account, (3) the notification of those class members of their right to recover, and (4) the processes by which members actually prove that they have a right to recover.

1. Creation of Account

The ordinance is quite specific about setting up the account into which the gross recovery will be deposited.[94] The procedure followed is that delineated in a New York state law entitled "Payment of Money or Securities into Court."[95] Under this system the defendant, when the final judgment is filed against him, pays the amount of the gross recovery into court and is thereby discharged from all future liability on the judgment.[96] The court then delivers the fund to the Finance Administrator of the City of New York,[97] in whom title in the fund is legally vested.[98] The court is to inform the Finance Administrator upon delivery whether or not to invest the funds.[99] If not invested, the money must be placed in a depository designated by the New York State Comptroller.[100] Investment is discouraged where some of the funds will be needed from time to time, or where the entire amount is likely

94 ". . . [an action] to direct that the amount of money or the property or other things recovered be paid into an account established pursuant to section two thousand six hundred one of the civil practice law and rules . . . ." Consumer Protection Law § 2203d-4.0(c).

95 N.Y. CIV. PRAC. LAW § 2601 (McKinney Supp. 1971).

96 *Id.* § 2601(a).

97 *Id.* § 2601(b).

98 *Id.* § 2601(c).

99 *Id.* § 2601(d).

100 *Id.* § 2601, Comment; N.Y. STATE FIN. LAW § 182 (McKinney Supp. 1971).

to be withdrawn after a short period.[101] Both considerations apply to funds deposited pursuant to the New York consumer ordinance: small amounts will be withdrawn as individual class members receive their claims and the remainder will escheat to the city one year after the establishment of the account. Thus, the money recovered under the Consumer Protection Law will be placed in an appropriate depository under control of the Finance Administrator of the City of New York, who will pay out portions to claimants as the court directs.

2. Identification of Claimants

Under the New York ordinance individual class members need be identified only after the judgment has been rendered and a recovery obtained. This procedure is in marked contrast to most class action rules, most notably federal Rule 23(b)(3),[102] where individual members must be identified as soon as the class is defined at the beginning of the lawsuit.[103] The reason for this difference is that under Rule 23(b)(3), class members must be notified about the action at its commencement. This procedure allows affected persons to withdraw from the class and thereby avoid being bound by any ensuing judgment.[104] Notice to class members is not required at this point under the New York ordinance because the judgment will not have a res judicata effect on class members.[105]

As a result, although the class on whose behalf the Department is suing is defined at the outset of the suit,[106] its individual members are not identified until after the judgment has been entered.[107] In this respect the New York ordinance is similar to the

101 *See* N.Y. Civ. Prac. Law § 2601, Comment (McKinney Supp. 1971).

102 Fed. R. Civ. P. 23(b)(3).

103 *Cf. id.* 23(c)(2).

104 *Id.* 23(c)(3).

105 See part II E of this Note, *infra.*

106 See part II A of this Note, *supra.*

107 Of course, as a practical matter some class members will be identified and notified under the New York ordinance prior to final judgment. Most likely, the Department will first be galvanized into action by the complaints of several consumers. And it will no doubt need the services of some class members as witnesses in proving its case.

California class action rule[108] as interpreted by California courts.[109] The New York ordinance and the California rule may be open to criticism on the ground that the precise contours of the class will not be known until after judgment. But by putting off identification of class members, each provision relieves the court of the necessity of delineating those contours before the processes of discovery and litigation throw light on the identity of the class.

3. Notification of Claimants

Once identified, individual claimants must be notified under the New York ordinance. The ordinance requires that the court establish minimum means of notifying class members of the successful litigation and the creation of the account.[110] This notice could conceivably be provided either on an ad hoc basis or through the promulgation of general court rules. So far the courts have declined to propound general guidelines on the subject of notification, preferring to develop some expertise in this area through a case-by-case approach.[111] No doubt a wise court would draw on the experience of the federal courts in sending out notice under Rule 23(c)(2).[112] Notice under that rule may range anywhere from the equivalent of service of process to the announcement in a newspaper of the right to recover.[113] Notice given by federal courts to a Rule 23(b)(3) class, however, must satisfy certain minimum standards of adequacy under the due process clause of

108 CAL. CIV. PRO. CODE § 382 (West 1954).

109 *See* Daar v. Yellow Cab Co., 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967); Homburger, *State Class Actions and the Federal Rule*, 71 COLUM. L. REV. 609, 625-26 (1971).

110 "[The court] shall also establish by order the minimum means by which the commissioner shall notify potential claimants of the creation of the account." Consumer Protection Law § 2203d-4.0(c).

111 Telephone interview with Bruce Ratner, Consumer Advocate, New York City Department of Consumer Affairs, November 24, 1971.

112 FED. R. CIV. P. 23(c)(2).

See Pomerantz, *The "Notice to the Class" under Amended Rule 23*, 1968 PRACTICING L. INST. 33; Ward & Elliott, *The Contents and Mechanics of Rule 23 Notice*, 10 B.C. IND. & COM. L. REV. 557 (1969); Note, *Constitutional and Statutory Requirements of Notice under Rule 23(c)(2)*, 10 B.C. IND. & COM. L. REV. 571 (1969); Note, *Class Actions under Rule 23(b)(3)—The Notice Requirement*, 29 MD. L. REV. 139 (1969); Comment, *Adequate Representation, Notice and the New Class Action Rule: Effectuating Remedies Provided by the Securities Laws*, 116 U. PA. L. REV. 889 (1969).

113 *See generally*, Note, *Class Actions under Federal Rule 23(b)(3)—The Notice Requirement*, 29 MD. L. REV. 139 (1969).

the Constitution.[114] The reason is that class members will be bound by the ultimate judgment and so must be given an opportunity either to withdraw or to ensure that they are receiving adequate representation.[115] Because class members are not bound under the New York ordinance,[116] no minimum notice requirements must be satisfied under the Constitution. As a result, the Department is freer than a federal court under Rule 23(b)(3) to adopt a more relaxed means of notice where the recoveries of individual claimants would be small and the costs of complete notice high.

4. Procedures of Proof

After the claimants have been identified and given notice of the fund, each must establish his right to receive a portion of it. The New York ordinance instructs the Commissioner of the Department of Consumer Affairs to establish certain procedures of proof, which are subject to court approval.[117] Thus far the Department has approached this problem on an ad hoc basis.[118] Usually the Department attaches great importance to the responses made by class members to the initial letters of notification.[119] These letters not only inform claimants of their membership in the class, but also question each about the particular fact situation surrounding his cause of action.[120] Claimants are requested to check boxes that describe most accurately the circumstances attending the signing of the contract. After completing the questionnaire, the claimant need only sign it in the presence of a witness and mail it to the Department. A given amount of damages is attached to each unlawful act described in the questionnaire. The return of the questionnaire creates a presumption in favor of a claimant's receiving

---

114 Note of Advisory Comm. 106-07.

115 *Id.*

116 See part II E of this Note, *infra.*

117 "Consumers making claims against an account established pursuant to this subsection shall prove their claims to the commissioner in a manner and subject to procedures established by the commissioner for that purpose. The procedures established in each case for proving claims shall not be employed until approved by the court. . . ." Consumer Protection Law § 2203d-4.0(c).

118 Telephone interview with Bruce Ratner, Consumer Advocate, New York City Department of Consumer Affairs, November 24, 1971.

119 *Id.*

120 *Id.*

the damages allotted to the unlawful acts that are checked.[121] One may criticize this system as far too suggestive, indicating to a class member what damages he should request. However, unless the notice is easily answered and the claimant's response channeled, the Department risks receiving either no reply at all or a reply confused by irrelevant information and unexplained omissions.[122]

The methods of proof before the Department itself are informal. The class member, aided by the presumption created by his earlier reply, need only convince a designated official that he is entitled to recover.[123] Thus, a consumer's costs in proving his claim are likely to be minimal; certainly they should not include attorney's fees.

When damages must be prorated, an additional procedure is required: a date must be set after the creation of the account before which no claims can be paid out and by which all claims must have been made. After that date the Department may pay out all claims (if the total claims are less than the account) or prorate claims (if the account is less than the total claims). But before then it can pay out nothing, since it does not know whether the account will in fact be greater than the claims made.[124] Because no cases requiring prorating have yet arisen, this problem remains to be solved in the future. The Department should set a date close to the end of the one year period to insure the presentation of as many claims as possible before prorating begins.

E. *Res Judicata Effect of Judgment*

The res judicata effect of judgments is covered in the New York ordinance by one sentence, more notable for what it fails to say than for what it actually says.[125] Class members are precluded, the

121 *Id.*

122 *Id.*

123 *Id.*

124 Although the total paid by class members to the defendant under the unlawful contracts is known, the costs incurred by claimants in making their individual claims cannot be ascertained until those claims are actually presented. Since the total claim of the class is the sum of these two amounts, it will not be known until the final individual claims have been made.

125 "Restitution pursuant to a judgment in an action under this subdivision shall bar, pro tanto, the recovery of any damages in any other action against the same defendant or defendants on account of the same acts or practices which were the basis for such judgment, up to the time of the judgment, by any person to whom such restitution is made." Consumer Protection Law § 2203d-4.0(c).

Compare this section with the settlement provisions of the ordinance, which give

ordinance states, from bringing future lawsuits under claims adjudicated in the Department action to the extent that damages are actually recovered in the first suit. If any member received less than his total claim, then he can still sue the defendant for the difference.

The implications of this provision can be examined best in the context of the possible outcomes of a Department suit. First, assume that the Department wins its mass restitution action. After being duly notified, a class member may make his claim against the fund. If he recovers his full claim, then he is foreclosed from future suits by the express terms of the ordinance.[126] However, to the extent that his recovery is less than his claim, the judgment has no res judicata effect on him; he may sue for the unrecovered amount in a new action. If the class member failed to obtain a full recovery because the fund was insufficient to meet all of the claims against it and hence had to be prorated, then this result seems fair and equitable. However, if the class member failed to recover his full claim because he could not prove injury to the administrator of the account, then the argument for res judicata becomes stronger. The defendant should not be subjected to further suits by a consumer who has had an opportunity to assert his claim. The cogency of this argument depends upon the nature of the proceedings before the administrator of the account. The more those proceedings resemble the safeguards of a small claims court (whose judgments are res judicata), the stronger the argument is for giving the judgments binding effect. Because the Department has so far opted for informal procedures of proof,[127] the argument in favor of res judicata is somewhat weakened.

