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### The Federal Trade Commission

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# The Federal Trade Commission

*Richard A. Posner*†

The history of criticism of the Federal Trade Commission is almost as interesting as the history of the agency itself. The landmarks are Gerard Henderson's 1924 study, the Hoover Commission's 1949 Report, the Landis Report in 1960, the Auerbach Report in 1964, the Nader Report in 1969, and, most recently, the Report of the American Bar Association's Commission to study the FTC.<sup>1</sup> What is remarkable about these studies, which span a period of 45 years, is the sameness of their conclusions. To be sure, with the resurgence of the consumer movement in the 1960's, a shift in critical emphasis from the agency's antitrust to its consumer-protection activities becomes discernible. But the diagnosis remains the same. The Commission is rudderless; poorly managed and poorly staffed; obsessed with trivia; politicized; all in all, inefficient and incompetent. And—the persistence of these criticisms would seem to indicate—largely impervious to criticism.

My excuse for adding still another entry to the list of critiques of the Trade Commission is that the main critical tradition, which I have just described, seems to me wide of the mark. The previous

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† Professor of Law, The University of Chicago. This article is a substantially revised version of the author's separate statement in REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION 91 (1969). The author wishes to thank Kenneth Culp Davis, Aaron Director, and George J. Stigler for helpful comments on earlier drafts.

<sup>1</sup> G. HENDERSON, THE FEDERAL TRADE COMMISSION (1924); COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, TASK FORCE ON REGULATORY COMMISSIONS, APPENDIX N (1949); J. LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT (1960); Auerbach, *The Federal Trade Commission: Internal Organization and Procedure*, 48 MINN. L. REV. 383 (1964); E. COX, R. FELLMETH & J. SCHULZ, THE CONSUMER AND THE FEDERAL TRADE COMMISSION (1969), reprinted in 115 CONG. REC. E. 370 (daily ed. Jan. 22, 1969); REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION (1969). See also FEDERAL TRADE COMMISSION MANAGEMENT SURVEY REPORT OF ROBERT HELLER & ASSOCIATES, INC. (1954); U.S. CIVIL SERVICE COMMISSION, EVALUATION OF PERSONNEL MANAGEMENT, FEDERAL TRADE COMMISSION (1965). In a class by itself is the recent memorandum of Commissioner Philip Elman of the FTC to the Chairman of the Senate Subcommittee on Administrative Practice and Procedure, entitled "Administrative Reform: The Federal Trade Commission," a scathing and authoritative critique of the Commission's internal management. It is printed in RESPONSES TO QUESTIONNAIRE ON CITIZEN INVOLVEMENT AND RESPONSIVE DECISION-MAKING 122 (Sen. Judic. Comm. print 1969).

studies depend on two dubious, and largely unexamined, assumptions. The first assumption is that the conception of a federal trade commission utilizing the administrative process to combat restraints of trade and consumer frauds<sup>2</sup> is fundamentally sound and that it is only the execution that has been deficient. If, on the contrary, it is the basic conception that is unsound, efficiency in implementation is worse than futile. Agencies that are highly efficient by the standards of the Trade Commission—I instance the Federal Power Commission since 1961 and the Securities and Exchange Commission throughout most of its history—have not escaped fundamental criticisms.<sup>3</sup> The defects of the Trade Commission also are more basic than poor management. The second assumption is that any deficiencies in the agency are a product of historical accident rather than of the inherent conditions of government regulation. Within limits this is doubtless correct, as attested by the superior efficiency of some other agencies. But those limits are narrow and a large measure of inefficient, and indeed perverse, implementation is inevitable given the kind of regulatory scheme entrusted to the FTC.

Previous critics adopted too narrow a framework of inquiry. They assumed away the most interesting and important questions,

### I. THE FEDERAL TRADE COMMISSION AND MONOPOLY

The Federal Trade Commission was created to deal with monopoly problems. Concern with fraud evidently played no part.<sup>4</sup> There is a persuasive case for having a vigorous antimonopoly policy. But a system of public and private judicial remedies for antitrust violations long antedated the creation of the FTC and the pertinent question, therefore, is not whether antitrust policy is a good thing but why it was thought desirable to supplement the existing antitrust institutions with an administrative agency.

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<sup>2</sup> The FTC, which is something of a conglomerate, has other duties besides antitrust enforcement and consumer protection, notably to gather and publish certain economic statistics and to make economic reports. I shall not discuss these other areas, beyond noting that the commission form of organization provides neither a necessary nor an especially suitable framework for them.

<sup>3</sup> See, e.g., Kitch, *Regulation of the Field Market for Natural Gas by the Federal Power Commission*, 11 J. LAW & ECON. 243 (1968); Stigler, *Public Regulation of the Securities Market*, 37 J. BUS. U. CHI. 117 (1964).

<sup>4</sup> Rublee, *The Original Plan and Early History of the Federal Trade Commission*, 11 ACAD. POL. SCI. PROC. 666, 669-70 (1926). The Senate debates contain some indications that the term "unfair methods of competition" was thought sufficiently broad to embrace passing-off and misrepresentation cases, but it was not expected that the Commission would be active in this area; the practices with which the Senators were concerned were monopolistic practices. See G. HENDERSON, *supra* note 1, at 34-37.

The reasons were both substantive and procedural in character.<sup>5</sup> Substantively, it was believed that the Sherman Act,<sup>6</sup> as it had been interpreted a few years earlier by the Supreme Court in the case against the Standard Oil Trust,<sup>7</sup> could be used effectively only against achieved monopoly and was ineffective to prevent monopolies from arising in the first place. The Clayton Act,<sup>8</sup> passed simultaneously with the Federal Trade Commission Act,<sup>9</sup> was designed to remedy this deficiency by dealing specifically with those practices believed to be important in the growth of monopoly: stock acquisitions, interlocking directorates, exclusive-dealing arrangements, and area price discrimination. Lest this enumeration omit any nefarious practice, Congress in section 5 of the Federal Trade Commission Act sweepingly forbade "unfair methods of competition."<sup>10</sup> The FTC was given exclusive authority to enforce section 5 and authority concurrent with that of the Justice Department and private plaintiffs to enforce the Clayton Act.<sup>11</sup>

On the procedural or institutional side, it was believed that the establishment of a continuing body with specialized responsibility and broad powers to deal with trade restraints would promote the sound, certain, and expeditious implementation of antitrust policy. Also, Commission enforcement would be outside of politics, and this would promote both effectiveness and impartiality.

Experience has proved these premises wrong; one is also irrelevant. It now seems clear that the practices regulated by the Clayton Act, as well as the additional anticompetitive practices attacked by the Commission under section 5 of its organic act,<sup>12</sup> were never significant sources of monopoly. If we exclude the special cases of governmental franchise and of overwhelming economies of scale—areas where the antitrust laws afford no solution—the sources of monopoly were and are two: mergers (or other forms of corporate amalgamation) leading to monopoly, and price-fixing agreements among competitors. Both practices had been condemned by the Supreme Court in Sherman Act proceedings before the Clayton and Federal Trade Commission

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<sup>5</sup> On the background of the Federal Trade Commission Act see G. HENDERSON, *supra* note 1, ch. I.

<sup>6</sup> 15 U.S.C. § 1 (1964).

<sup>7</sup> Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911).

<sup>8</sup> 38 Stat. 730, as amended, 15 U.S.C. § 12 (1964).

<sup>9</sup> 38 Stat. 717, as amended, 15 U.S.C. § 41 (1964).

<sup>10</sup> 15 U.S.C. § 45 (1964).

<sup>11</sup> See Clayton Act, § 11, as amended, 15 U.S.C. § 22 (1964).

<sup>12</sup> These are described in G. HENDERSON, *supra* note 1, ch. V. For latter-day instances see notes 48-53 *infra*.

Acts were passed.<sup>13</sup> In the one area where some strengthening of preexisting law might have been thought appropriate—that of mergers and acquisitions—the new acts, for a variety of technical reasons, turned out to be completely ineffectual.<sup>14</sup>

Some will argue that the regulation of other practices besides mergers and horizontal price-fixing can be justified on antitrust grounds. We need not debate the point here;<sup>15</sup> it is inessential. As we shall see in due course, whatever additional regulations might reasonably be considered appropriate in furtherance of antitrust policy, they are not those that the FTC has been imposing. More fundamentally, the fact that substantive law is considered inadequate is not a sufficient reason to create an administrative agency. Congress can change the law without changing enforcement institutions. When Congress in 1950 amended section 7 of the Clayton Act to make it applicable to mergers,<sup>16</sup> the principal impact, as it turns out, was on the enforcement activity of the Department of Justice; the FTC's role in the enforcement of the merger law has been secondary.

Whatever the substantive contours of antitrust policy, it can be argued that an administrative agency has a comparative advantage in articulating, elaborating, and applying that policy, or at least some facets of it.<sup>17</sup> And we may grant that a coherent body of technical law is more likely to emerge from a single tribunal specialized in the subject than from courts of general jurisdiction, especially if the specialized tribunal, unlike a court, is not limited to the role of passive arbiter of controversies fortuitously before it for decision but has substantial control over the selection of cases and the timing of litigation. But the comparison between an administrative agency and the courts is misleading. It fails to separate out the components of the administrative process and compare each with its counterpart in the system of judicially enforced antitrust policy.

In the administration of regulatory statutes such as the antitrust laws, one can distinguish a number of operations: announcing general principles to guide the application of the law in doubtful cases; de-

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<sup>13</sup> See *United States v. Trans-Missouri Freight Ass'n.*, 166 U.S. 290 (1897); *United States v. Joint Traffic Ass'n.*, 171 U.S. 505 (1898); *Northern Securities Co. v. United States*, 193 U.S. 197 (1904); *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911); *United States v. American Tobacco Co.*, 221 U.S. 106 (1911).

<sup>14</sup> See *United States v. Philadelphia National Bank*, 374 U.S. 321, 337-40 (1963); Neal, *The Clayton Act and the Transamerica Case*, 5 *STAN. L. REV.* 179 & n.4 (1953).

<sup>15</sup> Compare Director & Levi, *Law and the Future: Trade Regulation*, 51 *Nw. U.L. REV.* 281 (1956), with C. KAYSER & D. TURNER, *ANTITRUST POLICY* 120-3, 153-60, 179-80 (1959).

<sup>16</sup> 64 Stat. 1125.

<sup>17</sup> For a forceful exposition of this point of view see Elman, *Antitrust Enforcement: Retrospect and Prospect*, 53 *A.B.A.J.* 609 (1967).

termining enforcement priorities; investigating; selecting cases and deciding upon their sequence; deciding when to settle a case; adjudicating the guilt of the accused in contested proceedings; fashioning effective remedies; and supervising compliance. Administrative agencies perform all of these functions, and it is easy to see that, in contrast, courts do not. But the judicial enforcement of regulatory statutes is not exhausted in the actions of courts. The proper counterpart of the FTC in many of its functions is not the federal judiciary but the Antitrust Division of the Department of Justice.<sup>18</sup> The Division, subject to review and direction by the Attorney General, decides on enforcement priorities; issues, where appropriate, either individual advisory opinions or general policy guidelines; conducts investigations; negotiates settlements; proposes theories and remedies to the courts; supervises compliance with the courts' judgments; and, in short, provides continuity and direction in the development and application of judicially enforced antitrust principles. Like the FTC the Antitrust Division is a specialized body; it is in fact more specialized than the Commission since it does not divide its time between monopoly and fraud. And like the FTC the Division has the flexibility, the investigative resources,<sup>19</sup> and the positive enforcement mandate that courts lack. The qualities of continuity, expertise, focus, and initiative ideally predicated of administrative agencies should, therefore, find equally fertile soil in the Antitrust Division. Most observers would agree that these qualities have actually developed further in the Antitrust Division than in the FTC and that it is the Division, not the Commission, that has had the greater and on the whole healthier influence on the evolution of antitrust policy.

It is true that FTC commissioners tend to remain in office longer than chiefs of the Antitrust Division. But this is an unimportant difference; in both agencies it is the career staff that supplies the essential continuity and detailed operational knowledge and experience. It is also true that the Division is denied a method of policy formulation that the FTC can and does use and that holds an honored place in our legal traditions—the common law method, whereby policy emerges from the process of deciding particular cases. How-

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<sup>18</sup> This point is usually overlooked in discussions of the FTC's antitrust role. See, e.g., Zimmerman, *The Federal Trade Commission and Mergers*, 64 COLUM. L. REV. 500 (1964).

<sup>19</sup> Section 6(b) of the Federal Trade Commission Act, 15 U.S.C. § 46(b) (1964), which authorizes the Commission to require firms to furnish it with information under oath relating to any phase of business activity, is a more powerful investigative tool than anything the Department of Justice has in a civil antitrust suit. The Department has not to my knowledge been handicapped by the lack of an equivalent power, but if it were, the same power could be vested in it.

ever, although the Division cannot actually decide a case, it can urge the courts how to decide. And although the FTC has the power to issue decisions, they are reviewable by the federal courts of appeals and the Supreme Court. Since the antitrust standards are not purely administrative, the courts are not bound to adopt the FTC's theories of antitrust liability. One can argue, therefore, that as vehicles for the formulation of antitrust policy, FTC rules and decisions are not greatly dissimilar to Department of Justice briefs.<sup>20</sup> In both cases, in effect, the agencies merely propose, and the courts dispose.