The Department might win its mass restitution action, but a class member fail to claim his recovery either because he never received notice of the fund or because he was too lazy to assert his rights. In this case, the member's portion of the recovery would escheat to the city after one year,[128] assuming that it was not used to make up deficiencies in the claims of others. In any event, the class

---

a settlement res judicata effect if a claimant accepts *any* damages pursuant to a settlement. Part II F 3 of this Note, *infra*.

126 *Id.*

127 See part II D 4 of this Note, *supra*.

128 See part II C 2, note 92 of this Note, *supra*.

member would not be foreclosed from making a later claim against the defendant. If the consumer did initiate another suit on his own, the defendant would be confronted with the specter of having to pay damages a second time for the same offense. Possible objections to this system of double recovery are suggested below.[129] Certainly the potential problems could be avoided merely by giving the judgment res judicata effect regardless of whether the claimant actually appeared. This alternative seems sound if the reason for the claimant's non-appearance is his own sloth. However, if the claimant fails to appear because he did not receive notice of the setting up of the fund, then binding him by the judgment may be unconstitutional.[130] At the very least, the due process clause of the fourteenth amendment would require an adequate system of notice such as that prescribed in Rule 23(c)(2).[131] Thus, a prerequisite for abolishing the double recovery system implicit in the New York ordinance would be establishing a system of notice that meets constitutional requirements.

If the Department loses its mass restitution suit, the ordinance implies that the judgment would not bar future actions by individual class members.[132] The merits of the lack of res judicata in this situation are discussed below by way of comparison with class actions.[133] Once again, an adequate system of notice would be required by the Constitution if the judgment were to have a binding effect on individual consumers.[134] However, if the judgment is to have res judicata effect, the notice has to be given early in the suit so that individual class members can insure that their interests are being adequately protected by the class representatives.[135]

In short, then, the lack of res judicata in the New York ordi-

129 See part IV C 1 of this Note, *infra.*
130 *See* note 112 *supra.*
131 FED. R. CIV. P. 23(c)(2).
132 *See* note 125 *supra.*
133 See part IV C 2 of this Note, *infra.*
134 See note 112 *supra.*
135 *Cf.* Hansberry v. Lee, 311 U.S. 32 (1940).
The prerequisite of adequacy of representation might be met under the New York ordinance by the mere fact that the Consumer Advocate, who is presumably a competent attorney, was representing the class. See part III A 2 b of this Note, *infra.* In cases brought under the New York ordinance, therefore, there might be a presumption of adequacy of representation. However, it is questionable whether this presumption could completely eliminate the need for some kind of early notice.

nance can be criticized on two grounds: it allows a double recovery from a defendant who is defeated in succession by the Department and by a consumer suing individually; and it gives consumers who fail to recover as class members an unwarranted second opportunity to prove their claims. One might attempt to answer these criticisms by noting that as a practical matter the issue of res judicata is unlikely to arise: the judgment in a Department mass restitution suit will in effect serve as a conclusive determination of all issues. That is, a class member will never bring a later suit on his own against the defendant to collect whatever he failed to recover under the Department suit. By hypothesis the consumers on behalf of whom the Department is suing have claims that are too small to finance separate lawsuits.[136] Moreover, those consumers could not combine in a later class action to obtain their full recoveries because of New York's restricted class action rule.[137]

But this argument is unconvincing for several reasons. First, New York may eventually adopt a more liberal class action rule, either by judicial interpretation[138] or statutory enactment,[139] which allows consumer class actions. In that case, subsequent class actions by consumers dissatisfied with the results of the Department suit would become a distinct possibility. Second, other states with less restrictive class action rules might consider adopting the Department suit as an alternative or supplement to consumer class actions. Those states should be aware of the res judicata difficulties inherent in the New York ordinance. Finally, since the ordinance sets no maximum dollar limit to a claim which can be represented in a Department suit, some consumers may have a sufficient amount in controversy to finance further private lawsuits against the same defendant.

---

136 See part I A of this Note, *supra*.

137 See part I C of this Note, *supra*.

138 Class actions in California are governed by virtually the same statutory language as class actions in New York. *Compare* CAL. CIV. PRO. CODE § 382 (West 1954) *with* N.Y. CIV. PRAC. LAW § 1005 (McKinney 1963). But California courts have interpreted their statute to allow consumer class actions. Vasquez v. Superior Court, 4 Cal. 3d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971); Daar v. Yellow Cab Co., 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967). It is conceivable, though not likely, that the New York courts might reverse themselves and adopt the California approach in the future.

139 States with more liberal class action statutes than New York's are listed below. See notes 193-94, *infra*.

F. *Miscellaneous Matters*

1. Statute of Limitations

Various additional matters considered by the New York ordinance include the statute of limitations, notice to the defendant, and prerequisites for settlement.[140] The statute of limitations for a Department suit is five years, the period commencing when the disputed transaction accrued.[141] The usual statute of limitations for individual fraud actions in New York is either six years from the time the cause of action occurred[142] or two years from the time the right of action was discovered or should have been discovered;[143] for unconscionability, the period is six years from the accrual of the cause of action.[144] The New York ordinance, therefore, does not extend the statutory period for mass remedy suits beyond those presently available to individual plaintiffs. Certainly a class member who eventually obtains restitution under the ordinance will have had the advantage of the Department's filing for purposes of the statute of limitations. The difficult question is whether the Department's filing tolls the statute with respect to a claim by an individual class member who fails to receive his full claim in the Department suit. Justice requires that such a member have the advantage of the Department's filing, because his failure to institute an individual action may have been the result of his reliance on the probability of recovery in the mass suit.[145] The

140 A further subsection of the New York ordinance allows the Department to obtain an injunction against future conduct that is the subject of the mass remedy suit. Consumer Protection Law § 2203d-4.0(d). This relief in itself is not particularly remarkable. The interesting point, however, is the reversal under the ordinance of the roles of the injunction and the mass remedy action. Traditionally, the mass restitution suit has been ancillary to the injunctive suit, seemingly no more than an afterthought. See text accompanying notes 56-58, *supra*. But under the New York ordinance, the injunctive suit follows on the heels of the mass restitution action.

141 "Restitution under this subsection shall not apply to transactions entered into more than five years prior to commencement of an action by the commissioner." Consumer Protection Law § 2203d-4.0(c).

142 N.Y. Civ. Prac. Law § 213(9) (McKinney Supp. 1971).

143 *Id.* § 203(f).

144 *Id.* § 213(1) (McKinney 1963).

145 Under the 1938 version of federal Rule 23, which like the New York ordinance gave potential claimants the option of entering the class after a favorable judgment had been rendered ("one-way intervention"), filing by the party representative tolled the statute for all persons who eventually joined the class. York v. Guaranty Trust Co., 143 F.2d 503, 529 (2d Cir. 1944), *rev'd on other grounds*, 326

ordinance also fails to specify whether a class member who could have made a claim against the fund but did not receives the benefit of the Department's filing for purposes of the statute of limitations. Common sense dictates a negative answer. A person who has no intention of making a claim against the fund (either because he is unaware of the fund's existence or because he does not care) will probably not delay instituting an independent suit in reliance on the Department's filing tolling the statute of limitations.

2. Notice to Defendant

In order for a prospective defendant to justify his conduct the ordinance requires the Department to give him written notice of the imminence of the action and an opportunity to explain within five days why the alleged violations did not occur.[146] No doubt this provision was included in the ordinance as a concession to those fearing that innocent businesses might be suddenly subjected to the adverse publicity and inconvenience of a mass remedy lawsuit. This scenario, however, has a decidedly false ring to it. That a business will receive its first intimations of a lawsuit from this formal notice seems improbable. Surely prior Department investigations will alert any business which is a prime candidate for litigation. Even less probable is the chance that the business will be able to convince the Department just prior to the filing of the complaint that the charges are totally false. The Department will probably eliminate this possibility well before drawing up its complaint. The requirement of notice to the defendant before filing suit, then, will as a practical matter place no heavy burden on the Department.

3. Procedure for Settlements

The ordinance also delineates a procedure which the Department must follow in making settlements with a defendant.[147]

U.S. 99 (1945); *see* Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 712 (1941); Keeffe, Levy & Donovan, *Lee Defeats Ben Hur*, 33 CORNELL L.Q. 327, 339-42 (1948).

146 "Before instituting an action under this subsection, the commissioner shall give the prospective defendant written notice of the possible action, and an opportunity to demonstrate in writing within five days, that no repeated, multiple, or persistent violations have occurred." Consumer Protection Law § 2203d-4.0(c).

147 Consumer Protection Law § 2203d-5.0.

Basically, the settlement provision allows stipulations for the same kinds of damages that the Department could recover through litigation.[148] By requiring court approval both of settlements affecting them and of subsequent notification procedures, this section gives added protection to class members who have not yet been notified of the Department's suit.[149] Finally, a consumer is barred from further suits on his claim if he accepts *any* damages pursuant to a settlement.[150] This approach is in marked contrast to the provision of the ordinance giving res judicata effect to a litigated judgment only to the extent that class members have actually collected on their claims.[151] This distinction may reflect a desire of the drafters to encourage defendants to settle with the Department.

III. Advantages of the Ordinance over Consumer Class Actions

A. *Obtains Benefits of Government as Plaintiff*

The most obvious difference between the New York ordinance and consumer class actions is the former's use of the Department of Consumer Affairs as plaintiff. By making the government the class representative, the ordinance gains distinct advantages over the consumer class action: it utilizes governmental financial and professional resources, and provides a place for any uncollected recovery.

1. Government's Financial Resources

a. *Government Advances Initial Costs.* — A problem inherent in any class action is finding someone to finance the initial costs. Attorneys need advances, filing fees must be paid, litigation ex-

148 One important difference is that in the case of a settlement, the defendant must clearly pay the costs of the class members in making and pursuing their claims. See note 90, *supra*.

149 "If such stipulation applies to consumers who have been affected by the violator's practices but have not yet complained to the commissioner, the assurance must be approved by the court, which shall direct the minimum means by which potential claimants shall be notified of the stipulation." Consumer Protection Law § 2203d-5.0.

150 "A consumer need not accept restitution pursuant to such a stipulation; his acceptance shall bar recovery of any other damages in any action by him against the defendant or defendants on account of the same acts or practices." *Id.*

151 *See* note 125, *supra*.

penses are incurred, and disbursements must be made to provide notice to class members. The problem is greatest in a suit like the typical consumer class action where the party plaintiff cannot bear the financial costs of suing. In that case someone else must be found to provide the initial capital. Funds from other class members and the attorneys representing the class may not be available, however, unless there is a substantial likelihood of success after litigation on the merits.

Under the New York ordinance the initial costs of an investigation are to be paid out of the Department of Consumer Affairs' budget. Whereas a class action claim would receive initial funding according to its large recovery potential, a restitution suit under the ordinance will be financed in its early stages as part of the normal Department practice of investigating consumer complaints. As a result, marginal claims that may ultimately prove meritorious are more likely to be asserted under the New York ordinance than in a consumer class action. Thus, the ordinance may provide assistance even to consumers who are not prevented from bringing class actions.

b. *Government Bears Costs in Event of Defeat.* — Closely related to the problem of initial costs is that of total costs once the action has been litigated to a conclusion. At the very least there will be court costs, litigation expenses, and the class' attorneys' fees. There may even be liability for the attorney's fees of the defendant.[152] Unless either the party plaintiff or his counsel is willing to subsidize the class, these costs must be prorated among class members. The possibility that class members may ultimately be liable for the expenses of the lawsuit may deter injured consumers from joining the class in the first instance. Under the New York ordinance, the government bears the financial risk of losing the lawsuit. Class members are not identified for formal purposes until after a favorable decision on the merits. Hence the class' position cannot be weakened by the non-cooperation of members who are afraid of being held for costs.

Even if a plaintiff class wins a class action, the costs may be greater than the recovery if the class is small, individual recoveries

152 *See* Smith, *Are Class Actions for Consumers a Fraud on the Consumer?* 26 BUS. LAW. 1053, 1067-68 (1971).

are minuscule, or procedural complications require a significant amount of attorney's time. If this result occurs frequently, it will eventually discourage consumer class actions. Arguably, this is beneficial, because it prevents suits from being brought that are unlikely to result in any compensation to class members. This argument, however, disregards the second goal of mass remedy actions: deterrence. Future consumer frauds will be prevented if a governmental body pays the difference between the costs and the recovery of a mass remedy suit, as does the Department under the New York ordinance. This approach is similar to that followed in the criminal law, where the government expenditure is justified not in terms of immediate financial gain, but rather in terms of punishment and prevention.

c. *Government Bears Attorney's Fees.* — Another perennial problem with class actions is setting the fee of the class' attorney if the class is victorious. Two methods are used, each of which may prove unsatisfactory. The first method is to allow counsel only "reasonable" attorney's fees.[153] Although this minimizes the amount that counsel receives from the total recovery, it serves as a disincentive to attorneys attracted to class actions by the potentially high recovery. The second alternative guarantees counsel a fixed percentage of the recovery. However, if this approach is used, the consumers in the class will receive a correspondingly smaller amount in damages.[154] Thus any award of attorney's fees in a class action must consider two factors. Incentive to counsel must be balanced against compensation to consumers.

The New York ordinance solves this dilemma by having the class represented by a government official on a fixed salary. The Consumer Advocate, the official within the Department who conducts mass restitution cases, presumably will be spurred to his best efforts by the necessity of guarding his reputation as a full-time consumer lawyer, rather than by the possibility of a lucrative recovery. Objection may be made to the fact that the Advocate's salary and hence the attorney's fees in any suit are borne by the city's taxpayers rather than by the class members, who are bene-

153 *Cf.* Kegan, *Consumer Class Suits—Righting the Wrongs to Consumers*, 26 FOOD DRUG COSM. L. J. 130, 138 (1971).

154 *See* Travers & Landers, *The Consumer Class Action*, 18 KAN. L. REV. 812, 833 (1970) [hereinafter cited as Travers & Landers].

fited. But again, if deterrence as well as compensation is a goal of the consumer mass remedy, then the costs should be shared by society just as are prosecutors' fees in criminal cases.

2. Government's Professional Resources

a. *No Objections of Barratry, Maintenance, and Champerty.* — Barratry,[155] maintenance,[156] and champerty[157] are old common law offenses relating to the stirring up of litigation and the trafficking in lawsuits. Commentators[158] and judges[159] have been sensitive to the dangers of such offenses in connection with class action suits. An ambitious attorney might, for example, use the notice provisions of class action rules to contact consumers who were previously indifferent to their injury (possibly because it was relatively slight in financial terms), persuade them to join the class, and hence reap a portion of their recovery. This fear was reflected in the subsections of federal Rule 23[160] which prescribe court supervision of solicitation once a class has been defined.[161]

Any mass remedy action under the New York ordinance will be brought by the Consumer Advocate. Because the Consumer Advocate is a government official with a fixed salary, he will gain no personal financial advantage from stirring up quarrels or inciting consumers to initiate proceedings. Furthermore, because the Department is unable to handle all consumer complaints made to it,[162] it is unlikely to incite complaints and stir up marginal claims.

---

155 Barratry — "The offense of frequently exciting and stirring up quarrels and suits, either at law or otherwise." BLACK'S LAW DICTIONARY 190 (4th ed. rev. 1968).

156 Maintenance — "An unauthorized and officious interference in a suit in which the offender has no interest, to assist one of the parties to it, against the other, with money or advice to prosecute or defend the action." *Id.* 1106.

157 Champerty — "A bargain by a stranger with a party to a suit, by which such third person undertakes to carry on the litigation at his own cost and risk, in consideration of receiving, if successful, a part of the proceeds or subject sought to be recovered." *Id.* 292.

158 *E.g.*, Starrs, *The Consumer Class Action: Considerations of Equity and Procedure, Part II: Considerations of Procedure,* 49 B.U.L. REV. 407, 409 (1969) [hereinafter cited as Starrs]; Ward & Elliott, *The Contents and Mechanics of Rule 23 Notice,* 10 B.C. IND. & COM. L. REV. 557, 561-64 (1969).

159 *E.g.*, Cherner v. Transitron Electronic Corp., 201 F. Supp. 934, 936 (D. Mass. 1962).

160 FED. R. CIV. P. 23(c)(2), (d)(2).

161 *See* Note of Advisory Comm. 107.

162 *Hearings on H.R. 14931,* at 183-85 (statement of Philip G. Schrag, Consumer Advocate, New York City Department of Consumer Affairs).

One might argue that the Consumer Advocate has some financial incentive to sue on behalf of as many consumers as possible because under the ordinance any unclaimed sums revert to the Department after one year.[163] Part of the danger here lies in potential claimants not receiving effective notice of the recovery. The ordinance directs the court to insure that the notice given satisfies certain minimum requirements.[164] Hence the Department will be unable to increase its revenue by giving incomplete notice. However, if some class members cannot be contacted by even the best conceivable notice, the Department may be left with unclaimed sums in the fund after the passage of a year.[165] Whether the prospect of receiving these sums will encourage the Department to stir up litigation depends largely on their size. At this point not enough suits have been brought to make a definitive judgment in this regard.[166]

b. *Experienced Attorney as Representative.* — Mass remedy suits require special skills on the part of counsel. Even the simplest class action or government restitution suit is likely to present such special problems as defining the class benefited, separating out individual issues, and sending notice to claimants. Furthermore, because class actions may involve large attorney's fees, they often attract lawyers eager to speculate in lawsuits. In addition, most class members will not as a practical matter assert their right to participate in the selection of the class' attorney. Courts may therefore desire to scrutinize the qualifications of counsel representing the class. Thus, the drafters of present federal Rule 23 were careful to indicate that competence of counsel was a factor in deciding whether a class action could be maintained.[167] If consumer class actions become established over a long period as the normal remedy for consumer fraud, a private consumer bar may develop with some expertise in the areas of substantive consumer law and class

163 See part II C 2 of this Note, *supra*.

164 See part II D 3 of this Note, *supra*.

165 This would occur, for example, in a case where the class consisted of all of the passengers of a taxi company which had charged excessive rates over a period of time. *See* Daar v. Yellow Cab Co., 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967).

166 Telephone interview with Bruce Ratner, Consumer Advocate, New York City Department of Consumer Affairs, November 24, 1971.

167 *Cf.* FED. R. CIV. P. 23(a)(4); Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562 (2d Cir. 1968).

actions. At this date, however, it is too early to predict whether this is in fact happening.

The New York ordinance solves the problem of competence of counsel by insuring that the mass remedy suit will be under the control of the Consumer Advocate. As a lawyer handling consumer cases only and as one charged with the supervision of Department mass restitution actions, the Consumer Advocate will, along with his staff, presumably attain the needed expertise in short order. Courts will therefore be relieved of the necessity of making what may be a subjective and impressionistic judgment on the qualifications of the class' counsel. The New York ordinance thus ensures a lawyer who will probably be better qualified than many counsel conducting class actions. True, if class members become dissatisfied with the management of the suit, they cannot summarily replace the Consumer Advocate as they could a private attorney.[168] However, they will have in the Department an ongoing institution to handle any complaints about the conduct of the litigation. And if the Department becomes unresponsive, it is subject to the same formal controls as any other government agency.

c. *Less Danger of Disadvantageous Settlement.* — A serious criticism in class action litigation is that an attorney will bring a "strike suit" against a business which is afraid of unfavorable publicity, obtain a quick settlement for a sum smaller than actual damages to class members, and then take a sizeable portion as attorney's fees, leaving a small remainder to class members.[169] Federal Rule 23 recognizes this danger in the subsections requiring court approval of any dismissal or compromise as well as notice to class members who may object.[170]

The New York ordinance avoids these problems for obvious

168. It has been suggested that class members be allowed to intervene with their private attorneys in Department suits. In this way they could assure themselves that the Consumer Advocate was properly managing the litigation. *See Hearings on H.R. 14931*, at 165-66 (statement of Philip G. Schrag).