Strictly, the parallelism of the judicial and administrative antitrust enforcement systems applies only to the statutes that the Department and the Commission enforce concurrently, that is, the Sherman and Clayton Acts.<sup>21</sup> Section 5 of the Federal Trade Commission Act is technically without counterpart in the judicially enforceable antitrust laws. However, any significantly anticompetitive behavior can be reached under the Sherman or Clayton Acts and novel extensions of antitrust doctrine such as we owe to section 5 seem in general highly questionable.<sup>22</sup>

Insofar, then, as the FTC is more than merely another kind of court, it would appear to enjoy no comparative advantage in the administration of antitrust policy. We must now consider whether it is a superior kind of court. Evidently, it is not. A federal district court judgeship, being a more prestigious and remunerative post than that of FTC hearing examiner, attracts by and large abler individuals. This is so even though politics play a major role in the appointment of federal judges, for they play a role in the appointment of hearing examiners too. And just as hearing examiners are specialized, so district court judges can acquire expertise in the trial of antitrust cases by repeated assignment to such cases. Contrary to the myths of the administrative process, moreover, the procedures that have been developed by the federal district courts for the trial of major antitrust cases are more flexible than those followed in FTC hearings. The traditional rules of evidence, largely disregarded

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<sup>20</sup> As examples of efforts to formulate antitrust policy, compare the Briefs for the United States in *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966), and *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966), with the Commission's opinions in *Procter & Gamble Co.*, [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16673 (FTC 1963), and *Beatrice Foods Co.*, [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17244 (FTC 1965).

<sup>21</sup> Technically, the FTC does not have jurisdiction to enforce the Sherman Act, but section 5 of the Federal Trade Commission Act was early held to incorporate the prohibitions of the Sherman Act. *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922).

<sup>22</sup> See notes 45-50 *infra*.

in federal antitrust trials, continue to obsess FTC hearing examiners.<sup>23</sup> While comparison is difficult, it is a fair guess that a major antitrust case takes longer to try before the FTC than before a federal district court. Nor has the FTC been more imaginative than the courts in fashioning remedies or supervising compliance. Viewed as a "trade court," the FTC has displayed no comparative advantage over ordinary courts.<sup>24</sup>

One can argue that it is not the executive or adjudicative aspects of the administrative process, considered separately, that distinguishes it but the combination of both functions in one body. This has rather been a source of weakness. Preoccupation with the decision of particular cases to the exclusion of alternative methods of policy-making is a familiar and justified complaint against the agencies. What is less frequently emphasized is that executive responsibilities get in the way of fair and efficient judging. It is too much to expect men of ordinary character and competence to be able to judge impartially in cases that they are responsible for having instituted in the first place. An agency that dismissed many of the complaints that it issued would stand condemned of having squandered the taxpayer's money on meritless causes. And, all question of bias aside, commissioners who lack the tenure, the high status, and the freedom from other duties that federal judges enjoy cannot realistically be expected to perform the judicial function as well.

The founders of the Trade Commission were also mistaken in supposing that as an "independent" agency it would be freer than

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<sup>23</sup> This is the impression of experienced practitioners. In partial confirmation, the industrious reader might wish to compare the original record in *United States v. Philadelphia Nat'l Bank*, 201 F. Supp. 348 (E.D. Pa. 1961), a typical Antitrust Division merger case, with the record in *Procter & Gamble Co.*, [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16673 (FTC 1963), a contemporaneous and roughly comparable FTC merger proceeding.

<sup>24</sup> In the words of Commissioner Elman, *supra* note 1, at 123:

Partly because of its immersion in numerous trivial cases, the Commission has permitted delay to infect virtually all its processes. Investigations ordinarily take years to complete; almost everything the Commission does, and almost every case it decides, is based on stale or inadequate information. An atmosphere of "all deliberate lack of speed" prevails.

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. . . Despite amendments in the Commission's Rules of Practice designed to facilitate discovery and expedite adjudicative proceedings, adherence to ill-conceived and anachronistic notions of confidentiality and to the "sporting" theory of litigation has created a built-in impasse in the adjudicative process. The Commission has broken the promise of enlightened procedure implicit in the 1961 amendments to its Rules and has thus generated time-consuming interlocutory appeals and collateral litigation. Delay has vitiated the effectiveness of the Commission's adjudicative powers and remedies.

See also *id.* at 152-60.



the Department of Justice from debilitating political influences. The Commission has not displayed superior boldness or independence. The controversial cases and major doctrinal advances, the forward thrust and progressive direction of our antitrust policy, have come chiefly from the Department of Justice. This may not be merely an historical accident. Major policy initiatives are rarely taken without the backing of the President. If an independent agency is less subject to presidential direction than is the Attorney General, it is by the same token in a poorer position to enlist presidential support. Moreover, independence from the President apparently spells dependence on Congress, which goes far to explain why the politicization of anti-trust policy has proceeded further in the Commission than in the Department of Justice.<sup>25</sup>

I conclude that the notion that the administrative process has a distinctive contribution to make to antitrust enforcement is unsupported. In addition, the existence of two federal antitrust agencies with overlapping jurisdiction, far from engendering a healthy rivalry—like any sensible duopolists not subject to the antitrust laws, the agencies have proceeded by way of a division of markets<sup>26</sup>—has impeded the creation of a coherent body of antitrust law.<sup>27</sup> Worse, the FTC's contribution to the formulation of sound antitrust policy has actually been negative, judging from the restraint-of-trade cases decided by the Commission in the course of an arbitrarily selected recent year of activity.

In fiscal year 1963,<sup>28</sup> the Commission issued more than 250 decisions and orders in the restraint-of-trade area.<sup>29</sup> More than 90 per cent

<sup>25</sup> See text at notes 152-3 *infra*.

<sup>26</sup> See Brief for the Federal Trade Commission at 26-27, *FTC v. Dean Foods Co.*, 384 U.S. 597 (1966).

<sup>27</sup> The inconsistencies between Commission enforcement of the Robinson-Patman Act and the Antitrust Division's enforcement of the Sherman Act against price fixing are of course well known. See Levi, *The Robinson-Patman Act—Is It in the Public Interest?*, 1952 ABA SEC. ANTITRUST L. 60. Inconsistencies in the interpretation of the merger law are disclosed by a comparison of *Department of Justice Merger Guidelines*, 1 TRADE REG. REP. ¶ 4430 (May 30, 1968), with *Commission Enforcement Policy With Respect to Vertical Mergers in the Cement Industry*, *id.* at ¶ 4510 (Jan. 17, 1967), *Mergers in the Food Distribution Industry*, *id.* at ¶ 4520 (Jan. 17, 1967), *Product Extension Mergers in Grocery Products Manufacturing*, *id.* at ¶ 4530 (May 15, 1968), and *Textile Mill Products Industry*, *id.* at ¶ 4540 (Nov. 27, 1968). An episode of conflict in the interpretation of section 3 of the Clayton Act, 15 U.S.C. § 14 (1964), is recounted in Bok, *The Tampa Electric Case and the Problem of Exclusive Arrangements under the Clayton Act*, 1961 SUP. CT. REV. 267, 277-81.

<sup>28</sup> July 1, 1962, to June 30, 1963. I have chosen this period only because it is the last year for which there are printed volumes of FTC decisions.

<sup>29</sup> A breakdown of this total by type of case will be found in a table on the next page. For the sake of brevity, I use an abbreviated system of citation consisting of (a) the first or first and second names in the title of the case, (b) a "1" or "2" indicating volume 61

of them were issued on the basis of consent, without a trial. In discussing these cases, I assume the facts to be as stated in the Commission's opinion or, in the case of consent orders, as alleged in the complaint. The bulk of the orders—more than 200—involved alleged violations of sections 2(d) or (in one case) 2(e) of the Clayton Act, provisions added by the Robinson-Patman Act.<sup>30</sup> Section 2(d) forbids a seller to grant an advertising allowance to one of his distributors without making it available on proportionally equal terms to those of his other distributors who are in competition with the recipient.

FTC RESTRAINT-OF-TRADE DECISIONS—FISCAL YEAR 1963

Clayton Act		
Section 2(a)	9	
Section 2(c)	17	
Sections 2(d) and (e)	218	
Section 7	6	
FTC Act, Section 5		
Horizontal conspiracies		4
2(d) inducement		1
Exclusive dealing		5
Total	260	

Source: FTC Decisions, Volumes 61, 62

Section 2(e) applies the same principle to the furnishing of advertising services. The cases primarily involve allowances by wearing-apparel manufacturers to department stores, by magazine publishers to news dealers, and by toy manufacturers to toy wholesalers selling through catalogs.<sup>31</sup> In none of these cases, or any other 2(d)-(e) case in the sample, did the Commission suggest or is it likely that there was monopoly power at the manufacturer level or monopsony (buying) power at the distributor level of the industries involved. In these circumstances it is overwhelmingly likely that the granting of disproportionate allowances either evinced a recognition that certain distribution outlets are more efficient advertisers or constituted a form of indirect price competition among the manufacturers. A supplier might offer a discount or allowance to one distributor, but not to others, because the distributor did a better job of ad-

or volume 62 of the Federal Trade Commission Decisions, and (c) the page number of the case within the volume. Thus: "Southwestern Sugar, 1-525" stands for Southwestern Sugar & Molasses Co., 61 F.T.C. 525 (1962). Subsequent history of the cases cited is generally omitted.

<sup>30</sup> 49 Stat. 1526 (1936); see 15 U.S.C. § 13(d), (e) (1964).

<sup>31</sup> See, e.g., Belmont, 1-88; Nuarc, 1-375; Actual, 1-443; Transogram, 1-629; Folger, 1-1166; Alexander, 1-1317; Abby Kent, 2-1248.

vertising.<sup>32</sup> To object to such a "discrimination" would be tantamount to disapproving the payment of an extra bonus to a salesman who turns in an outstanding performance. Alternatively, the grant of a discount might mean that the supplier was reducing his price to, or closer to, his cost. In that event, competition would soon force the price cut to be made general. It is unlikely that the discount would be the result of the supplier's having decided to sell *below* his cost in order to monopolize the supply of the product in question, unless for some reason he had access to capital resources on more favorable terms than his rivals; and even then he must balance the speculative future gains of monopoly against the certain present losses from selling below cost.<sup>33</sup> Nor is it likely that the distributor could have extracted an unjustified concession from the supplier, since the latter could always shift his business to other distributors. Even if the distributor had a monopsony, it would probably not pay him to discriminate among competing suppliers, since that would drive some of them out of the market and thereby reduce his sources of supply.

Seventeen cases in the sample involve alleged violations of section 2(c) of the Clayton Act, another Robinson-Patman provision: the "brokerage clause."<sup>34</sup> In sixteen of the cases, sellers of agricultural produce (mostly citrus fruits) were ordered to stop paying brokerage to buyers or buyers' representatives.<sup>35</sup> So far as appears, the recipient of the brokerage payment rendered services that fully entitled him to the payment. But even if phony brokerage were involved, it would be unclear why a public agency should be concerned. Unearned

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<sup>32</sup> This appears rather clearly in one of the few cases in this group in which the Commission wrote an opinion, Folger, 1-1166, 1181.

<sup>33</sup> See Leeman, *The Limitations of Local Price-Cutting as a Barrier to Entry*, 64 J. POL. ECON. 329 (1956); McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J. LAW & ECON. 137 (1958); Telser, *Cutthroat Competition and the Long Purse*, 9 J. LAW & ECON. 259 (1966). This and some other economic issues under the Robinson-Patman Act are discussed in McGee, *Some Economic Issues in Robinson-Patman Law*, 30 L. & CONTEMP. PROB. 530 (1965).

<sup>34</sup> 15 U.S.C. § 13(c) (1964):

That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

<sup>35</sup> Exchange Distrib., 1-1; Dixie-Central, 1-67; Lange, 1-263; Walter, 1-413; Mission, 1-419; Alamo, 1-515; Rogers, 1-565; Lightner, 1-575; Western Fruit, 1-586; Spada, 1-908; Pure, 1-976; Warren, 1-980; Wayne, 1-1294; Valley Fruit, 1-1389; Dan, 2-1212; Guercio, 2-1391.

brokerage might either be a form of concealed price competition or, in some cases, a fraud on the seller's broker, but in neither case would competitive processes be seriously endangered. In one of the seventeen cases, involving a discount allegedly "in lieu of" brokerage, the Commission, to its credit, found that the discount was compensation for a legitimate function in distribution performed by the recipient and dismissed the complaint.<sup>36</sup>

Nine cases involve section 2(a) of the Clayton Act. In five, a seller was charged with granting a discount to a grocery store or other large or chain retailer, but no circumstances were alleged that would support an inference of monopolistic conditions or tendencies.<sup>37</sup> Like almost all of the Robinson-Patman cases in the sample, these cases arose in highly competitive industries such as wholesale and retail distribution, magazine publishing, agriculture, auto parts, and toys, industries where one would have thought that the determination of price could safely be left to free market processes.

In two other 2(a) cases, the Commission condemned functional (also quantity and volume) discounts granted by manufacturers to jobbers or other distributors.<sup>38</sup> If one distributor performs more service for the manufacturer in the distribution process than another—perhaps by acting as a warehouseman—it is natural that he should demand a lower price from the manufacturer in order to cover his additional expenses. To the Commission, however, if the distributors receiving different functional discounts are in competition, the differential is an unlawful price discrimination. The effect of this rule is to prevent manufacturers from adopting the most efficient method of distribution.

In another case, the Commission struck down a large dairy company's practice of selling its own brand milk at a higher price than milk sold under distributors' brands.<sup>39</sup> Since a seller incurs advertising expenses in promoting its own brand that it does not incur when its product is sold under the distributor's brand and advertised, if at all, by the distributor, a price difference is necessary. The Commission's hostility to the sale at lower price of off-brand merchandise is inexplicable in terms of the goal of promoting a competitive economy: distributor brands weaken the power of the heavily advertised manufacturer brands.

The last of the Commission's section 2(a) cases in the sample

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<sup>36</sup> Hruby, 1-1437.

<sup>37</sup> Thompson-Hayward, 1-323 (complaint dismissed); Southwestern Sugar, 1-525; Dietetic, 2-1288; Foremost, 2-1344; Oz, 2-1378.

<sup>38</sup> D L Products, 2-35; Inland, 2-728.

<sup>39</sup> Borden, 2-130, upheld in *FTC v. Borden Milk Co.*, 383 U.S. 637 (1966).

involves a charge of predatory conduct on the part of a woodenware manufacturer.<sup>40</sup> The opinion recites evidence of predatory intent that, if true, would support a criminal conviction under section 2 of the Sherman Act, but that, no such criminal action having been brought, is probably untrue. The critical defect of the Commission's case, as pointed out by the dissenting Commissioner<sup>41</sup>—but evident on the face of the Commission's opinion as well—is the want of persuasive evidence that price differences (all that section 2(a) reaches) were the weapon used by the alleged predator.

The Robinson-Patman cases that I have briefly sketched cannot be justified in terms of the goal of promoting competition and efficiency, or, for that matter, in terms of any other arguably meritorious goal that the reader may care to supply. It will not do to reply that the Commission in these cases is merely doing the will of Congress. Not only was the Commission instrumental in procuring the passage of the Robinson-Patman Act,<sup>42</sup> but nothing in the Act compels the Commission to enforce it so much and in so literal-minded a fashion. The wise exercise of administrative discretion would lead the Commission to remit most Robinson-Patman complainants to the private remedies that are available under the Act,<sup>43</sup> and in those cases that it does bring, to interpret the Act's rather plastic language in a manner designed to make it harmonious with rather than subversive of antitrust policy.<sup>44</sup> There is a good deal of give in the statute.<sup>45</sup>

The Commission's restraint-of-trade activity in the test year also includes 10 cases under section 5 of the Federal Trade Commission Act. Four involve price-fixing and other conspiracies among competitors.<sup>46</sup> As I have explained in a recent article, a weak injunctive remedy is not an adequate remedy against conspiracy; conspiracy cases should normally be prosecuted by the Department of Justice

<sup>40</sup> Forster, 2-852. For later developments in the case see [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17304 (FTC 1965).

<sup>41</sup> Forster, 2-852, at 923-4.

<sup>42</sup> See FTC, FINAL REPORT ON THE CHAIN STORE INVESTIGATION, S. DOC. NO. 4, 74th Cong., 1st Sess. (1935).

<sup>43</sup> See 15 U.S.C. § 15 (1964).

<sup>44</sup> As the Supreme Court has said it should. *Automatic Canteen Co. v. FTC*, 346 U.S. 61 (1953).

<sup>45</sup> See, e.g., *Continental Baking Co.*, [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16720 (FTC 1963); *Flotill Products, Inc.*, [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16970 at 22044-7 (FTC 1964) (separate opinion of Commissioner Elman); *Monroe Auto Equipment Co.*, [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 17011 at 22106-16 (FTC 1964) (dissenting opinion of Commissioner Elman).

<sup>46</sup> *Southwestern Sugar*, 1-525; *Manufacturing Chemists'*, 1-1410; *Wallace*, 2-733; *Revlon*, 2 968.

and punitive sanctions sought.<sup>47</sup> Another case involves a charge that a buyer induced the grant of an advertising allowance unlawful under section 2(d) of the Clayton Act;<sup>48</sup> my earlier comments on that provision apply here. The remaining section 5 cases, which involve various forms of exclusive dealing, seem to be sports from the standpoint of promoting a competitive economy. A franchise system of retail distribution in the highly fragmented shoe industry is struck down.<sup>49</sup> Frozen-food manufacturers are accused of having attempted to sew up retail outlets by giving them display cases without charge.<sup>50</sup> Territorial and customer restrictions imposed by a manufacturer of floor coverings on its distributors in an attempt to stave off bankruptcy are invalidated.<sup>51</sup> Requirements contracts in the scrap-iron business are condemned<sup>52</sup> in an opinion that, as the dissenting Commissioner points out,<sup>53</sup> lacks any intelligible theory of illegality. And oil companies are forbidden to agree with tire companies to promote the sale of the latter's tires, batteries, and accessories to the oil companies' retail dealers.<sup>54</sup>

There remain for discussion six cases under section 7 of the Clayton Act. Two are dismissals.<sup>55</sup> Two involve attacks on mergers between manufacturers of the same product in different geographical markets; economic power is darkly alleged, but no coherent theory as to why such mergers are thought to endanger competition is suggested.<sup>56</sup> In another case, a merger is struck down on the ground that it might facilitate reciprocal buying.<sup>57</sup> The Commission's premise that reciprocal buying is an inherently anticompetitive practice<sup>58</sup> is highly ques-

<sup>47</sup> Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 STAN. L. REV. 1562, 1588 (1969). This precept would not apply to cases designed to test the frontiers of the law. What is striking about the FTC conspiracy cases in the sample, however, is that the conduct alleged is not only well within the bounds of existing interpretations of the price-fixing prohibition but often downright vicious. In earlier years, however, there were some pathfinding FTC conspiracy cases. See *FTC v. Cement Institute*, 333 U.S. 683 (1948); *Triangle Conduit & Cable Co. v. FTC*, 168 F.2d 175 (7th Cir. 1948), *aff'd by an equally divided Court sub nom. Clayton Mark & Co. v. FTC*, 336 U.S. 956 (1949).

<sup>48</sup> *American Radiator*, 1-930 (complaint dismissed).

<sup>49</sup> *Brown Shoe*, 2-679. The Supreme Court eventually upheld the Commission's order. *FTC v. Brown Shoe Co.*, 384 U.S. 316 (1966).

<sup>50</sup> *Swift*, 1-172 (complaint dismissed).

<sup>51</sup> *Sandura*, 1-756. The Commission's order was set aside in *Sandura Co. v. FTC*, 339 F.2d 847 (6th Cir. 1964).

<sup>52</sup> *Luria*, 2-243.

<sup>53</sup> *Id.* at 641-6.

<sup>54</sup> *Goodrich*, 2-1172. See *Atlantic Ref. Co. v. FTC*, 381 U.S. 357 (1965).

<sup>55</sup> *Crane*, 1-1462; *Warner*, 2-1295.

<sup>56</sup> *National Dairy*, 2-120, 124-5; *Martin-Marietta*, 2-834, 840-3.

<sup>57</sup> *Consolidated Foods*, 2-929, upheld in *FTC v. Consolidated Foods Corp.*, 380 U.S. 592 (1965).

<sup>58</sup> 2-950-3.

tionable.<sup>59</sup> Suppose that widget-maker *X* both purchases steel from steel-producer *Y* for fabrication into widgets and, through a newly created or acquired catering subsidiary, applies for the cafeteria concession in one of *Y*'s plants. If *Y* has other equally good customers for its steel, it will grant the cafeteria concession to *X* only if *X*'s terms are better than competing concessionaires'. If *Y* is for some reason at a disadvantage in bargaining over the sale of steel with *X*, then *X* may be able to insist that *Y* use its cafeteria service even though it is more costly than or otherwise inferior to competitors' service. But if *X* has such power over *Y* it can exploit it without going into the cafeteria business: it can demand a lower price on steel. Reciprocal buying is therefore hard to fathom either as a means to or as a manifestation of monopoly. It seems more likely to represent either a justified preference or a method of covert price competition. *Y* might prefer to grant *X* a discount indirectly, by paying an excessive price for cafeteria service, rather than directly and risk reprisal by competing steel suppliers. A rule outlawing mergers that facilitate reciprocal buying is built on sand. It can also be used to justify attacking virtually any acquisition by a large company.<sup>60</sup>

My sample of more than 250 restraint-of-trade cases contains none that seems justified on economic or any other grounds save (a) one merger case, not previously discussed, involving leading manufacturers of particle accelerators<sup>61</sup> and (b) the conspiracy cases that should have been brought, if at all, by the Department of Justice. I doubt that the picture would change markedly if a similar analysis were performed on the Commission's work product of other years or if the focus were enlarged to include the Commission's nonadjudicative activities. The report of President Nixon's antitrust task force gives one instance of what goes on beneath the adjudicative surface: the protection of dealers against termination in circumstances unrelated, where not opposed, to antitrust objectives.<sup>62</sup> One may object that any survey of the Commission's activities necessarily ignores the violations that are deterred by the Commission's readiness to proceed against a violation. However, since many of the precedents established by the Commission involve the condemnation of

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<sup>59</sup> See Ferguson, *Tying Arrangements and Reciprocity: An Economic Analysis*, 30 *LAW & CONTEMP. PROB.* 552, 567-74 (1965); Stigler, *Working Paper for the Task Force on Productivity and Competition: Reciprocity*, 5 *TRADE REG. REP.* ¶ 50252 at 55525 (June 24, 1969).

<sup>60</sup> Cf. Address of Attorney General Mitchell, June 6, 1969, reported in 5 *TRADE REG. REP.* ¶ 50247.

<sup>61</sup> High, 2-1028.

<sup>62</sup> REPORT OF THE PRESIDENT'S TASK FORCE ON PRODUCTIVITY AND COMPETITION, reported in 5 *TRADE REG. REP.* ¶ 50250 at 55517-8 (1969).

practices likely to promote competition and efficiency, it is probable that many good practices are deterred along with bad. The most pernicious practice attacked by the Commission in the sample year, horizontal price-fixing, is probably not deterred at all by the prospect of an FTC proceeding.<sup>63</sup>

The Commission's antitrust activity, 99.5 per cent of which seems misguided, is not costless. The Commission's appropriations in fiscal year 1963 were \$11.5 million, of which about 50 per cent was allocated to restraint-of-trade work.<sup>64</sup> The legal and related expenses incurred by firms in attempting to comply with (or evade) Commission rules and orders, and in defending the cases prosecuted by the Commission, are, at a guess, 5 to 10 times as great as the Commission's expenses.<sup>65</sup> The direct cost of the Commission's restraint-of-trade activity in the sample year must therefore have exceeded \$30 million. The total social cost of the activity may be much higher, since many of the Commission's decisions outlawed beneficial practices. (A study of compliance would be necessary, however, to establish that the Commission's orders actually abated the forbidden practices and hence imposed these additional costs.)

## II. THE COMMISSION AND CONSUMER FRAUDS

Although the FTC was originally created to grapple with monopoly problems, by its second decade 90 per cent of its orders were directed at deceptive rather than monopolistic practices.<sup>66</sup> This development is instructive, and we shall consider the reason later.<sup>67</sup> A more fundamental question, although one rarely put because most people consider the answer self-evident, is whether there should be a government agency that proceeds against sellers who try to mislead consumers.

Even in the absence of legal remedies of any kind, it is unlikely that deceptive selling would be rampant. The principal preventives against deception have always been nonlegal. There is first of all the incentive of the consumer to exercise reasonable care and common sense in purchasing and to learn from any unhappy experiences.

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<sup>63</sup> See note 47 *supra* and accompanying text.

<sup>64</sup> 1963 FTC ANN. REP. 31. Of course, many of the expenses involved in the cases decided during the sample year were incurred in previous years and many of the expenses incurred in the sample year pertained to cases decided in subsequent years. But a more precise estimate of the expenses of the cases surveyed is not necessary for our purposes.

<sup>65</sup> Cf. Gerwig, *Natural Gas Production: A Study of Costs of Regulation*, 5 J. LAW & ECON. 69, 86 (1962).

<sup>66</sup> M. WATKINS, PUBLIC REGULATION OF COMPETITIVE PRACTICES IN BUSINESS ENTERPRISE 125 (1940).

<sup>67</sup> See p. 87 *infra*.



Second, there is competition. A seller has a strong incentive not to antagonize customers lest he lose their patronage to his competitors. This factor alone should make fraud rare among sellers who depend heavily on repeated sales of the same items to the same consumers (such as grocery stores) or who would find it costly to liquidate their business on short notice as a result of having forfeited consumer good will by dealing unfairly (such as department stores and most manufacturers). Correlatively, competitors of deceptive sellers have an incentive to give consumers prompt and accurate information in order to correct any misrepresentation that might cause a substantial diversion of sales.