169 *See* Starrs 409; *Hearings on S. 3201 Before the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 333-34, 338 (1970) (statement of J. Edward Day, Special Counsel, Consumer Products Division, Electronics Industry Association).

The consumer class action has even been called an "invitation to legal blackmail." *Hearings on S. 3201, supra* at 342 (statement of Thomas Nichol, Jr., General Counsel, Gas Appliance Manufacturers Association, quoting Caspar Weinberger, Chairman, Federal Trade Commission).

170 FED. R. CIV. P. 23(e).

reasons. The Consumer Advocate stands to gain nothing personally by a settlement. Moreover, he is a public figure subject to disciplinary action if he is remiss in his duty toward the class. In addition, the ordinance requires court approval of the settlement and notice to the consumers affected.[171] In this way, the New York law makes certain that consumers are not harmed by a settlement.

3. Proper Recipient of Uncollected Recovery

A problem endemic to any mass remedy suit is disposing of unclaimed money that may remain in the fund due to the failure of some class members to appear. Courts confronted with this dilemma have responded with a variety of ad hoc solutions, some of them quite original. Occasionally the money is returned to the defendant as a windfall.[172] Sometimes it is allocated among the class members who actually do appear.[173] It may escheat to the state after a given period of time.[174] The most interesting dispositions occur where the court uses the money to confer a future benefit on the general group of which the class is a part. For example, when a carrier is found to have charged excessive rates to past customers whose identities are unknown, the undistributed recovery has been used to lessen fares in the future[175] or to improve the carrier's facilities for the public.[176] The New York ordinance provides for certainty in dealing with these funds. Any unrecovered money remaining in the account one year after its creation is paid to the City, to be used by the Department of Consumer Affairs for further consumer law enforcement activities.[177] The Department which managed the mass remedy suit is a fitting recipient of any unclaimed funds. Because the defendant is deprived of all gains from the unlawful transaction, the ordinance attains its deterrent goals. Although the compensation objectives cannot be strictly satisfied, consumers in general will benefit from

171 See part II F 3 of this Note, *supra*.

172 *E.g.*, Illinois Bell Tel. Co. v. Slattery, 102 F.2d 58, 62 (7th Cir. 1939); *see* Travers & Landers 833-34; Note, *Damages in Class Actions: Determination and Allocation*, 10 B.C. IND. & COM. L. REV. 615, 631-32 (1969).

173 *See* Note, *Damages in Class Actions*, *supra* note 172, at 631.

174 *Id.*

175 Daar v. Yellow Cab Co., 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967).

176 Market St. Ry. Co. v. Railroad Comm., 28 Cal. 2d 363, 171 P.2d 875 (1946).

177 See part II C 2 of this Note, *supra*.

the Department's increased enforcement activities, financed by the unclaimed portion of the recovery.

B. *Overcomes Restrictive Class Action Rules*

Utilization of the Department as plaintiff is not the only advantage of the New York ordinance over consumer class actions. The Consumer Protection Law would have a very dramatic impact in states such as New York, which are unreceptive to consumer class actions. For the first time, consumers in these jurisdictions would have the advantage of a mass remedy suit.[178] New York is not the only state which is hostile to consumer class actions. Of the four class action rules in existence among the states — the common law rule, the Field Code rule, the 1938 federal Rule 23 rule, and the 1966 federal Rule 23 rule — the first two present significant obstacles to consumer class actions.[179]

The common law class action exists in six states,[180] all of which trace their rules back to the same formulation of Joseph Story in

---

178 Persons dissatisfied with the fate of the consumer class action in certain states have adopted two approaches besides that exemplified by the New York ordinance. The first is to press for special consumer class action statutes. MASS. GEN. LAWS ANN. ch. 93A, § 9(2) (Supp. 1971); *see* Rice, *New Private Remedies for Consumers — The Amendment of Chapter 93A,* 54 MASS. L.Q. 307, 312 (1969); CAL. CIV. CODE § 1781 (West Supp. 1971); *see* Reed, *Litigating for the Consumer,* 2 PACIFIC L.J. 1 (1971). The second is to open the federal courts to consumer class actions by allowing the class to aggregate its damages to achieve the jurisdictional amount. *See* text accompanying notes 65-66, *supra*; H.R. 5630, 92d Cong., 1st Sess. (1971) (introduced by Representative Eckhardt); S. 1378, 92d Cong., 1st Sess. (1971) (introduced by Senator Bayh) (companion bill to H.R. 5630); S. 984, 92d Cong., 1st Sess. (1971) (introduced by Senator Magnuson); S. 1222, 92d Cong., 1st Sess. (1971) (introduced by Senator Magnuson on behalf of Nixon Administration); see generally Dixon, *S. 1980 — The Class Action Jurisdiction Act,* 4 NEW ENGLAND L. REV. 67 (1969); Eckhardt, *Consumer Class Actions,* 45 NOTRE DAME LAW. 663 (1970); Newberg, *Federal Consumer Class Action Legislation: Making the System Work,* 9 HARV. J. LEGIS. 217 (1972); Tydings, *The Private Bar — Untapped Reservoir of Consumer Power,* 45 NOTRE DAME LAW. 478 (1970); Tydings *S. 1980 — The Class Action Jurisdiction Act,* 4 NEW ENGLAND L. REV. 82 (1969); Note, *Protective Jurisdiction and Adoption as Alternative Techniques for Conferring Jurisdiction on Federal Courts in Consumer Class Actions,* 69 MICH. L. REV. 710 (1971); Comment, *Consumer Protection — The Class Action Jurisdiction Act,* 44 TULANE L. REV. 580 (1970).

179 *See generally* Starrs.

180 Illinois (Harrison Sheet Steel Co. v. Lyons, 15 Ill. 2d 532, 155 N.E.2d 595 (1959)); Massachusetts (Thorn v. Foy, 328 Mass. 337, 103 N.E.2d 416 (1952)); Mississippi (Floreen v. Saucier, 200 Miss. 428, 27 So. 2d 557 (1946)); New Hampshire (Textile Workers Union v. Textron, Inc., 99 N.H. 385, 111 A.2d 823 (1955)); Tennessee (Jordan v. Jordan, 145 Tenn. 378, 239 S.W. 423 (1922)); Virginia (O'Hara v. Pittston Co., 186 Va. 325, 42 S.E.2d 269 (1947)).

the early nineteenth century.[181] The Story rule has been limited to suits in equity; class actions are allowed only where there is danger of a multiplicity of suits, and, often, where there is also an imminent and continuing wrong.[182] As a result, consumer class actions may not be allowed where an injunction is not sought, or where the damage aspect of the suit overshadows the injunctive aspect. Furthermore, some states have interpreted their common law to allow class actions only where joinder would be compulsory.[183] Few members of a consumer class would succeed in meeting this standard.

The Field Code class action originated, as its name suggests, from the civil procedure code proposed by David Dudley Field in 1848.[184] This approach is currently followed in fourteen states,[185] including New York.[186] The greatest obstacle to consumer class actions under the Field Code rule lies in the language requiring a "common or general interest" in order to maintain a class. These words have been read by many courts to prohibit class actions in cases where the individual causes of action arise out of separate, although identical, fact situations.[187] This result is especially serious from the consumer's point of view, because class members in most consumer class actions will be united in just this way. That some state courts have given the language a more liberal reading[188] has not prevented one commentator from condemning the Field Code rule as an anachronism.[189]

181 J. STORY, COMMENTARIES ON EQUITY PLEADINGS § 97, at 96-97 (2d ed. 1840).

182 *Id.* 231-32.

183 *E.g.*, Coulson v. Harris, 43 Miss. 728 (1871).

184 *Id.* 433-34.

185 ALA. CODE tit. 7, § 128 (1960); ARK. STAT. ANN. § 27-809 (1962); CAL. CIV. PRO. CODE § 382 (West 1954); CONN. GEN. STAT. ANN. § 52-105 (1958); FLA. R. CIV. P. 1.220 (1967); IND. ANN. STAT. § 2-220 (1967); MD. R. CIV. P. 209 (1963); NEB. REV. STAT. § 25-319 (1964); N.M. STAT. ANN. § 21-6-1 (1953); N.Y. CIV. PRAC. LAW § 1005 (McKinney 1963); OKLA. STAT. tit. 12, § 233 (1960); ORE. REV. STAT. § 13.170 (1969); S.C. CODE ANN. § 10-205 (1962); WIS. STAT. ANN. § 260.12 (1957).

186 The restrictive interpretations given the rule by New York courts have been described above. See part I C of this Note, *supra*.

187 Starrs 444-46; *see, e.g.*, Hall v. Coburn Corp., 26 N.Y.2d 396, 259 N.E.2d 720, 311 N.Y.S.2d 281 (1970).

188 *E.g.*, Vasquez v. Superior Court, 4 Cal. 3d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971); Daar v. Yellow Cab Co., 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967).

189 Homburger, *State Class Actions and the Federal Rule*, 71 COLUM. L. REV. 609, 617 (1971).

In contrast to the common law and Field Code rules, the 1938[190] and 1966[191] Rule 23 provisions generally permit consumer class actions.[192] The 1938 rule exists in twenty states,[193] the 1966 version in twelve.[194] The chief difference between the two rules is that members of a consumer class who do nothing are bound by the 1966 version, but not by the 1938 version.[195] In this respect, the ordinance is closer to the 1938 rule since its res judicata effects are similarly limited.[196] Because the 1938 and 1966 rules allow consumer class actions, they (and particularly the 1966 rule) will serve as standards to which the New York ordinance will be compared in the remainder of this Note.