In the political arena we posit a marketplace of ideas in which good ideas can be expected to prevail in open competition with bad, and one can take the same approach to advertising. Individuals know more about household products than they do about political questions, so if we trust them to evaluate competing and often fraudulent claims by political candidates, we should also trust them to evaluate competing product claims. Since other sellers, like rival candidates, have every incentive to counter the misleading representations of a competitor, false claims should eventually be unmasked. To pursue the political analogy (which I do not claim is perfect) one step further, occasional transitory misrepresentations may not be entirely a bad thing. If a false claim elicits a substantial increase in sales, the industry has learned something new about consumers' wants and competitors of the false advertiser will have an incentive to develop a product about which the claim can be truthfully made.<sup>68</sup>

The role of competition is strangely ignored in discussions of consumer protection. The hostility in legal literature to "contracts of adhesion" (standard contracts offered to buyers on a take-it-or-leave-it basis) is a case in point.<sup>69</sup> It is not the opportunity to negotiate separately with each seller that is the consumer's best protection, but competition, the opportunity to shop for the best new-car warranty or fire-insurance policy. So long as there is more than one seller of a product it is of no moment that each finds it cheaper to issue a standard contract than to negotiate separately with every consumer.

An inadequate understanding of the competitive process is also evident in the prevalent view that "one false advertisement is likely to breed others in response" rather than to invite refutation.<sup>70</sup> There

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<sup>68</sup> Cf. J. S. MILL, *On Liberty*, in *ON LIBERTY AND OTHER ESSAYS* 3, 21, 41-54 (1926).

<sup>69</sup> See Mueller, *Contracts of Frustration*, 78 *YALE L.J.* 576 (1969), and articles cited *id.* at 580 n.19.

<sup>70</sup> *Developments in the Law—Deceptive Advertising*, 80 *HARV. L. REV.* 1005, 1030 (1967).

will almost always be some sellers who have more to gain from exposing than from joining in a deceptive practice. Thus, producers of genuine cowhide and distributors holding stock of the product would hardly be in a position to join with sellers of a cheap substitute who were trying to pass it off as the genuine article; to protect their business they must expose the fraud. Beyond that, some sellers will want to expose competitors' misrepresentations in order to establish a superior reputation for honesty and reliability. And competitive disparagement—blatant in face-to-face selling, subtle but not less effective in television and other advertising—is in fact quite common. It is an important function of trade associations.

Competitors are not the only source of product information to the consumer in a free market. It is relatively rare for a consumer to deal with only one firm, one source of information, in making a purchase. Consumers consult physicians, appraisers, securities brokers, home improvement contractors, newspaper and magazine columnists, interior decorators, travel agents, and a host of others whose business it is to advise consumers on choosing among competing products and whose livelihood depends to no small extent on the honesty and accuracy of their advice. An important example is the department store, which "may be viewed as an institution which searches for the superior qualities of goods and guarantees that they are good quality."<sup>71</sup> These "information brokers" do not exist primarily to prevent deception, but they have that effect. They provide at least a partial answer to the problem, to be discussed below,<sup>72</sup> of the misrepresentation that is not challenged by a competing seller because there is no competing seller who would not be equally discredited by the truth.

While market processes should provide broadly adequate protection against the deception of consumers, they will not provide complete protection. Since the provision of information is not costless,<sup>73</sup> there will be cases where the amount of sales affected by the deceptive practice is so small that it does not pay competitors or information brokers to supply correct information. These are doubtful cases for any form of corrective action, public or private, not only because any corrective action will involve some direct costs and the benefits will be slight, but also because efforts to protect a few particularly gullible or vulnerable people may result in the denial of useful in-

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<sup>71</sup> Stigler, *The Economics of Information*, 69 J. POL. ECON. 213, 224 (1961), reprinted in G. STIGLER, *THE ORGANIZATION OF INDUSTRY* 171, 187 (1968).

<sup>72</sup> See text at notes 86-87 *infra*.

<sup>73</sup> See generally Stigler, *The Economics of Information*, 69 J. POL. ECON. 213 (1961), reprinted in G. STIGLER, *THE ORGANIZATION OF INDUSTRY* 171 (1968). See also Telser, *Some Aspects of the Economics of Advertising*, 41 J. BUS. U. CHI. 166, 171 (1968).

formation to the many or the imposition of unwanted information on them.<sup>74</sup>

A more serious, I would say *the* serious, problem arises from the fact that there will always be some lag between misrepresentation and rebuttal. The prospect of a quick killing before consumers are made wise to the fraud by competing sellers may induce a firm that is not concerned with remaining in the business to commit fraud until unmasked, and then switch to another line. If consumers had no legal protection against such firms they would resort to costly self-protective devices such as increased expenditures on shopping and refusals to deal with newly established firms; many more information brokers would also be needed. The law of contracts is intended to answer to this problem. The provision of legal remedies for breach of contract reduces the cost of transactions by obviating (or at least reducing) the need for buyer or seller to adopt cumbersome measures to protect himself from the other's bad faith.<sup>75</sup> As an incidental feature of the system of contract rights and remedies, one inveigled into a transaction by deception may rescind the transaction, or, if it has already been consummated, collect damages from the defrauding party.<sup>76</sup> In this fashion, the legal system protects buyers

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<sup>74</sup> On this point, see, further, text at notes 83-84 *infra*.

<sup>75</sup> This is not to suggest that the only purpose of the law of contracts is to protect against bad faith. Another is to resolve peaceably bona fide disputes arising from ambiguity in drafting, unforeseen circumstances, and the like.

<sup>76</sup> RESTATEMENT, CONTRACTS, §§ 470 *et seq.* (1932). Fraud and misrepresentation are also, and more familiarly, torts. See RESTATEMENT, TORTS, §§ 525 *et seq.* (1938). A good discussion of the consumer's rights under tort and contract law is Seavey, *Caveat Emptor as of 1960*, 38 TEX. L. REV. 439 (1960). It might improve clarity of analysis to classify all wrongs committed by one party to a contractual relationship upon another as in the nature of breaches of contract, and to reserve the tort classification for wrongs inflicted on those not in a contractual relationship with the wrongdoer. Were there no government regulation of airplane safety, the safety of passengers and crews would be determined by bargaining between them and the airline companies. The latter would supply the mixture of price, comfort, safety, and other service characteristics demanded by passengers and crew members. If a crash resulted from the airline's failure to maintain the level of safety that it had expressly or impliedly promised, it would be guilty of a breach of contract and would be liable in damages for the death or injury of any passenger or crew member. The relationship between the airline and, say, a farmer whose crops are destroyed as a result of the crash is quite different. The relationship is not voluntary and contractual, and the question of legal liability cannot be resolved by reference to the bargain of the parties. This is a tort situation properly so called. The problem of consumer fraud belongs in the contract category, since it is a wrong committed by one upon the other party to a sale agreement. Of course, where a product is sold through an intermediary, there may be a question whether and in what sense the manufacturer may be said to have a contractual relationship with the consumer. This is the issue of privity, which has plagued the products-liability area. See Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966); Kessler, *Products Liability*, 76 YALE L.J. 887 (1967). Incidentally, I do not mean to imply that society should necessarily rely on

against sellers who are tempted by the prospect of short-term gains to obtain business by deceit.

As in the case of the FTC's antitrust role, then, there was an existing system of remedies for fraudulent conduct and the question is why it was thought necessary to supplement them by a scheme of administrative regulation. (As mentioned earlier, it was apparently not thought necessary by the sponsors of the Commission, who envisaged it as an antitrust agency.)<sup>77</sup> The justification usually advanced for having the government prosecute deceptive sellers is that the system of private remedies is ineffectual where the injury to any single consumer is small. Although the aggregate injury to the consuming public may be considerable, no individual consumer has an incentive to assume the costs of litigation. An independently valid corollary is that private remedies should be relatively effective in preventing serious frauds—those that endanger health or safety or involve a large pecuniary loss—for the likelihood of a private suit in such cases is great.

The point about the small loss is unforceful. With respect to the vast number of products marketed through large and reputable retail outlets, the retailer will amalgamate the claims of many consumers and act as their broker. Suppose that a mattress manufacturer who sells through Sears Roebuck makes false claims in the advertising of the product. Defrauded consumers might not consider suing the manufacturer, but they will not hesitate to complain to Sears, which will refund the purchase price and turn around and sue the manufacturer, or at least cease buying from him. In cases where the manufacturer deals directly with the consumer or where the fraud is committed by the retailer, it should be possible to rely on competitors of the deceptive seller to institute judicial proceedings for the elimination of a fraud that, if successful, must be diverting appreciable sales from them. In such a proceeding the competitor of the deceptive advertiser (or trade association of competitors<sup>78</sup>) would in

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legal remedies alone to protect the health and safety of consumers. The fact that an airline is motivated to provide the level of safety demanded by its passengers and crew members does not exclude the possibility of carelessness or mistake. Since the consequences are often irrevocable—money is rarely adequate compensation for death or grave injury—society may wish to take additional steps to prevent a mishap: government licensing and testing of pilots, government inspections, criminal sanctions for carelessness, etc. *But see Sands, How Effective Is Safety Legislation?*, 11 J. LAW & ECON. 165 (1968). With a minor exception (*see note 94 infra* and accompanying text), the FTC does not regulate safety and this analysis is inapplicable.

<sup>77</sup> See note 4 *supra* and accompanying text.

<sup>78</sup> There is, of course, the danger that any expansion of trade-association activity may, by increasing the occasions of collaboration among competitors, foster price fixing.

effect be aggregating the individually insignificant consumer claims. Consumers would not be made whole for past losses but the practice would be stopped, which is all that FTC fraud proceedings can do.

Implicit in the foregoing, it may be argued, is the assumption that the courts are capable of evolving reasonably satisfactory legal principles governing consumer fraud. The assumption seems broadly correct, although the courts have been slow to recognize the right of a competitor to sue on the ground of false advertising per se<sup>79</sup> (the occupation of the field by the FTC may provide a partial explanation). Fraud and misrepresentation are familiar concepts in Anglo-American jurisprudence, and their application in the sale context should involve neither conceptual nor practical difficulties of moment. But an assumption of judicial lawmaking adequacy is unnecessary. If the courts hesitate or stumble in adapting common law principles to novel circumstances, it is open to the legislature to lend a hand by excising existing defenses or declaring new rights of action. In the Federal Employers' Liability Act, for example, Congress altered common law rights while leaving administration of the new rights to the courts.<sup>80</sup> Of more immediate relevance, in section 43(a) of the Lanham Trade-Mark Act Congress created a new right of action for competitors injured by misrepresentation that, although little utilized,<sup>81</sup> may well have repaired any deficiencies of the common law in this area.<sup>82</sup>

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<sup>79</sup> For the development of legal thinking on this question see *American Washboard Co. v. Saginaw Mfg. Co.*, 103 F. 281 (6th Cir. 1900); *Ely-Norris Safe Co. v. Mosler Safe Co.*, 7 F.2d 603 (2d Cir. 1925), *rev'd on other grounds*, 273 U.S. 132 (1927); *Handler, False and Misleading Advertising*, 39 YALE L.J. 22 (1929); RESTATEMENT, TORTS § 761 (1938); *Callmann, False Advertising as a Competitive Tort*, 48 COLUM. L. REV. 376 (1948); RESTATEMENT, TORTS § 712 (Tent. Draft No. 8, 1963); *Developments in the Law—Competitive Torts*, 77 HARV. L. REV. 888, 905-7 (1964); *Lewis, Consumer Protection from Misrepresentation Through Individual Action of a Competitor*, 1967 N.Y. STATE BAR ASS'N ANTI-TRUST LAW SYMPOSIUM 24.

<sup>80</sup> 45 U.S.C. § 51 *et seq.* (1964).

<sup>81</sup> *Developments in the Law—Competitive Torts*, *supra* note 79, at 908. Its nonuse may in part reflect the fact, discussed in text at note 91 *infra*, that the FTC affords a costless remedy to a firm injured by a competitor's deceptive sales practice. But this cannot be the complete answer, since the FTC cannot award damages. Perhaps the number of frauds causing sufficient diversion of sales to warrant the expense of bringing a lawsuit is simply very small.

<sup>82</sup> Section 43(a), 15 U.S.C. § 1125(a) (1964), provides:

Any person who shall affix, apply, or annex, or use in connection with any goods or services, or any container or containers for goods, a false designation of origin, or any false description or representation . . . and shall cause such goods or services to enter into commerce . . . shall be liable to a civil action by any person doing business in the locality falsely indicated as that of origin . . . or by any person who believes that he is or is likely to be damaged by the use of any such false description or representation.

For interpretations stressing the breadth of the provision see, e.g., *L'Aiglon Apparel, Inc.*

It may also be doubted whether administrative enforcement of antifraud principles has any comparative advantage, procedurally or institutionally, over judicial. The nature and complexity of the issues do not argue for an administrative agency. The interpretation of advertising or sales representations and the determination of their truth are within the ordinary competence of judges and juries. To be sure, expertise is not the only reason for entrusting administration of a statute to an administrative agency rather than to the courts. Another reason is that a newly created agency can be expected to give a more sympathetic interpretation to a statute intended to break with common law traditions.<sup>83</sup> Given its head, an agency probably would develop stricter standards of what constitutes unlawful deception than would the courts. It would be more likely to define its mission as one of consumer protection, narrowly conceived, rather than as the neutral resolution of disputes between sellers and buyers. But society may not gain from the stricter standards. Just as the cheapest way to reduce the incidence of certain crimes, such as car theft, is by inducing potential victims to take simple precautions (locking car doors), so possibly the incidence of certain frauds could be reduced at least cost to society by insisting that consumers exercise a modicum of care in purchasing, rather than by placing restrictions on sellers' marketing methods. Whenever the Commission compels a seller to supply additional information to consumers, it increases the consumers' shopping burdens and, since consumers must be nearly saturated with product information already, may be forcing the displacement of other and equally significant product messages. Much advertising that the Commission views as suspiciously inexplicit or elliptical may simply reflect the need to economize on product information, albeit a by-product may be that here and there someone is misled.<sup>84</sup> Since an attempt to protect the care-

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v. Lana Lobell, Inc., 214 F.2d 649 (3d Cir. 1954); *Gold Seal Co. v. Weeks*, 129 F. Supp. 928 (D. Colo. 1955), *aff'd per curiam sub nom. S.C. Johnson & Son v. Gold Seal Co.*, 230 F.2d 832 (D.C. Cir. 1956), *cert. denied*, 352 U.S. 829 (1956). A recent discussion is Lewis, *supra* note 79. It has been argued that section 5 of the Federal Trade Commission Act itself creates a private right of action for a competitor injured by an unfair or deceptive practice. Bunn, *The National Law of Unfair Competition*, 62 HARV. L. REV. 987 (1949).

<sup>83</sup> For a good recent summary of these and other grounds for entrusting enforcement of a statute to an administrative agency see Winter, *Judicial Review of Agency Decisions: The Labor Board*, 1968 SUP. CT. REV. 53, 55-67. None of the other grounds he discusses seems applicable to the Trade Commission either; nor do others come to mind that might be.

<sup>84</sup> On the economic role of advertising see Stigler, *supra* note 73; Lancaster, *A New Approach to Consumer Theory*, 73 J. POL. ECON. 132, 150 (1966); Telser, *Supply and Demand of Advertising Messages*, 56 AM. ECON. REV. PAPERS & PROCEEDINGS 457 (1966); Posner, *Working Paper for the Task Force on Productivity and Competition: Advertising*

less may deny information to the careful, the answer in these cases may be to hold the consumer to a somewhat higher standard of care. The FTC, which avows a standard of protecting credulous as well as average consumers from deception,<sup>85</sup> seems incapable of grasping this point. A court might be more sensitive to the reciprocal character of the problem of deception.

A system of private remedies for fraud is unlikely to be completely adequate. In particular, it will fail to deter sellers who compound their fraud by ingeniously evading legal processes through concealment of their assets or frequent changes in corporate identity and in the locus of their activities. Criminal or other punitive sanctions are necessary in such cases. But this is not a problem that having a Federal Trade Commission will cure.

The one area in which the case for an agency is stronger than previously suggested is where no seller has an incentive to furnish correct information, or to sue a seller who misleads the consumer. An example is cigarettes. There are competing cigarette manufacturers but none of them stands to gain from advertising that the smoking of cigarettes is hazardous to health. To be sure, if cigarette sales declined because people became convinced that smoking was dangerous, the sales of other products or services would rise. However, apart from sellers of other tobacco products, for whom a campaign of disparaging cigarettes would involve a palpable risk of being hoist with their own petard, no seller or group of sellers could anticipate a marked rise in sales as a result of a reduction in smoking. There is therefore no competitor with an incentive to supply information on the relationship between smoking and health that cigarette companies naturally try to withhold. Nor is this a case where "information brokers" are likely to be active. Few consumers would pay a company to investigate the relationship between smoking and health, since it is clear that once the information were developed it would be disseminated to all consumers and not merely to those who were paying for it; there is a problem of free loading.

Even the cigarette case is less clear-cut than at first appears. Charitable organizations such as the American Cancer Society have sup-

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and Product Differentiation, 5 TRADE REG. REP. ¶ 50250 at 55527 (June 24, 1969). For a recent survey and bibliography see Doyle, *Economic Aspects of Advertising: A Survey*, 78 ECON. J. 570 (1968).

<sup>85</sup> See, e.g., *Exposition Press, Inc. v. FTC*, 295 F.2d 869, 872 (2d Cir. 1961); *Aronberg v. FTC*, 132 F.2d 165, 167 (7th Cir. 1942); *General Motors Corp. v. FTC*, 114 F.2d 33, 36 (2d Cir. 1940), cert. denied, 312 U.S. 682 (1941); *Heinz V. Kirchner*, [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16664 at 21539-40 (FTC 1963) (Commission will protect the "gullible and credulous" although not the "foolish or feeble-minded").

ported both extensive research into the health hazard and extensive dissemination of the results of the research. Private tort actions by consumers are potentially an effective remedy<sup>86</sup> since the injury to the individual is, in this instance, not trivial. And competitive pressures should induce cigarette companies to search out ways of making their product less toxic and should evoke efforts to devise a nontoxic substitute for cigarettes. Cigarette companies *have* striven to reduce the tar and nicotine content of their tobaccos and to improve filtration, and ingenious people have invented cigarettes that contain lettuce or some other allegedly harmless tobacco substitute. In the ordinary course one would expect cigarette companies to advertise that a particular brand was safer than competitors'—thereby tipping the industry's hand, for such advertising unmistakably implies that there is a health hazard—and for the inventors of nontobacco cigarettes to advertise that their products, unlike tobacco cigarettes, are safe. Competition would cause the information barrier eventually to crumble. It is a profound irony that for years the FTC, encouraged by cigarette companies that feared just the process I have described, forbade the disclosure in advertising of the tar or nicotine content of any cigarette brand.<sup>87</sup>

Although the strongest case for a consumer-protection agency<sup>88</sup> relates to the situation just described where the fraud embraces all close substitutes of a product, and there is consequently no incentive for competing sellers to furnish correct information or to bring suit, this has not been the emphasis of the FTC.<sup>89</sup> Judging from the character of the cases, and from other clues, most FTC fraud cases originate directly or indirectly in the complaint of a competitor.<sup>90</sup> These

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<sup>86</sup> See *Green v. American Tobacco Co.*, 391 F.2d 97 (5th Cir. 1968), where for the first time a cigarette company was held liable in a suit by a victim of lung cancer. As knowledge concerning the risks of smoking becomes widespread, the cigarette companies may be able to defend such suits successfully on the ground of assumption of risk. See *Pritchard v. Liggett & Meyers Tobacco Co.*, 295 F.2d 292 (3d Cir. 1961). By the same token, however, a hypothesis of deception will become less plausible.

<sup>87</sup> See 1960 FTC ANN. REP. 82.

<sup>88</sup> And not necessarily a government agency.

<sup>89</sup> In fairness to the Commission, its initiative in attempting to require a disclosure of health hazards in cigarette advertising should be noted. See Trade Regulation Rule for the Prevention of Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324 (1964).

<sup>90</sup> I am recording here the impression of knowledgeable observers and insiders. See, e.g., Blair, *Planning for Competition*, 64 COLUM. L. REV. 524, 525-6 (1964); Thompson, *Highlights in the Evolution of the Federal Trade Commission*, 8 GEO. WASH. L. REV. 257, 262 (1940). The facts are hard to pin down because one does not know how many "consumer" complaints are lodged by employees of competitors, and how many genuine consumer complaints result in Commission action compared to complaints by competitors (or by labor unions representing their employees). The most persuasive evidence of the com-



are precisely the cases in which private remedies should be adequate. Where competitors do not complain and where, therefore, private remedies may be inadequate, it is rare that the FTC provides any remedy either. The individual consumer can hardly be relied upon to set the FTC's enforcement machinery in motion, though some do. If the market is failing to supply correct information, the consumer may not realize that he has been defrauded. And if he does, he will have no incentive to complain to the Commission, for it cannot help him. It has no power to award reparations or even to order rescission. It can only enter a cease and desist order forbidding future deceptions, a form of protection that can afford little satisfaction to a consumer who realizes that he was bilked.

If I have correctly described the FTC's emphasis in the fraud area—and some corroborative evidence will be provided in a moment—the FTC is doing little that is not within the competence of courts. But the FTC's fraud activities are not merely redundant. Ordinarily, a firm cannot conduct a lawsuit against a competitor or potential competitor without incurring costs comparable to those of its opponent. This rough equality of burdens is a deterrent to the use of the litigation process to harass. Proceeding against a competitor by way of a complaint to the Trade Commission, in contrast, is a method of imposing the costs of litigation on the competitor at no cost to the complainant. All of the costs of prosecution are borne by the FTC; all of the costs of defense by the respondent. The complainant pays nothing. This arrangement creates an incentive to foment litigation designed purely to suppress competition, for it enables the complaining party to create a barrier to entry in its exact technical sense: a condition that imposes upon a new entrant a cost not borne by firms already in the market.<sup>91</sup>

I emphasize the effects of the unequal burdens of FTC litigation on entry because it is the new firm or, what is analytically quite similar, the new product sold by an existing firm that is most vul-

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petitor-inspired character of most FTC fraud action is to be found in the nature of the cases, discussed in text at notes 94-137 *infra*. The one area in which the FTC does not rely upon outside complaints for most of its enforcement action turns out to be the exception that proves the rule. The Commission conducts a systematic inspection of fur, wool, and textile fiber product merchants to assure compliance with the Fur, Wool, and Textile Fiber Product labeling acts. But these are statutes that were enacted at the behest of the industries to protect their trademarks and goodwill rather than to protect consumers against fraud. See note 124 *infra*.

<sup>91</sup> G. STIGLER, *THE ORGANIZATION OF INDUSTRY* 67 (1968). The traditional fear, noted in Dole, *Merchant and Consumer Protection: The New York Approach to Deceptive Trade Practices*, 53 *CORNELL L.Q.* 749, 775 (1968), that a competitor's private remedy for false advertising would promote "vexatious litigation" thus seems exactly wrong. It is the existence of a public remedy that foments baseless complaints by competitors. The costs of litigation should usually discourage the use of the private suit to harass competitors.

nerable to a charge of deceptive marketing. A new product is generally a substitute for an old one. To market the new product successfully, the seller must convince consumers that it has all or many of the best features of the old, besides being cheaper or otherwise preferable. This gives an opening to the seller of the old product to argue that its attributes are being falsely ascribed to the new. Such arguments are likely to fare better before an administrative agency that conceives its mission as one of protecting the gullible from being misled than before a court that views its mission as the impartial resolution of disputes between an old and a new seller. A perusal of FTC rules and decisions reveals hundreds of cases in which prohibitory orders have been entered against practices, not involving serious deception, by which sellers have attempted to market a new, often cheaper, substitute for an existing product. Forced disclosure of the country of origin of watchbands, Christmas tree bulbs, radio components, and scores of other products; the prohibition of literally true designations on the ground that they might cause confusion with the same product made by a different—new—process; broad prohibitions against comparisons with more expensive substitutes; forced disclosure of facts that are irrelevant to product performance but might alarm consumers (for example, that motor oil has been “reprocessed”): these and other unworthy categories of proceeding constitute a significant part of the FTC’s total output over the years.<sup>92</sup> The reviewing courts have exercised little check over this activity. They have deferred broadly to the judgment of the Commission in fashioning standards of deception, perhaps because the unfair-or-deceptive standard of section 5 of the Federal Trade Commission Act, unlike antitrust prohibitions, is a purely administrative standard.

Partial confirmation that the FTC’s efforts in the consumer-fraud field are systematically misdirected is furnished by a survey of the more than 200 decisions and orders in this field issued by the Commission during the 12-month period, July 1, 1962, to June 30, 1963, scanned earlier in connection with the agency’s antitrust work.<sup>93</sup> In almost 40 per cent of the cases, there was—so far as one can determine from the allegations of the complaint or, in the few litigated cases, from the Commission’s opinion—no fraud worthy of the name involved. Among the clear sports are cases under the Flammable Fab-

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<sup>92</sup> These cases are discussed in S. ALEXANDER, *HONESTY AND COMPETITION passim* (1967).

<sup>93</sup> A summary of results is tabulated on the following page. The same system of citation is used as in the restraint-of-trade survey; see note 29 *supra*. I warn the reader that there is some double-counting in my totals, since often more than one charge is made in a single case.

rics Act,<sup>94</sup> a safety statute having nothing to do with fraud or information, curiously entrusted to the Commission to enforce; cases involving payola,<sup>95</sup> a form of commercial bribery; and cases involving the use of games of chance to sell merchandise.<sup>96</sup> There are also cases in which the truth of the allegedly false representation depends on how one resolves a technical dispute among experts—over the efficacy of vitamin and iron supplements,<sup>97</sup> the salubriousness of yogurt,<sup>98</sup> the durability of a “six month” floor wax,<sup>99</sup> or other claims.<sup>100</sup> Where there is room for a difference of opinion on the merits of a product, the verdict should be left to the market. That is not only a fundamental premise of a market economy but, judging from the FTC’s performance in these cases, the only prudent course.<sup>101</sup>

FTC UNFAIR-OR-DECEPTIVE-PRACTICES DECISIONS—FISCAL YEAR 1963

Disputes among experts	5
Payola	2
Lotteries	3
Flammable Fabrics Act	9
Collection agencies	4
Foreign origin	12
Fictitious pricing	14
Guarantees	10
Free	3
Bait and switch	4
Other marginal cases	24
Subtotal of cases not involving serious deception	90
Passing off and disparagement	12
Sales to businessmen	11
Fur, Wool, and Textile Fiber Act cases	69
Subtotal of cases where private remedies clearly adequate	92
Hard-core fraud	24
Other	23
Total	229

Source: FTC Decisions, volumes 61, 62

<sup>94</sup> 15 U.S.C. § 1191 *et seq.* (1964). See, e.g., Novik, 2-229. For an explanation of the abbreviated citation form for cases from volumes 61 and 62 of the Federal Trade Commission decisions, see note 29 *supra*.