C. *Nullifies Need of Notice before Suit*

The Consumer Protection Law is superior to class action provisions like current federal Rule 23(b)(3) in part because it does away with the requirement of notice before the lawsuit. Under Rule 23(b)(3) a party plaintiff must send notice to members of a consumer class shortly after the commencement of the lawsuit.[197] The reason is that class members will ultimately be bound by any judgment handed down,[198] and thus have a constitutional right to participate in the conduct of the suit.[199] Specifically, notice is re-

190 FED. R. CIV. P. 23(a)(3) (1938) (repealed in 1966).

191 FED. R. CIV. P. 23(b)(3).

192 *See* Starrs 463-96.

193 ALA. EQUITY R. 31 (1960); ALASKA R. CIV. P. 23 (1963); DEL. CHANC. R. 23 (1971); GA. CODE ANN. § 81A-123 (1967); HAWAII R. CIV. P. 23 (1954); IDAHO R. CIV. P. 23 (1958); IOWA R. CIV. P. 42 (1951); LA. CODE CIV. PRO. ANN. art. 591-92 (West 1960); ME. R. CIV. P. 23 (1965); MICH. GEN. CT. R. 208 (1969); MO. ANN. STAT. § 507.070 (1952); NEV. R. CIV. P. 23 (1967); N.J. R. CIV. P. 4:36 (1968); N.M. STAT. ANN. § 21-1-1(23) (1970); N.C. GEN. STAT. § 1A-1, R. 23 (Supp. 1969); PA. R. CIV. P. 2230 (1967); R.I. R. CIV. P. 23 (1970); TEX. R. CIV. P. 42 (1967); W. VA. R. CIV. P. 23 (1959); WYO. R. CIV. P. 23 (1966).

Alabama and New Mexico have both Field Code and 1938 Rule 23 class action rules.

194 ARIZ. R. CIV. P. 23 (Supp. 1971); COLO. R. CIV. P. 23 (1970); KAN. STAT. ANN. § 60-223 (Supp. 1971); KY. R. CIV. P. 23 (Supp. 1968); MINN. R. CIV. P. 23 (1968); MONT. R. CIV. P. 23 (Supp. 1971); N.D. R. CIV. P. 23 (Supp. 1971); OHIO R. CIV. P. 23 (Page 1971); S.D. COMPLIED LAWS ANN. § 15-6-23 (Supp. 1971); UTAH R. CIV. P. 23 (Supp. 1971); VT. R. CIV. P. 23 (1971); WASH. R. CIV. P. 23 (1970).

195 *See* Note of Advisory Comm. 98, 105-06.

196 See part IV C of this Note, *infra*.

197 FED. R. CIV. P. 23(c)(2).

198 *Id.* 23(c)(3).

199 *Cf.* Hansberry v. Lee, 311 U.S. 32 (1940).

quired to insure that there are no divisions within the class, that the class' attorney is competent, and that any dissatisfied member can withdraw from the class before the judgment becomes binding.[200] Commentators have criticized the notice requirements of Rule 23 as being too strict in cases where (as in most consumer class actions) the class is large and not easily identified, and the individual recoveries are small.[201] In situations like those, individual class members may have little interest in pursuing legal redress on their own. The members therefore are unlikely to withdraw after receiving the requisite notification. The expense of identifying and contacting each class member may in the end be greater than, or at least a significant burden on, the total recovery. If that appears likely at the commencement of the suit, then the party plaintiff's attorney will no doubt immediately discontinue the lawsuit. The notice mandated by the Constitution and required under Rule 23 is thus not only unnecessary from a practical point of view in most consumer class actions, but also may ultimately prevent the suit from being brought.

The New York ordinance avoids these problems by making the defendant independently liable for the costs incurred by the Department in notifying the claimants.[202] To be sure, in those cases where the defendant cannot pay the Department's expenses, the costs of notification will be subtracted from the claimants' recovery.[203] But even then the costs will seldom swallow up the entire recovery. The reason is that the judgment in a Department suit is res judicata only to the extent that a class member actually recovers his damages.[204] Because a claimant will not be bound by a judgment against the Department, he need not be sent notice at the commencement of the lawsuit in order to assure adequacy of representation. Thus, the lawsuit may proceed unhampered by what might be prohibitive costs of sending initial notices. If the Department is eventually successful in its action against the defendant, it must notify claimants of the recovery and creation of

200 *See* Note of Advisory Comm. 104-05, 106-07.

201 *See, e.g.*, Homburger, *State Class Actions and the Federal Rule*, 71 COLUM. L. REV. 609, 642-43 (1971); Ward & Elliott, *The Contents and Mechanics of Rule 23 Notice*, 10 B.C. IND. & COM. L. REV. 557, 569 (1969).

202 See part II B 2 of this Note, *supra*.

203 See part II C 1 of this Note, *supra*.

204 See part II E of this Note, *supra*.

the account.[205] However, notice at this point will not be subject to due process requirements since class members who never learn of the account can still recover their claims in independent lawsuits. For this reason, the Department is free to give as complete or incomplete notice as it desires. The Department should give the most complete notice where the total recovery is large and the claimants are easily contacted. Where the claims are small and the claimants hard to contact, the Department should spend less on notice so that expenses do not subsume the recovery.

The fact that notice is not given to class members under the ordinance until after the judgment is rendered[206] has an added benefit. Because of their innate procedural complexities, consumer class actions tend to be lengthy litigations. As a result, individual class members may lose interest and accept an attractive settlement offer if made.[207] The New York ordinance minimizes this problem of attrition. Class members will probably not know about the suit until it is over. True, if they find out about the action while it is pending, they may be induced to settle individually. This inducement may be especially strong where the members fear that the Department will be defeated on the merits and that they will be financially unable to bring subsequent suits on their own. However, the burden of notifying members at this stage about individual settlements will be on the defendant. The expense and trouble of notification may cause him to abandon his attempts at individual settlements, thus leaving the class intact.

D. *Waives Requirement of Individual Reliance*

The New York ordinance waives not only the requirement of notice before the lawsuit, but also that of individual reliance. The problem of individual reliance is a recurrent one in the law of consumer class actions. The issue is basically whether a class member should be required to demonstrate actual reliance on the fraudulent promise or unconscionable practices of a merchant before being allowed to recover. Most substantive laws of fraud[208]

205 See part II D 3 of this Note, *supra*.

206 *Id.*

207 Smit, *Are Class Actions for Consumer Fraud a Fraud on the Consumer?* 26 BUS. LAW. 1053, 1066-67 (1971); Travers & Landers 831.

208 *See* 12 S. WILLISTON, CONTRACTS § 1515 (3d ed. W. Jaeger 1970).

and some of unconscionability[209] require that a plaintiff demonstrate such reliance at some stage of the proceedings.[210] Usually questions of this type will be adjudicated in the damage distribution stage, because they involve issues of fact that are peculiar to each member rather than common to the class as a whole. The difficulty is that individual questions of this type will hurt the class aspects of the action by shattering it into as many separate lawsuits as there are class members. Government mass remedy suits might dispense with the requirement of individual reliance altogether.[211] The New York ordinance has accomplished this result by altering the substantive definitions of "deceptive" and "unconscionable" trade practices. Under the ordinance a deceptive trade practice is a false statement with the "capacity, tendency or effect of deceiving or misleading customers."[212] The words of a merchant need only have the *capacity* to deceive. An unconscionable trade practice is one "which unfairly takes advantage of the lack of knowledge, ability, experience or capacity of a consumer" or "results in a gross disparity between the value received by a consumer and the price paid, to the consumer's detriment."[213] The first definition, but not the second, appears to require reliance on the part of each consumer. The New York ordinance therefore makes it unlikely that a requirement of proof of individual reliance will hurt the class aspects of the remedy. The same cannot be said of many consumer class actions.

IV. Disadvantages of the Ordinance in Relation to Consumer Class Actions

A. *Distrust of Government Agency as Consumer Guardian*

The most obvious criticism of the New York ordinance is that it transfers the enforcement of consumer laws from the injured consumer to a government agency. The experience with govern-

209 *Cf., e.g.*, Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449-50 (D.C. Cir. 1965).

210 Smit, *Are Class Actions for Consumer Fraud a Fraud on the Consumer?* 26 Bus. Law. 1053, 1070-71 (1971).

211 Wade & Kamenshine 1061-62.

212 Consumer Protection Law § 2203d-2.0(a).

213 Consumer Protection Law § 2203d-2.0(b).

ment bodies designated to protect the consumer in the past has not been a happy one. The inability of district attorneys to stem consumer fraud through criminal sanctions or civil penalties has already been indicated in this Note.[214] Nor have agencies which specialize in consumer protection been much more successful. The Federal Trade Commission has recently come under attack for its failure to protect consumers.[215] As an example of the Commission's ineffectuality, commentators frequently point to the Holland Furnace Case,[216] which appears to have gained a permanent place in the folklore of consumer law.[217] In that case, it took twenty-nine years, two cease and desist orders, and one fine for contempt for the Commission to put an end to the fraudulent activities of the Holland Furnace Company. The limited resources of the FTC, coupled with the demands of supervising the entire nation, have created an unenviable task. The New York City Department of Consumer Affairs, on the other hand, is a local body with limited jurisdiction which may be expected to take cognizance of frauds confined to one metropolitan area. Indeed, the record of the Department in thwarting and remedying consumer fraud appears thus far to have been exemplary.[218] Among long-time observers of government regulatory bodies there is, however, an instinctive feeling that the passage of time will bring deterioration and less enforcement. Professor John Kenneth Galbraith sums up this attitude perhaps most succinctly:

> [R]egulatory bodies, like the people who comprise them, have a marked life cycle. In youth they are vigorous, aggressive, evangelistic, and even intolerant. Later they mellow, and in old age — after a matter of ten or fifteen years — they become, with some exceptions, either an arm of the industry they are regulating or senile.[219]

---

214 See part I A of this Note, *supra*.

215 *See* E. Cox, R. Fellmeth & J. Schulz, "The Nader Report" on the Federal Trade Commission (1969).