<sup>95</sup> M.S. Distrib., 1-1345 (vacating previous orders); Radio Corp., 2-1291 (vacating previous orders).

<sup>96</sup> Gillmore, 1-1398; Haven, 2-1009; Dandy, 2-1419.

<sup>97</sup> Lanolin, 1-534; Hadacol, 2-65.

<sup>98</sup> Dannon, 1-840. The expert witnesses who testified, some in support of the complaint, some for the respondents, are listed at 1-855.

<sup>99</sup> Continental, 2-1064.

<sup>100</sup> Compare the tortured efforts to determine “comparable value” in such cases as Nash, 1-596, 606-09, and Gimbel, 1-1051.

<sup>101</sup> For the flavor of the FTC proceedings see Continental, 2-1064, 1080-3.

A few cases in this group involve the practice of collection agencies in smoking out elusive debtors by announcing that a reward or bequest awaits the individual whom they are trying to run to ground.<sup>102</sup> But surely this is a mild and inoffensive creditor's remedy, at least where the validity of the debt is not in question. A number of cases involve nondisclosure of the foreign origin of badminton-set components, watch bands, and other products.<sup>103</sup> In one foreign origin case domestic manufacturers were called to testify that consumers prefer American-made products!<sup>104</sup> Another decision compelled disclosure of the foreign origin of ball bearings supplied, not to consumers, presumed to be xenophobic, but to manufacturers.<sup>105</sup> In no case was there a suggestion that foreign materials or workmanship were inferior in quality to domestic, or otherwise distinguishable save in being cheaper.

A number of the cases in this group involve allegations of fictitious pricing. A sale price is represented to be lower than the seller's regular price or the manufacturer's preticketed or list price. Judging from the cases in which the Commission wrote an opinion, the seller's representation is usually accurate. The sale price is lower than the former price; the compared price is the bona fide manufacturer's list price. The Commission's complaint is that the seller did not have many sales at the former price or that, due to widespread discount selling in the local area, the manufacturer's list price is not a common selling price there.<sup>106</sup> Such representations are not only literally truthful, but unlikely to be understood by consumers in the strained sense insisted upon by the Commission. Consumers must realize that price reductions are commonly motivated by the seller's inability to move the item at the former price and that many products are rarely sold at the manufacturer's list price. These cases serve no purpose other than the harassment of discount sellers.<sup>107</sup> The Commission's hostility to price competition is sometimes poorly concealed.<sup>108</sup>

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102 National, 1-883; Mosteller, 2-88; Universal, 2-669; Commercial, 2-1339.

103 See, e.g., Recent Games, 1-44; Giant Plastics, 1-179; Fuller, 2-1328.

104 Baldwin, 1-1345, 1364.

105 Hoover Ball, 2-1410.

106 See Leeds, 1-152; Giant, 1-326; Regina, 1-983; Gimbel, 1-1051. The last of these cases contains a revealing statement of the Commission's standard of deception:

There can be no doubt that among the many millions in the New York City area, ten, twenty or even fifty witnesses could be produced to testify that they understand the term "list price" means the price generally charged by retailers in their area. And, doubtless, respondent could produce an equal number to testify to a different understanding of the term. A record containing such conflicting testimony would, at substantial expense, prove only what is already obvious from a reading of the advertisement itself, that is, that some people are likely to be misled thereby.

1-1071.

107 The *Giant* case, 1-326, illustrates this point nicely. Giant, a retailer in the Washington, D. C. metropolitan area, was forbidden to compare in advertisements the manu-

Among the many other cases in which it is hard to believe that an appreciable number of consumers would be (or were intended to be) fooled are cases in which the Commission orders a seller of dime-store jewelry to disclose that its "turquoise" rings do not contain real turquoises,<sup>109</sup> a toy manufacturer to disclose that its toy tank does not fire projectiles that actually explode,<sup>110</sup> a maker of "First Prize" bobby pins to change the name lest a consumer think that purchase would make him eligible to enter a contest,<sup>111</sup> and a manufacturer of shaving cream to cease representing that his product can shave sandpaper without first soaking the sandpaper for several hours.<sup>112</sup> The representation that a product is "guaranteed" is interpreted by the Commission, though one doubts by any consumer, to mean fully guaranteed; the term is misleading per se unless all the conditions of the guarantee are printed in the ad.<sup>113</sup> "Free," as in "buy one get one free," means, to the Commission, and only to the Commission, a true gratuity.<sup>114</sup> Other examples of the Commission's proclivity for giving unnatural readings to sales representations abound.<sup>115</sup> The Commission will place no part of the responsibility for averting unhappy experiences on the consumer, even in cases where the consumer's only effective protection is self-protection.<sup>116</sup> Thus, the practice of offering a cheap product in

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factorer's list or suggested retail price with its own sale price. There was no suggestion that Giant had falsified the list price. The objection was that the list price was not the usual sale price in the Washington area. The reason it was not is that discount selling is extraordinarily prevalent in that area. The effect of the decision is to make it more difficult for Giant and other discount retailers to attract customers from neighboring areas in Maryland and Virginia where discount selling is less widespread.

<sup>108</sup> See Regal, 1-74, 80.

<sup>109</sup> G&C, 2-663.

<sup>110</sup> Marx, 1-269.

<sup>111</sup> Rieser, 1-1378.

<sup>112</sup> Colgate-Palmolive, 2-1269, *aff'd*, *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965).

<sup>113</sup> See, e.g., Altheimer & Baer, 1-430; Morse, 1-1078; Silent, 1-1325.

<sup>114</sup> Altheimer & Baer, 1-430; Garland, 1-552; Fairbanks, 1-877.

<sup>115</sup> See, e.g., Borg-Erickson, 1-435, 437 ("Lifetime Service Policy" read to mean "respondent will unconditionally service [the product] without charge for the life of the purchaser"); Gimbel, 1-1051, 1065 ("each of the advertisements carries the caveat 'All sizes approximate' . . . ; a rug 8 feet 7 inches by 11 feet 7 inches in size is not approximately the same size as a 9' x 12' rug. The word 'approximate' will perhaps cover an inch or two departure from the norm, but it cannot in this instance stretch to cover five inches"); Pearls, 2-659, 660-61 (ad for "fabulous simulated pearl creation with the priceless look of precious cultured pearls!" held to be representation that product was made of cultured pearls).

<sup>116</sup> A good example of this point is provided by C.D.I., 2-214, where respondent advertised a device falsely claimed to ensure that a woman using the rhythm method of birth control would avoid conception. A woman eager to avoid pregnancy is ill advised to shop among contraceptives as she would shop among hats, experimenting until she finds one that works. There are some products that should not be bought without first

order to get a hearing from the consumer, and then trying to switch her to a more expensive one, is deemed fraudulent even when the seller is apparently prepared to sell the cheaper product if the consumer prefers it.<sup>117</sup>

In another 40 per cent of the year's consumer-protection cases, if there is any fraud (and one's guess is that usually there is none) the matter is one for private legal remedies and there is no excuse for expending public funds. This group includes cases of passing off one product as another and of disparagement of competitors. Typical are false claims that a product is "stone china"<sup>118</sup> or "whole cowhide"<sup>119</sup> or meets the standards of the Aluminum Window Manufacturers Association.<sup>120</sup> The trade association composed of sellers of the genuine article would have no difficulty in obtaining an injunction in a private action.<sup>121</sup> Other cases involve sales not to consumers, but to business firms or to businessmen *qua* businessmen.<sup>122</sup> These purchasers should be held responsible for protecting themselves against deception, either by the exercise of normal caution or by invoking the contractual remedies on which business enterprises rely in purchasing. A businessman who needs the FTC to protect him against misrepresentations by his suppliers will not long survive in business in any event.

The remaining cases in the group, constituting the vast majority, are cases under the Wool Products Labeling Act of 1939, the Fur Products Labeling Act, and the Textile Fiber Products Identification Act.<sup>123</sup> Sellers of fur, wool, or textile products who employ fraud could be dealt with under section 5 of the Federal Trade Commission Act. The purpose of the specialized statutes, as disclosed by their terms and the legislative history, is not so much to prevent fraud as to protect the trademarks and good will of high-grade furs, wools, and

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consulting a specialist, in this case a physician, a staff member of a birth-control clinic or Planned Parenthood, or a social worker. The elimination of misrepresentation in contraceptive ads will not touch this problem.

<sup>117</sup> Morse, 1-1078; Excel, 1-1119; Wichita, 2-1105.

<sup>118</sup> Harker, 2-1382.

<sup>119</sup> George Frost, 1-517; *see also* Nash, 1-596; Accurate, 1-1305.

<sup>120</sup> Cal-Tech, 2-93. For other examples of passing off and disparagement cases see Western, 1-272; Barclay, 1-306; Alzheimer & Baer, 1-430; Crestmark, 1-739; Hilton, 1-742; Radiator, 1-748; Chemstrand, 1-1134. *Cf.* Hamilton, 1-371; Country Tweeds, 1-1250; U.S. Testing, 1-1312.

<sup>121</sup> *See, e.g.,* Federal-Mogul-Bower Bearings, Inc. v. Azoff, 313 F.2d 405 (6th Cir. 1963); Mutation Mink Breeders Assn. v. Lou Nierenberg Corp., 23 F.R.D. 155 (S.D.N.Y. 1959); Advance Music Corp. v. American Tobacco Co., 296 N.Y. 79, 70 N.E.2d 401 (1946); Houston Chronicle Pub. Co. v. Martin, 64 S.W.2d 816 (Tex. Civ. App. 1933).

<sup>122</sup> *E.g.,* Robin, 1-450; U.S. Chemical, 1-485; Helene Curtis, 1-510; Pile, 1-1087; C-E-I-R, 1-1468; Aluminous, 2-1048; Cam, 2-1086.

<sup>123</sup> 15 U.S.C. § 68-70 (1964).

textile fibers against infringement or dilution by sellers of cheap substitutes.<sup>124</sup> Judging from the cases in my sample, much of the Commission's enforcement activity under these statutes consists of springing traps on the unwary. Sellers are enjoined for failing to label natural mink "natural";<sup>125</sup> for using abbreviations instead of the full name;<sup>126</sup> for using the name of an animal in the advertising of a textile product, regardless of disclaimers<sup>127</sup>—though anyone who has ever seen a "fake" (cloth) fur knows that it cannot be mistaken for the real thing; and for other misdeeds of comparable gravity.<sup>128</sup> My point, however, is not that the Commission's enforcement of these curious laws (which it helped get enacted)<sup>129</sup> is frequently aberrational but that the policing of trademarks and quality standards is a job for sellers and their trade associations rather than for the government.

A number of other cases involve hard-core fraud where, if the allegations of the complaint be believed, the number and blatancy of the misrepresentations, sometimes combined with evidence of the evasive character of the respondent's operations, indicate the kind of malice or wilfulness (in the legal sense of those terms) that would justify criminal proceedings under the federal mail-fraud statute<sup>130</sup> or state criminal fraud laws.<sup>131</sup> These are the freezer-plan, correspondence-school, and other mail-order and door-to-door frauds that have long been a staple of the Commission's fraud docket.<sup>132</sup> It would be

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<sup>124</sup> See *Hearings on H.R. 944 Before a Subcomm. of the House Comm. on Interstate and Foreign Commerce*, 76th Cong., 1st Sess. 17 (1939); *Hearings on H.R. 169, 5606 and 6524 Before a Subcomm. of the House Comm. on Interstate and Foreign Commerce*, 85th Cong., 1st Sess. 22, 38, 42 (1957); *Hearings on H.R. 2321 Before House Comm. on Foreign and Interstate Commerce*, 82d Cong., 1st Sess. 8 (1951).

<sup>125</sup> *E.g.*, Colt, 1-289; Pollock, 1-457; Gorbatenko, 1-1114.

<sup>126</sup> *E.g.*, Pfeifers, 1-578.

<sup>127</sup> *Elysée*, 1-616; Consolidated, 2-113; Fashion, 2-1223. The Commission's penchant for misreading advertisements is prominent in these cases. Thus "silky" is interpreted to mean containing silk. *Elysée*, *supra*. See also Fabric Shop, 1-463.

<sup>128</sup> Among the other violations are: failure to state the manufacturer's name on the label (Gorbatenko, 1-1114); understatement of wool, overstatement of cheaper fibers (Sacks, 1-1226); use of handwriting in labels, and "mingling" of information not required by the statute with required information (Gervitz, 1-74); use of both sides of label (Artel, 1-284).

<sup>129</sup> See, *e.g.*, *Hearings on H.R. 2321 Before a Subcomm. of the House Comm. on Interstate and Foreign Commerce*, 82d Cong., 1st Sess. 8 (1951).

<sup>130</sup> 18 U.S.C. § 1341 (1964).

<sup>131</sup> Collected in Note, *The Regulation of Advertising*, 56 COLUM. L. REV. 1018, 1098-1111 (1956). Apart from subjecting the perpetrator to prosecution under special statutes relating to false advertising or sales representations, such practices may sometimes be punishable as larceny.

<sup>132</sup> See, *e.g.*, Greater Premium, 1-278; Aluminum Enterprises, 1-293; Cleland Simpson, 1-472; Hilton, 1-742; American Transportation, 1-962; Midland, 2-39; Belden, 2-849; Kenron Awning, 2-1402.

surprising if the Commission, with its highly limited remedial powers, had much impact on fraudulent activity of this sort. The character of the respondents apart, the fraudulent businesses in question require little capital or skill; entry and exit are rapid. In these circumstances, the threat of a cease and desist order has a negligible deterrent effect. If enjoined, the respondent moves nimbly into another line. The Commission cannot even force him to disgorge the profits obtained in the interim, often considerable, before the Commission struck. Even if the Commission succeeded in placing all currently active con men under order, an objective not likely to be attained by the issuance of two dozen orders a year, the effect would be minimal; with entry so easy, others would flood into the market.

That leaves only a few cases, perhaps 10 per cent of the year's fraud total, in which the Commission's action is not highly questionable on its face. These include cases where a watch was falsely represented to be shockproof,<sup>133</sup> where the length of a tape was misrepresented,<sup>134</sup> where the interior size of a sleeping bag was misdescribed,<sup>135</sup> and a few others.<sup>136</sup> All of these are cases where corrective action against the deception could probably be left to retailers or competitors.<sup>137</sup>

In fiscal year 1963, I conclude, the FTC bought precious little consumer protection for the more than \$4 million that it expended in the area of fraudulent and unfair marketing practices,<sup>138</sup> and the millions more that it forced the private sector to expend in litigation and compliance. Besides wasting a good deal of money in tilting at windmills, the Commission inflicted additional social costs of unknown magnitude by impeding the free marketing of cheap substitute products, including foreign products of all kinds, fiber substitutes for animal furs, costume jewelry, and inexpensive scents; by proscribing truthful designations; by harassing discount sellers; by obstructing a fair market test for products of debatable efficacy; and, most of all perhaps, simply by imposing on sellers the costs of furnishing addi-

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<sup>133</sup> *E.g.*, Emil Braude, 2-1284.

<sup>134</sup> Superior, 1-416.

<sup>135</sup> North Bergen, 1-447; Geotrade, 2-102.

<sup>136</sup> *E.g.*, Lam Fi, 1-491; Fairbanks, 1-873; Uniforms by Gilson, 2-1263; Volumes in Values, 2-1385. I count, I think generously, 22 cases in my residual category of cases in which FTC action conceivably served some purpose, although all, to repeat, are cases where private remedies, in the absence of the FTC, would probably be adequate to eliminate the fraud. Admittedly, my attempt to distinguish these from hard-core fraud cases where criminal remedies seem necessary and appropriate, and from incredible cases where no one is fooled, has elements of arbitrariness. But reclassification of a few cases would hardly affect the picture of extraordinary misdirection of effort that emerges from my survey.

<sup>137</sup> See text accompanying note 78 *supra*.

<sup>138</sup> See 1963 FTC ANN. REP. 31; caveat in note 64 *supra*.



tional information and on buyers the costs of absorbing that information (both types of cost are borne ultimately or immediately by the consumer). For reasons noted earlier,<sup>139</sup> I doubt that the picture would change markedly if one considered the Commission's performance in other years, its nonadjudicative activities, or its general deterrent impact.

One may object that a survey of what the Commission has done does not reveal what it could do. Recently the Commission has been urged to lift its sights, to concentrate its efforts not on the kind of activities disclosed in our survey but instead on (a) the protection of poor people from exploitation by merchants and finance companies and (b) the establishment of product standards, consumer education, and other measures designed to enable the consumer to choose more intelligently among competing goods and services.<sup>140</sup> I shall argue shortly that the likelihood of a radical redirection of the Commission's activities is slight. I also suspect that the proposed new directions would in any event prove dead ends.

Although concern with the alleged exploitation of poor consumers is widespread,<sup>141</sup> the supporting evidence thus far adduced is unconvincing. The evidence consists of legislative inquiries and consumer surveys.<sup>142</sup> In the former<sup>143</sup> a number of individuals testify that they were bilked, but they are not cross-examined and no other efforts to verify their stories are made. Even if all of their testimony were accepted at face value, it would prove little. There are many billions of consumer transactions each year. It is no trick to assemble an impressive array of witnesses to testify that they were defrauded. The question for public policy is whether consumer fraud among the poor (or other groups) is prevalent or highly infrequent. The legislative inquiries, with their parades of volunteers, do not illuminate this question.

The consumer surveys<sup>144</sup> are more promising, since they attempt to

<sup>139</sup> See text accompanying note 63 *supra*.

<sup>140</sup> See E. COX, R. FELLMETH & J. SCHULZ, *supra* note 1; REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION, *supra* note 1, at 54-62.

<sup>141</sup> See, e.g., REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (Kerner Report) 139-41 (1968).

<sup>142</sup> For summaries of the literature see Note, *Translating Sympathy for Deceived Consumers Into Effective Programs for Protection*, 114 U. PA. L. REV. 395 (1966); Comment, *Consumer Legislation and the Poor*, 76 YALE L.J. 745 (1967).

<sup>143</sup> E.g., *Hearings on S. 1599 Before a Subcomm. of the Senate Comm. on Commerce*, 90th Cong., 2d Sess. (1968); *Hearings on H.R. 7179 Before a Subcomm. of the House Comm. on Government Operations*, 89th Cong., 2d Sess. (1966).

<sup>144</sup> E.g., D. CAPLOVITZ, *THE POOR PAY MORE* (1963). The survey evidence is by no means all one way. See Kenney, *A Survey of Family Expenditures in a low-Income Neighborhood*, Syracuse, New York, 25 REV. SOC. ECON. 90, 99 (1967); Jung, *Variations Among Home-Remodeling Contractors*, 34 J. BUS. U. CHI. 52, 56 (1961).

obtain a representative sample of consumers. But again there is no effort to verify the stories of the interviewed consumers. Many tales of fraud that sound impressive in the buyer's mouth might assume a quite different aspect if the seller's side of the story were known. The picture is further complicated by the evident confusion in the minds of observers, and *a fortiori* of the poor themselves, of fraud with other circumstances that provoke complaints about the price and quality of goods and services. Even in the absence of any fraud one would expect the poor, in general, to pay higher prices, obtain lower quality, and commit more mistakes in purchasing than middle-class consumers. They live in areas where the cost of retail selling is high due to abnormal pilferage rates; they cannot afford high-quality merchandise; they are often poor credit risks; and they tend to be badly educated.<sup>145</sup> Circumstances such as these are bound to create unhappiness and, given the human tendency to personalize problems, to incite charges of exploitation by rapacious merchants, shysters, and Shylocks. Our newly awakened concern with poverty has spurred a frantic search for causes and correctives. Perhaps this explains the indiscriminating embrace of the exploitation hypothesis.<sup>146</sup>

My skepticism is reinforced by the absence of theoretical reasons for expecting fraud to be rampant in sales to the poor. Since the poor of

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<sup>145</sup> In the words of one sympathetic observer, "the new wave of informational legislation will be of little help to the poor because it presupposes values, motivation and knowledge which do not generally exist among them." Comment, *supra* note 142, at 754. It is more common for observers to waffle on the point. Thus, the Kerner Report concludes its discussion of the variation in food prices between low- and middle-income neighborhoods:

These practices do not necessarily involve exploitation, but they are often perceived as exploitative and unfair by those who are aware of the price and quality differences involved but unaware of operating costs. In addition, it is probable that genuinely exploitative pricing practices exist in some areas. In either case, differential food prices constitute another factor convincing urban Negroes in low-income neighborhoods that whites discriminate against them.

REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, *supra* note 141, at 141.

<sup>146</sup> The consequences of basing public policy on anecdotal evidence are illustrated by the parallel case of predatory pricing. For many years it was believed that large sellers frequently sold below their cost in order to destroy competitors. This belief, sustained by victims' anecdotes much like those one reads about in the fraud area, spurred enactment of section 2 of the original Clayton Act, 38 Stat. 730 (1914), and other statutes. In 1958, a scholarly study of the Standard Oil Trust showed that, even before section 2 was enacted, the most notorious predator of them all had apparently not employed predatory pricing; the study also supplied reasons why, as a matter of economic theory, such pricing is rarely a rational strategy for monopolizing. McGee, *supra* note 30. This study has never been refuted, and is widely accepted. See Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 HARV. L. REV. 1313, 1339-52 (1965). It is corroborated by the extraordinary paucity of cases over the years in which predatory pricing could plausibly be inferred. Predatory pricing is now regarded by most students of antitrust as largely a mythical beast. The belief in its importance was based on the same kind of casual, anecdotal evidence now adduced, again without good basis in theory, to create belief in the existence of a serious problem of consumer fraud.

any major city represent in the aggregate a substantial market, one would expect sellers to compete in supplying true information about products to poor as to rich consumers. And neither the reported profit rates of slum merchants nor the structure of retail distribution and finance markets support a hypothesis of exploitation.<sup>147</sup> Still, there may be a problem here. Perhaps the educational deficiencies of poor people are so great that honest sellers find it too costly to educate them to the product misrepresentations of dishonest rivals. But given our state of knowledge—or rather of ignorance—it would be premature to unleash the FTC on the problems of poor consumers. Study should precede action.<sup>148</sup> Having failed in so much else, the FTC is not likely to succeed in making a dent in so intractable a problem as that of poverty until its relevant dimensions are better understood.

Another reason for hesitation is that a campaign of compelling greater disclosure of product claims by slum merchants might have results quite different from intended. To repeat an earlier point, information is not costless. If slum merchants are required to supply information, this will increase their costs and thereby lead them to raise their prices. In effect, the careful poor consumer will be forced to insure his careless neighbor. That seems a curious way to fight poverty.

Similar problems attend proposals to outlaw as unfair certain devices used in the financing of consumer purchases, such as the defense of holder in due course, which permits a finance company to enforce a consumer's promissory note free of the defenses that the consumer might have against the merchant.<sup>149</sup> It does not occur to critics that

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<sup>147</sup> Cf. G. STERNLIEB, *THE TENEMENT LANDLORD* (1966); Cottle, *The Earnings Performance of the Consumer Finance Industry*, 15 J. FIN. 387, 401 (1960); Smith, *Cost of Providing Consumer Credit: A Study of Four Major Types of Financial Institutions*, 17 J. FIN. 476, 495 (1962); Kawaja, *The Economics of Statutory Ceilings on Consumer Credit Charges*, 5 W. ECON. J. 157 (1967).

<sup>148</sup> The rash of recently enacted state and federal consumer-protection statutes provides a fruitful field for the scientific study of these questions. By comparison of prices, profits, credit sources, sales, and other statistics before and after the effective date of such a statute, it should be possible to determine whether the statute has had any effect on the market and if so whether it is the intended effect. Some studies indicating that Massachusetts' truth-in-lending legislation has not had the desired effect are discussed in Kripke, *Gesture and Reality in Consumer Credit Reform*, 44 N.Y.U.L. REV. 1, 7 (1969).

<sup>149</sup> For examples of the proposals, see, e.g., Comment, *supra* note 142; for enactments embodying them see, e.g., N.Y. PERS. PROP. LAW §§ 403(3)(b)-(g), 402(3)(b)(1), (7), (10), 404, 414 (1962); N.Y. BANKING LAW §§ 352, 358 (1964). And for critical discussion see Kripke, *Consumer Credit Regulation: A Creditor-Oriented Viewpoint*, 68 COLUM. L. REV. 445 (1968); Kripke, *Gesture and Reality in Consumer Credit Reform*, 44 N.Y.U.L. REV. 1 (1969). I emphasize that I am not here questioning that the availability of the holder in due course defense should be made known to a prospective purchaser. That is a different question from whether the defense should be outlawed.

such devices, even if sometimes abused, may be efficient and that their abrogation might raise the prices of products and credit to poor people, thereby making it even more difficult for them to obtain the goods that they want (of course, that could be the unacknowledged objective of the proposals). There may be some practices that are purely, or almost so, an instrument of fraud or overreaching and their elimination would benefit all or most consumers. But it is essential to distinguish between these and legitimate practices that deceive or oppress only a small minority of careless or ignorant consumers. This differentiation is impossible without responsible empirical studies. The burden of legal harassment of merchants, landlords, and loan companies that do business with the poor is borne ultimately, in large measure at least, by the poor themselves.

As to whether the Commission or any other official body should make a major effort to create a better informed consuming public, by promulgating product standards, by testing products and communicating the results of the tests to the public, by requiring specified information to be disclosed in ads, tags, and invoices, or by other means, I have the gravest misgivings. The lack of meaningful standards to circumscribe official discretion seems nigh absolute here, and the opportunities for abuse correspondingly great. What is proposed in effect is the extension of the Fur Products Labeling Act, a model of the detailed regulation of an industry's sales and advertising practices, to the economy as a whole; and it is a prospect that appalls. What is more, there is again no sound theoretical basis for the undertaking. As discussed earlier,<sup>150</sup> the market will furnish product information both as an incident to competitive rivalry and, through "information brokers," as a direct service. It will not furnish it in infinite amounts, of course; the provision of information will be limited by cost and demand. Those who urge a vastly enlarged role for the government in this area understand neither the role of the market nor the limitations that information costs and consumer wants impose on attempts, public or private, to make the consumer better informed than he is.