216 *In re* Holland Furnace Co., 24 F.T.C. 1413 (1936); *In re* Holland Furnace Co., 55 F.T.C. 55 (1958), *aff'd*, 295 F.2d 302 (7th Cir. 1961); *In re* Holland Furnace Co., 341 F.2d 548 (7th Cir.), *cert. denied*, 381 U.S. 924 (1965).

217 *E.g.*, Eckhardt, *Consumer Class Actions*, 45 Notre Dame Law. 663, 667 (1970); Travers & Landers 816; Tydings, *The Private Bar — Untapped Reservoir of Consumer Power*, 45 Notre Dame Law. 478, 481 (1970).

218 See part I C of this Note, *supra*.

219 J.K. Galbraith, The Great Crash, 1929, at 171 (1954).

Several factors explain this belief that government enforcement will inevitably mean inadequate enforcement. First, the government is itself unharmed by business activities that deprive consumers of their money. Consumer predation poses no threat to public order or to an immediate government interest. Even if set up to protect the consumer, an agency will not experience the sting of money lost or the healthy malice toward the taker that spurs one to action. Inevitably, the agency will feel less impetus to sue and less incentive to pursue the marginal case.[220] The second fear is that a government agency will suffer from a work overload unless it is conscientious about defining its priorities and limiting itself to important areas.[221] The New York City Consumer Advocate has himself admitted that, even with a budget one-third the size of that given to the Federal Trade Commission's Bureau of Deceptive Practices to police the entire nation, the Department still does not have "the resources to move against every pattern of consumer fraud in New York City."[222] It seems neither very realistic nor very satisfying to reply that perhaps the budget of the Department should be increased. A better solution is to have the Department bring only those mass remedy suits which would not otherwise be brought as consumer class actions. Although this is of course impossible in New York, where consumer class actions are currently not allowed,[223] it might serve as a useful guide in other jurisdictions. The third objection to entrusting consumer enforcement activities to a government agency stems from the fear that the agency may become subject to political influence, eventually becoming the tool of business interests. The Department of Consumer Affairs is itself somewhat removed from the political arena. The official controlling the institution of lawsuits, the Consumer Advocate, is appointed by the Commissioner of Consumer Affairs, who is in turn appointed by the Mayor. The Consumer Advocate has the general permission of the New York City Corporation Counsel to initiate litigation. The decision on whether to institute a suit is made within the Department of

220 Rice, *Remedies* 607.

221 *See* Rice, *New Private Remedies for Consumers: The Amendment of Chapter 93A*, 54 MASS. L.Q. 307, 309, 311 (1969).

222 *Hearings on H.R. 14931*, at 183 (statement of Philip G. Schrag).

223 See part I C of this Note, *supra*.

Consumer Affairs, chiefly by the Consumer Advocate.[224] Nevertheless, the Department's activities could be curtailed or halted in innumerable ways. A series of budget cuts at the hands of a hostile Mayor or City Council, for example, might render the Department impotent in short order. Even given assurances that the Department will not be subject to immediate political influence, one wonders whether in the long run it is any less likely than other agencies to be captured by the businesses it seeks to regulate. Philip G. Schrag, who served as Consumer Advocate until 1971, seemed conscious of this likelihood when he made the following prediction about the future of the Department:

> [F]rom time to time, Government agencies . . . become very close to the industries which they ostensibly oversee and regulate . . . . [H]istory teaches us that thirty or forty years from now we may have to abolish the New York City Department of Consumer Affairs and create a New York City trade commission with new people.
>
> I think the effective life, the useful life of a regulatory agency tends to be something less than thirty years. I think not only is there that built-in limitation on its effective life, but from time to time political forces may operate on an agency which prevent it from moving effectively against unscrupulous industries that it might otherwise have taken action against.[225]

Those who question the efficacy of a government agency as a consumer guardian are usually optimistic about the ability of consumers themselves to accomplish the same tasks more effectively. The consumer class action, they argue, multiplies and channels the energies of private individuals.[226] Furthermore, to the extent that a consumer class is composed of the poor, the class action may give class members a feeling of cohesiveness and solidarity that the New York ordinance does not provide. In this vein, one

224 *Hearings on S. 2246*, at 183 (statement of Bess Myerson Grant).

225 *Hearings on H.R. 14931*, at 189 (statement of Philip G. Schrag).

226 *See* Eckhardt, *Consumer Class Actions*, 45 NOTRE DAME LAW. 663, 668 (1970).

> A Federal class action law — at least one which is not limited by needless procedural roadblocks to economic justice — will put the power to seek justice in court where it belongs — beyond the reach of campaign contributors, industry lobbyists, or Washington lawyers — it will put power in the hands of the consumers themselves and in the hands of their own lawyers, retained by them to represent their own interests alone.

Hearings on S. 2246, at 172 (statement of Bess Myerson Grant).

commentator has even visualized the class representative as a neighborhood folk hero backed by a throng of discontented people.[227] Not only does the New York ordinance place control of the mass remedy suit outside of the class, but it prevents class members from learning about the action until it is over.[228] The ordinance may thus result in both the erosion of government protection and the atrophy of private energies.

B. *Confinement of Remedy to Locality*

That the New York ordinance is confined to policing consumer activities in one metropolitan area is generally thought to be an advantage. Because of its limited geographical scope, the ordinance permits the Department to take cognizance of purely local consumer frauds that might escape the attention of a national agency such as the Federal Trade Commission. But the Department's limited jurisdiction also creates certain disadvantages. If the Department is better equipped to ferret out misconduct in the local marketplace, it is also less able to halt large-scale misbehavior occurring on a statewide or interstate basis. If a scheme of consumer fraud extends beyond one metropolitan area,[229] then a government mass remedy suit of the kind provided for by the New York ordinance can only deal with the local portion. To be sure, this in itself provides some benefit. But far greater protection would result from a consumer class action, whether under state or federal law, that cut across jurisdictional boundaries and made a business accountable for an entire program of misconduct.

C. *Lack of Res Judicata Effect*

1. If Department Wins

This Note has already explored the advantages of the Consumer Protection Law in allowing a judgment to have res judicata effect only to the extent that class members actually recover their claims.[230] Limitations on res judicata, however, bring difficulties as

227 Starrs 410.

228 See part II D 3 of this Note, *supra*.

229 The Holland Furnace Company, for example, did business in forty-five states. Holland Furnace Co. v. FTC, 269 F.2d 203, 209 (7th Cir. 1959), *cert. denied*, 361 U.S. 932 (1960).

230 See part III C of this Note, *supra*.

well as benefits. These difficulties were adumbrated in a prior section of this Note.[231] There it was mentioned that if the Department won but a claimant failed for any reason to recover his claim, then the defendant might be subjected to double damages: the Department's recovery would escheat to the city after one year, while the claimant would not be barred from reasserting his claim against the defendant in another action. This outcome appears to violate the doctrine of merger, which extinguishes a cause of action upon which a plaintiff has been successful and has obtained a recovery.[232] The situation here differs from the classic case of merger in several important respects: the plaintiffs in the successive actions (the Department and the individual claimant respectively) are different; the plaintiff in the second action may never have had notice of the judgment in the first action; and an undistributed judgment does not usually escheat to the state after one year. But a prime purpose of merger would seem to be to protect a defendant from successive judgments on the same cause of action. This the ordinance plainly fails to do. Perhaps the problem will never come up in New York, because the individual claimant is unlikely to sue on his own and consumer class actions are not allowed in that jurisdiction.[233] However, if the problem does arise, the defendant may justly complain, perhaps even alleging that his due process rights under the Fourteenth Amendment are violated.[234] A class action statute such as federal Rule 23 avoids this problem by giving the judgment in the consumer class action wider res judicata effect.[235]

2. If Defendant Wins

If the defendant is successful in the original Department suit, he still may be subject to individual actions by claimants. A prime purpose of mass remedy suits is to conserve judicial effort by con-

---

231 See part III A 3 of this Note, *supra*.

232 RESTATEMENT OF JUDGMENTS §§ 45(a), 47 (1942).

233 See part II E of this Note, *supra*.

234 The defendant would argue that the policy of protecting a person from a double recovery gives the doctrine of merger constitutional dimensions. The due process clause of the fourteenth amendment is violated when a state court compels a defendant to compensate a plaintiff twice for the same injury, even though the remedial statute allows no punitive damages.

235 *See* FED. R. CIV. P. 23(e)(3).

centrating similar claims in one forum at one time.[236] Because it makes certain that there will be a final adjudication of all claims, res judicata is a key element in accomplishing this end. The drafters of the 1966 version of federal Rule 23 emphasized this when they made the judgment in a Rule 23(b)(3) class action binding on all class members who received adequate notice and proceeded to do nothing.[237] By the prior federal rule, these persons would not have been bound by the judgment.[238] Hence the inertia of inaction was placed on the side of res judicata. The New York ordinance, however, appears oblivious to these considerations. Theoretically at least, a judgment in a Department action might fail completely to concentrate claims; if the Department lost, the claimants would simply bring subsequent actions. This result is, as a practical matter, unlikely. Most consumer claims are too small to finance an individual lawsuit and consumer class actions are prohibited in New York. But it remains a possibility.[239]

D. *Limitation of Remedy to Restitution*

A final disadvantage of the New York ordinance with respect to consumer class actions concerns the limitation of the remedy to restitution.[240] Because the mass remedy provisions of the ordinance are tied to the substantive claims of fraud and unconscionability, the Department can sue only to have consumer contracts rescinded and money paid under them restored. It cannot sue to enforce contracts and obtain expectancy damages. In situations where there is no fraud or unconscionability, but the merchant merely fails to perform his side of the contract, the Department is without power to obtain damages on a mass scale. Consumer class

236 *Cf.* Note of Advisory Comm. 104.

237 FED. R. CIV. P. 23(c)(3).

238 Note of Advisory Comm. 105-06.

239 The practice under the ordinance of allowing the class members to obtain the benefits of a Department victory while not incurring the risks of res judicata should the Department lose bears a strong resemblance to the much-criticized practice of "one-way intervention" under the 1938 version of federal Rule 23(a)(3). According to "one-way intervention" a class member could intervene and claim a recovery after the party representative had obtained a judgment. *See* Note of Advisory Comm. 105-06. "One-way intervention" was criticized as violating the theory of "mutuality of estoppel." *See* Developments in the Law, *Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 874, 936 (1958). It was eliminated in the 1966 version of Rule 23.

240 See part II B 1 of this Note, *supra*.

actions, where they are permitted, suffer from no such limitations. Perhaps situations where consumers might wish to enforce their contracts in a mass action comprise a small percentage of consumer cases. But when they do occur, the New York ordinance will provide no help.

V. Conclusion

This Note has attempted to assess the relative virtues of the New York ordinance and current class action rules, particulary present federal Rule 23. On a broader plane, it has tried to compare government restitution suits in general with class actions. On balance, the remedy provided by the New York ordinance appears to be most valuable as a supplement, rather than an alternative to, consumer class actions. The class action is of greatest utility when class members have the knowledge and energy to assert their claims and the recovery is substantial enough to attract attorneys to represent the class. It is least effective where, although the class is large, each individual claim is minuscule, so that the total recovery of the class would be small. The high number of claims will create management problems, necessitating large disbursements for notification and attorney's fees. The small total recovery will initially discourage counsel from bringing the suit and may eventually result in his taking for fees what is left of the fund. Such a suit is unlikely to be brought in the first place and, even if brought, will net little money for claimants. Thus, the twin goals of deterrence and compensation will be frustrated. The ordinance, however, will achieve these goals by allowing the government to bring the action. Furthermore, it is in precisely these situations that the ordinance's lack of initial notice and of res judicata are of least consequence.

The framers of the New York ordinance were well aware that their remedy would serve best as a supplement to the consumer class action. They emphasized that consumers needed both remedies if they were to enforce the rights guaranteed them by substantive law.[241] Together with the consumer class action, the

241 *Hearings on H.R. 14931,* at 165-66, 183-84 (statement of Philip G. Schrag); *Hearings on S. 2246,* at 184 (statement of Bess Myerson Grant).

government restitution suit can be of significant value to injured consumers; by itself it will have a much more limited effect. The government may successfully play Robin Hood, but it should do so only where individuals cannot play it for themselves.

*Allan D. Jergesen**

APPENDIX

New York City

Consumer Protection Law of 1969

§ 2203d-1.0 UNFAIR TRADE PRACTICES PROHIBITED.—No person shall engage in any deceptive or unconscionable trade practice in the sale, lease, rental or loan or in the offering for sale, lease, rental, or loan of any consumer goods or services, or in the collection of consumer debts.

§ 2203d-2.0 DEFINITIONS.—a. *Deceptive trade practice.* Any false, falsely disparaging, or misleading oral or written statement, visual description or other representation of any kind made in connection with the sale, lease, rental or loan or in connection with the offering for sale, lease, rental, or loan of consumer goods or services, or in the extension of consumer credit or in the collection of consumer debts, which has the capacity, tendency or effect of deceiving or misleading consumers. Deceptive trade practices include but are not limited to: (1) representations that goods or services have sponsorship, approval, accessories, characteristics, ingredients, uses, benefits, or quantities that they do not have; the supplier has a sponsorship, approval, status, affiliation, or connection that he does not have; goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, or secondhand; or, goods or services are of particular standard, quality, grade, style or model, if they are of another; (2) the use, in any oral or written representation, of exaggeration, innuendo or ambiguity as to a material fact or failure to state a material fact if such use deceives or tends to deceive; (3) disparaging the goods, services, or business of another by false or misleading representations of material facts; (4) offering goods or services with intent not to sell them as offered; (5) offering goods or services with intent not to supply reasonable expectable public demand, unless the offer discloses to limitation of quantity; and (6) making false or misleading representations of fact concerning the reasons for, existence of, or amounts of price reductions, or price in comparison to prices of competitors or one's own price at a past or future time; (7) stating that a consumer transaction involves consumer rights, remedies or obligations that it does not involve; (8) stating that services, replacements or repairs are needed if they are not; and (9) falsely stating the reasons for offering or supplying goods or services at scale discount prices.

b. *Unconscionable trade practice.* Any act or practice in connection with the sale, lease, rental or loan or in connection with the offering for sale, lease, rental or loan of any consumer goods or services, or in the extension of consumer credit, or in the collection of consumer debts which unfairly takes advantage of the lack of knowledge, ability, experience or capacity of a consumer; or results in a gross disparity between the value received by a consumer and the price paid, to the consumer's detriment; provided that no act or practice shall be deemed unconscionable under

* Member of the class of 1972 at the Harvard Law School.

this title unless declared unconscionable and described with reasonable particularity in a local law, or in a rule or regulation promulgated by the commissioner. In promulgating such rules and regulations the commissioner shall consider among other factors: (1) knowledge by merchants engaging in the act or practice of the inability of consumers to receive properly anticipated benefits from the goods or services involved; (2) gross disparity between the price of goods or services and their value measured by the price at which similar goods or services are readily obtained by other consumers; (3) the fact that the acts or practices may enable merchants to take advantage of the inability of consumers reasonably to protect their interests by reason of physical or mental infirmities, illiteracy or inability to understand the language of the agreement, ignorance or lack of education, or similar factors; (4) the degree to which terms of the transaction require consumers to waive legal rights; (5) the degree to which terms of the transaction require consumers to jeopardize money or property beyond the money or property immediately at issue in the transaction; and (6) definitions of unconscionability in statutes, regulations, rulings and decisions of legislative or judicial bodies in this state or elsewhere.

c. *Consumer goods, services, credit and debts.* As used in §§ 2203d-1.0, 2203d-2.0 (a) and 2203d-2.0 (b) of this title, goods, services, credit and debts which are primarily for personal, household or family purposes.

d. *Consumer.* A purchaser or lessee or prospective purchaser or lessee of the consumer goods or services or consumer credit, including a co-obligor or surety.

e. *Merchant.* A seller, lessor, creditor or any other person who makes available either directly or indirectly, goods, services or credit, to consumers. "Merchant" shall include manufacturers, wholesalers and others who are responsible for any act or practice prohibited by this title.

f. *Commissioner.* Shall mean the commissioner of consumer affairs.

* * *

§ 2203d-4.0 ENFORCEMENT.—a. The violation of any provision of this title or of any rule or regulation promulgated thereunder, shall be punishable upon proof thereof, by the payment of a civil penalty in the sum of fifty dollars to three hundred and fifty dollars, to be recovered in a civil action.

b. The knowing violation of any provision of this title or of any rule or regulation promulgated thereunder, shall be punishable upon conviction thereof, by the payment of a civil penalty in the sum of five hundred dollars, or as a violation for which a fine in the sum of five hundred dollars shall be imposed, or both.

c. Upon a finding by the commissioner of repeated, multiple or persistent violation of any provision of this title or of any rule or regulation promulgated thereunder, the city may, except as hereinafter provided, bring an action to compel the defendant or defendants in such action to pay in court all monies, property or other things, or proceeds thereof, received as a result of such violations; to direct that the amount of money or the property or other things recovered be paid into an account established pursuant to section two thousand six hundred one of the civil practice law and rules from which shall be paid over to any and all persons who purchased the goods or services during the period of violation such sum as was paid by them in a transaction involving the prohibited acts or practices, plus any costs incurred by such claimants in making and pursuing their complaints; provided that if such claims exceed the sum recovered into the account, the awards to consumers shall be prorated according to the value of each claim proved; to direct the defendant or defendants, upon conviction, pay to the city the costs and disbursements of the action and pay to the city for the use of the commissioner the costs of his investigation leading to the judgment; or if not recovered from defendants, such costs are to be deducted by the city from the grand recovery before distribution to the consumers; and to direct that any money, property, or other things in the account and unclaimed by any persons with such claims within one year from creation of the account, be paid to the city, to be used by the commissioner for further

consumer law enforcement activities. Consumers making claims against an account established pursuant to this subsection shall prove their claims to the commissioner in a manner and subject to procedures established by the commissioner for that purpose. The procedures established in each case for proving claims shall not be employed until approved by the court, which shall also establish by order the minimum means by which the commissioner shall notify potential claimants of the creation of the account. Restitution pursuant to a judgment in an action under this subdivision shall bar, pro tanto, the recovery of any damages in any other action against the same defendant or defendants on account of the same acts or practices which were the basis for such judgment, up to the time of the judgment, by any person to whom such restitution is made. Restitution under this subsection shall not apply to transactions entered into more than five years prior to commencement of an action by the commissioner. Before instituting an action under this subsection, the commissioner shall give the prospective defendant written notice of the possible action, and an opportunity to demonstrate in writing within five days, that no repeated, multiple, or persistant violations have occurred.

d. Whenever any person has engaged in any acts or practices which constitute violations of any provision of this title or of any rule or regulation promulgated thereunder, the city may make application to the supreme court for an order enjoining such acts or practices and for an order granting a temporary or permanent injunction, restraining order, or other order enjoining such acts or practices.

e. To establish a cause of action under this section it need not be shown that consumers are being or were actually injured.

§ 2203d-5.0 SETTLEMENTS.—a. In lieu of instituting or continuing an action pursuant to this title, the commissioner may accept written assurance of discontinuance of any act or practice in violation of this title from the person or persons who have engaged in such acts or practices. Such assurance may include a stipulation for voluntary payment by the violator of the costs of investigation by the commissioner and may also include a stipulation for the restitution by the violator to consumers, of money, property or other things received from them in connection with a violation of this title, including money necessarily expended in the course of making and pursuing a complaint to the commissioner. All settlements shall be made a matter of public record.

If such stipulation applies to consumers who have been affected by the violator's practices but have not yet complained to the commissioner, the assurance must be approved by the court, which shall direct the minimum means by which potential claimants shall be notified of the stipulation. A consumer need not accept restitution pursuant to such a stipulation; his acceptance shall bar recovery of any other damages in any action by him against the defendant or defendants on account of the same acts or practices.

b. Violation of an assurance entered into pursuant to this section shall be treated as a violation of this title, and shall be subject to all the penalties provided therefor.

* * *

BOOK REVIEW

LAW AND DISORDER: THE LEGITIMATION OF DIRECT ACTION AS AN INSTRUMENT OF SOCIAL POLICY. Edited by *Samuel I. Shuman.*[1] Detroit: Wayne State University Press, 1971. Pp. 236. $8.95.

Reviewed by John M. Payne[2]

A man of religion, convinced that his country has embarked upon an immoral course, urges defiance of the law. His conduct and that of his followers is illegal. It impinges upon the rights of others and incites social disorder. The man and his followers are brought to justice:

> The Defendants: We obey a higher law.
> The Court: [T]hose who go to the extreme of condemning the Constitution and the laws made under it as unjust and immoral cannot, even upon such an assumption, justify resistance.[3]

It could be the Berrigan or Spock trial, but in fact it is the trial of Reverend Theodore Parker in 1851, and the issue is the freeing of Shadrach, who was held for return to his owner in the South under the notorious Fugitive Slave Act.[4]

Thus the relevancy of *Law and Disorder*[5] is not confined to the present decade. In the context of the Berrigans and Spocks, we should look back to the Boston trial of Reverend Parker, as former Justice Tom C. Clark advises in the opening lecture. We should ask whether resistance to the Slave Act in the form of such action was legitimate or whether it has been legitimated by the

---

1 B.A., M.A., Ph.D., University of Pennsylvania; J.D., University of Michigan; S.J.D., Harvard University. Professor of Law, Wayne State University.

2 B.A. 1963, Yale University; J.D. 1970, Harvard Law School. Assistant Professor of Law, Rutgers University.

3 The court's charge is that given to a federal grand jury in the aftermath of the *Shadrach* case, 30 F. Cas. 1015, 1016 (No. 18,263) (D. Mass. 1851).

4 For two related trials, see United States v. Scott, 27 F. Cas. 990 (No. 16,240b) (D. Mass. 1851) and United States v. Morris, 26 F. Cas. 1323 (No. 15,815) (D. Mass. 1851).

5 This book is a compilation of the essays delivered at the Leo M. Franklin Memorial Lectures, Wayne State University, 1969. Citations to the book will be made by page number hereinafter.

Civil War and the subsequent passage of time. The answers to these questions, together with the awareness that resort to direct action runs deep in our history, will assist us in determining what limits today's constituted authority should impose. The five lectures contained in *Law and Disorder* explore the issues raised in the search for those limits, and because of the insight these essays give, they should be read by lawmakers at the levels of local, state, and federal government. As Justice Clark cautions, "[Government] must provide the moral tone that will set the pattern for all of its citizens. Superior strength — the use of force — cannot make wrongs into rights."[6]

The simplest and least helpful attitude toward dissent is that reflected by Professor van den Haag[7] who says of a *democratic* political system, "[D]irect action is antidemocratic (therefore illegitimate from a democratic viewpoint) if the change aimed for requires curtailment or abolition of democratic political processes, or ignores or overrides democratic political decisions."[8] If this code of conduct were observed, there would be far fewer justiciable controversies in the area of Constitutional law, and the civil rights movement of the 1950's in this country would have been blotted out on the date of the first minor disruption.

In discussing campus unrest,[9] which is the focal point of his lecture, van den Hagg de-emphasizes social problems (governmental promises, reports, and academic versions of millenarianism) in formulating the motivation underlying direct action. Instead, he gives us a psychoanalysis of the activist student to explain the current commotion:

> Adolescents always have been most susceptible to what has been called alienation (estrangement), anomie (rulelessness), acedia (apathy), or cachexia juvenilis (juvenile torpor) and, in more extreme cases, to dementia praecox (early madness, today called schizophrenia). To ward off withdrawal and depression, adolescents often hunger for involvement and

6 P. 29.

7 Adjunct Professor of Social Philosophy, New York University.

8 P. 98.

9 For a discussion of a legislative solution to the problem of militant student unrest, see Note, *Recent California Campus Disorder Legislation*, 8 HARV. J. LEGIS. 310 (1971). *See also* Brennan, *A Judge Looks at Student Dissent*, 19 HARV. LAW SCHOOL ALUMNI BULL. 9 (1968).

> activity in (instead of reflection on) reality, as well as for independence — a wish sometimes gratified by defying those already established.[10]

According to this conventional wisdom, the politicization of students is a further attempt to ward off tedium. Sex and drugs have served to distract young people in the past, but now students are seeking a transcendent challenge.[11] Part of the reason for this deterioration and disorientation is the loss of group influence or communal support with the demise of fraternities and sororities.[12] The infatuation with the revolutionary ideal springs not from external injustices but rather from internal instabilities.

Two major defects in the van den Hagg essay should be exposed. First, it is descriptive rather than analytical. His narrative says much about repudiating parental roles, but apart from reciting platitudes about the transition from adolescence to adulthood, it does not adequately explain political demonstrations protesting the war in Vietnam or the alleged exploitation of minority races which so many students claim as their inspiration for obstreperous conduct. Second, even if maladjustment does account for the rebellious spirit of young people, not all of today's students are adolescents and not all of today's direct action advocates are students. In short, van den Hagg gives us little guidance for the task of defining limits for direct action.

In contrast to Professor van den Hagg, Samuel I. Shuman[13] seeks to bring direct action within the guarantee of the first amendment. As a matter of form, however, his argument is difficult to follow because it is written in a textually close, baroquely footnoted style of high academicism. Shuman cannot resist developing tangential points, and he extensively reiterates his ideas. Out of the maze of his definitions, qualifications, and presumptions, one suspects that even the interested reader will quit, unengaged and uninformed.

Whereas van den Haag concludes that "what is orderly is legitimate," Shuman's thesis is that "what is constitutional is legiti-

---

10 Pp. 102-03.
11 P. 108.
12 P. 104.
13 Professor Shuman is the author of two essays contained in the book which are treated collectively here.

mate." Early in his lecture Shuman posits the vital importance of free speech in terms of Holmes' marketplace of ideas.[14] From this perspective, he summarizes the traditional constitutional parameters of freedom of speech as they have evolved through decisional law. He touches seriatim on Justice Black's absolutist, no limitations theory; content limitations such as the now defunct clear and present danger test; limitations as to time, place, and circumstances; the incite to riot test (freedom to speak except when serious disturbance cannot be averted by protective measures); and the least intrusive alternative test (only the least restrictive alternative should be upheld). Shuman adopts from this spectrum either the criterion of the least intrusive alternative or the absolutist freedom test coupled with the limitations of time, place, and circumstances. But, upon analysis, his solution offers nothing more novel than a subjective balancing test — a principle which, ironically, he decries as unduly tending to favor repressive legislation.[15] Shuman would strike the balance between freedom of expression and order, yielding the former only insofar as required to achieve "socially useful" (*i.e.*, necessary) measure of the latter; and there's the rub, for he is no more successful than past constitutional scholars at determining the requisite amount of order.

Finally, Charles V. Hamilton,[16] who contributes the fourth essay, confronts some of the hard questions that Professors van den Haag and Shuman do not. Distinguished by its common sense and conciseness, Hamilton's essay is the most compelling. Professor Shuman describes in his editor's introduction the Hamilton lecture as a rejoinder to Professor van den Haag's position. It is that, but with its emphasis on direct action as a shaping force of justice, it also helps give content to Shuman's mechanistic mode of analysis. Hamilton's language is strong, but it is eloquent and empathetic:

> There is today a crisis of legitimacy, a breakdown of consensus. Very many young black people simply do not feel constrained to play by the established rules of the game, because

14 P. 37.

15 P. 47.

16 Professor of Government, Columbia University and consultant for the National Broadcasting Company (NBC) on the urban crisis in America.

> they see those rules as racist and the game as basically crooked and exploitative. When this becomes massively the case, those activists will feel less and less constrained in using direct action of the most disruptive sort.[17]

Hamilton's central theme is that direct action is a necessary and useful adjunct to the judicial redress of grievances. Direct action makes the target group — black citizens in his examples — more conscious of their rights and ultimately better equipped to exercise them. He contemplates a whole panoply of activities, for example, ranging from street rallies to canvassing, as direct action complements to voter registration litigation. Granted, if the goal is to achieve a more equitable distribution of goods and services, then Hamilton's advocacy of direct action would be inconsistent with his pragmatism. But if the goal is to achieve a more equitable distribution of decision-making power, as Hamilton argues,[18] then direct action becomes a *sine qua non.*

The indispensability of direct action to the progress of justice is developed in Hamilton's discussion of the crisis-reacting nature of our society:

> Many direct action, civil rights protesters believe that America is a crisis-reacting society. They believe that this country is prone to opt for the status quo in race relations or, at best, to opt for slow, incremental, token change unless confronted with a serious crisis which threatens order and stability.[19]

The obvious danger inhering in this attitude is that activists will use it to justify self-conferred legitimacy; carried to its logical conclusion, Hamilton's theme supports *ex post facto* legitimacy for those actions which, although clearly illegal when executed, are later recognized as having blasted us out of our complacency. Witness, for example, the arguments advanced for granting amnesty to Vietnam war deserters. But it is equally arguable that Hamilton's reasoning supports the conclusion that direct action should not be legitimated since it takes its very *raison d'être* from its denial of legitimacy. It is the martyrs and not the conformists who shock the conscience of apathetic America.

17 P. 137.
18 P. 139.
19 P. 131.

In concluding, Professor Hamilton's message to those who walk the corridors of legislative power is twofold. Do not, he exhorts, worry about bringing direct action within society's rules:

> [I]n regard to direct action, racial protest and public policy, what decision-makers should be doing primarily is to try to work out a new consensual framework. . . . This consensus would include [for example] the normative value that not one human being in this country must go to bed hungry *any* night, or go without absolutely adequate medical care, or have to fight rats in tenements, or be denied an education to his fullest capacity.[20]

Do, he says, give your attention to wise and compassionate laws which will make direct action not illegitimate, just unnecessary.

20 Pp. 138-39.