Strange as it may seem, the FTC's frequently decried proclivity for going after small chiselers rests, one imagines accidentally, on sound economic foundations. In general the problem of consumer deception is created by the fly-by-night operator and the con man, not by the reputable firm.<sup>151</sup> But the FTC is not the right agency to deal with what is largely a local police problem. As our sample of its decisions showed, if one subtracts hard-core frauds of a sort that cease-and-desist

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<sup>150</sup> See text at notes 68-72 *supra*.

<sup>151</sup> See notes 68-72 *supra*.

orders cannot stop effectively, there is very little of merit left, and the recent proposals for new emphases in FTC consumer-protection activities are, as just explained, unpromising.

### III. THE CAUSES OF REGULATORY FAILURE

If the Commission's prior critics are to be believed—and there is no reason to doubt the descriptive accuracy of their studies—the Commission's performance has been gravely deficient throughout its entire history. In the light of this extraordinary record, the critics' determination to regard the agency's failings as accidental and readily remediable, their faith that minor changes in organizational structure or personnel or procedures will turn the trick, does not convince. With failings so palpable and the correctives so obvious and relatively easy to implement, why has nothing been done? The answer is that many of the suggested correctives *have* been applied<sup>152</sup> and have had little effect, because they were addressed to unimportant symptoms rather than to the underlying causes. We are now in a position to discuss some of those causes. The foremost one is that the administrative process appears to have no constructive contribution to make to combatting either fraud or monopoly. When it is introduced into these areas the principal effect is to create undesirable biases and inefficiencies in the formulation and application of policy.

In addition, the ability of the FTC to promote the public interest is impaired by its dependence on Congress. Whatever the legal or constitutional merits of the view that the FTC is an "arm of Congress," the phrase describes the political realities accurately. Why many agencies both inside and outside the Executive Branch are extremely subservient while others, such as the Department of Justice, are not is something of a mystery. A part of the answer, perhaps, is that the size and complexity of the federal government preclude the establishment of an effective presidential presence other than at a few key points. Elsewhere power gravitates to Congress. Now Congress is organized in a manner calculated to protect and foster

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<sup>152</sup> For example, the Commission now writes opinions in virtually all adjudicative matters; opinion writing is now the responsibility of each Commissioner's office, rather than of a central pool of opinion writers; the rules of practice and procedure have been vastly improved; Commission meeting procedures have been placed on a more efficient basis; the Commission has experimented with new administrative techniques, such as the trade regulation rule; litigation has been deemphasized in favor of greater reliance on rulemaking and informal compliance techniques; consent-order procedures have been instituted; the position of the Chairman has been strengthened; the Bureau of Economics has been strengthened in recent years; and an Office of Program Review has been created.

parochial economic interests at the expense of the larger consumer interest. Each Congressman represents a particular geographical area, often quite small. The welfare of his constituents may depend disproportionately on a few key industries. The promotion of these industries becomes one of his most important duties as a representative of the district. The consequent distortions in economic legislation are aggravated by the fact that power is unevenly distributed among the members of Congress. An important committee chairman has a great deal of power to advance the interests of businesses located in his district, however unimportant those interests may be from a national standpoint. Moreover, in bidding for the favor of members of Congress, consumers are at a disadvantage in comparison with trade associations, labor unions, and other more familiar pressure groups. Consumers form too large, diffuse, and heterogeneous a group to organize effectively for the presentation of demands to their representatives.<sup>153</sup> It is hardly surprising that so much of our economic legislation is protectionist in character.<sup>154</sup>

The arm, like the torso, seems guided more by solicitude for parochial interests than by consideration for the general welfare. The Trade Commission has acquired a constituency of business groups that includes numerous associations of retail dealers, food brokers, wholesale grocers, auto-parts jobbers, and others. It promotes their interests, as we have seen, with little regard for the larger social interest in competition and efficiency. This is a pattern one would expect of an arm of Congress, and, rooted as it seems to be in the structure of our governmental system, the exhortations of critics are unlikely to change it. Why the Commission's constituency consists of small-business rather than big-business groups, heavily concentrated in distribution rather than in manufacturing, is a fascinating and important question. Perhaps it is because a typical such group—we may instance the National Association of Retail Druggists—has certain attributes favorable to the exertion of political influence not shared by most large manufacturers or chain stores. It has numerous members in every congressional district, and not only are they numerous but they constitute a prosperous, vocal, and on both counts influential segment of every community. Yet they are not so wealthy or powerful as to arouse fear or envy. Their welfare can be materially advanced by relatively modest congressional or administrative action, so it pays

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<sup>153</sup> See M. OLSEN, *THE LOGIC OF COLLECTIVE ACTION* 165-6 (1965).

<sup>154</sup> Some recent discussions are H. JOHNSON, *ECONOMIC POLICIES TOWARD LESS DEVELOPED COUNTRIES* (1967); TURNER, *The Scope of Antitrust and Other Economic Regulatory Policies*, 82 *HARV. L. REV.* 1207, 1231 (1969).

them to organize and lobby, and there is a relative homogeneity of interests among them—more so than one would expect to find among, say, employees (including both workers and executives) of General Motors.

Another obstacle to radical improvement of the FTC arises from the structure of incentives operating on the members and staff of the Commission. It is a familiar proposition in economics that when individuals are unable to appropriate the social gain resulting from an undertaking the allocation of resources to it will be deficient. If farmers are not permitted to own the crops that they grow, they will lack incentive to sow—others being free to reap—and an adequate supply of food will not be forthcoming. The failure to apply similar reasoning to the analysis of governmental undertakings, a failure just beginning to be remedied,<sup>155</sup> has concealed serious deficiencies in the governmental process.

Let us adopt the plausible assumption that people who work for an administrative agency, whether as members of the agency or as its staff, are not a race apart; that the differences between them and people in private life in respect of probity, high-mindedness, freedom from material concerns, self-abnegation, and the like are on the whole unimportant. We assume, and rightly so, that businessmen are primarily motivated by hope of private gain, and I am suggesting only that a similar assumption be indulged of civil servants. That is not to say that civil servants are corrupt. In the vast majority of cases they pursue their private gain within the limits of the legally permissible. Private gain, moreover, is not to be equated solely with money, but includes leisure, security, prestige, power, serenity, and other goods, and the optimum mixture of these goods varies from individual to individual. But we must not be misled by the rhetoric of public service to suppose that the personnel of the FTC differ fundamentally as to motivation and incentives from those of Procter and Gamble.

There would be no reason for dismay at this were there some mechanism by which the private gain of FTC commissioners and staff could be aligned with the social gain yielded by consumer-protection activities. But there is not. The output of a regulatory agency, unlike the output of a private firm, is not sold in any market, and not being sold, cannot be priced. As a result, unless the mission

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<sup>155</sup> See A. DOWNS, *INSIDE BUREAUCRACY* (1966); J. HIRSHLEIFER, J. DE HAVEN & J. MILLI-MAN, *WATER SUPPLY: ECONOMICS, TECHNOLOGY, AND POLICY* 82-86 (1960); Stigler, *The Regulation of Industry* (April 10, 1969, mimeo.).

of the agency is quite straightforward—I instance the Internal Revenue Service—it is impossible, within broad limits, to determine whether the resources being devoted to the regulatory activity are too few or too many. Worse, it means that regulators lack objective criteria against which to measure the efficiency of regulation. The absence of such criteria, in turn, makes it difficult to design a system of rewards for success and punishments for failure that would equate the regulators' self-interest to the social interest in effective regulation. Unlike businessmen, whose social product is measured with reasonable precision by profit-and-loss statements, or professionals, whose performance can usually be measured with tolerable accuracy by reference to widely accepted professional standards, the performance of regulators is extremely difficult to evaluate, which makes it possible for them in many instances to bend their regulatory duties to the service of personal interest.

The reader may object that this analysis amounts to a sweeping indictment of all governmental, and many nongovernmental, institutions. But it is not necessary to regard all nonprofit activities as inherently inefficient in order to believe that the absence of the profit and competitive disciplines, and of professional standards, will make the reform of an agency with a long record of deficient performance decidedly an uphill fight. A more cogent objection is that the analysis fails to explain how some nonprofit institutions, most relevantly the Antitrust Division, manage to turn in a much more creditable performance than others, such as the Trade Commission. But we have already considered some bases for distinction.<sup>156</sup>

Whatever its limitations, the analysis is at least relevant as a reminder of what should be obvious anyway, that the personal goals of FTC members and staff (power is shared between these groups, not concentrated exclusively in the hands of the commissioners) influence the character and direction of the Commission's activity. What are those goals? In an unpublished paper, George J. Stigler proposes as a reasonable assumption that regulators act so as (a) to retain their jobs and (b) to obtain greater appropriations for their agency as a way of increasing personal power (and frequently remuneration as well).<sup>157</sup> This assumption seems reasonable in regard to commissioners who seek reappointment and those staff members who make a career of government service. The self-interest of such individuals would appear to dictate the avoidance of controversy

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<sup>156</sup> See text at notes 25, 153 *supra*.

<sup>157</sup> Stigler, *supra* note 155.



and the conciliation of well organized economic interests and influential Congressmen. Such policies are inconsistent with the determined and effective pursuit of consumer interests.

Not every commissioner or staff member, to be sure, makes a career of government service. Among the 15 FTC commissioners appointed since 1949 who are not present incumbents, the average tenure was less than 4 years, which is much less than a full term (7 years). The majority of these commissioners left the agency to join private law firms. The turnover among staff is also high,<sup>158</sup> and most of those who leave enter the private practice of law too. A commissioner concerned with his future success at the bar will have no greater incentive to promote the consumer interest fearlessly and impartially than one whose guiding principles are job retention and agency aggrandizement. He will receive no bonus upon entry (or reentry) into private practice for the vigorous championing of the consumer interest. The gratitude of consumers—indulging the improbable assumption that such a thing exists—cannot be translated into a larger practice. On the other hand, the enmity of the organized economic interests, the trade associations and trade unions, that a zealous pursuit of consumer interests would engender may do him some later harm, while making his tenure with the Commission more tense and demanding than would otherwise be the case. Exceptional people may rise to the challenge but they are unlikely ever to constitute a sizable fraction of commissioners.

The picture is much the same with regard to those members of the staff who do not intend to make the Commission a career. The principal attraction of Commission service to lawyers who wish to use it as a steppingstone to private practice lies in the opportunities it affords to gain trial experience of an amount and at a level of responsibility usually denied young men in private firms. (Thus, it is reported that the recent reduction in the level of the FTC's litigation activity has made it difficult for the Commission to recruit good young lawyers.) The value of their trial experience to future employers is unaffected by whether the cases tried promote or impair the welfare of society. It is the experience of trying cases, the more the better, not the social payoff from the litigation, that improves the professional skills and earning prospects of FTC lawyers.

Given the absence of any mechanism for effectively conforming the private interests of FTC personnel to the social interest in consumer protection, it is hardly surprising that over the years the FTC

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<sup>158</sup> See E. COX, R. FELLMETH & J. SCHULZ, *supra* note 1, at E. 388 (80% of newly hired lawyers leave within 4 years).

has devoted its principal efforts to bringing cases that, if our sample is at all representative, do not promote any coherent public policy, at the behest of corporations, trade associations, and trade unions whose motivation is at best to shift the costs of their private litigation to the taxpayer and at worst to harass competitors. By taking the part of well organized economic pressure groups, representing established firms and their employees, rather than of new entrants, foreigners, or the unorganized and largely silent consumer, the FTC commissioners and staff have minimized the friction and work that a genuine dedication to consumer interests would have entailed. By concentrating on trivial fraud cases they have created the illusion of tangible results, while minimizing controversy, acquiring litigation experience, and stimulating demand for lawyers experienced in Trade Commission cases. And by concentrating its antitrust activities not in monopolistic or oligopolistic industries, but in the most competitive industries in the American economy, such as food, textiles, and retail and wholesale distribution, and by applying antitrust principles to shield the well organized economic blocs in those industries (such as food brokers and retail gasoline dealers) from the competitive gale, the Commission has curried favor with the politically influential.

#### IV. WHAT IS TO BE DONE

There are mounting indications<sup>159</sup> that the operational efficiency and overall effectiveness of the Commission are, by any standard, extremely low at present.<sup>160</sup> The persistence of gross deficiencies in the Commission's management underscores the problem discussed in the preceding part, that regulators lack both the incentives and the pressures to be efficient that competition and the lure of profit furnish business managers. Even so, the Commission today is probably more poorly managed than other federal agencies. To many, its comparative inefficiency will seem scandalous, but one could regard it as the agency's saving grace. A recent study of the Commission criticized it for the diminution of its enforcement activities in the last few years;<sup>161</sup> it might instead have commended it. One would be deeply concerned about an institution that pursued with skill, tenacity, and dispatch the anticompetitive policies that are the Commission's stock-in-trade in both the restraint-of-trade and deceptive-practice areas. Perhaps a

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<sup>159</sup> See the ABA, Nader, and Elman reports cited in note 1 *supra*.

<sup>160</sup> This sentence was written on September 12, 1969.

<sup>161</sup> REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION, *supra* note 1, at 25-26.

more efficient management would reconsider those policies, but I doubt it. If the analysis presented in this article is correct, there is no salutary role for a federal trade commission. What is required is not redirection, but reduction. Few bureaucrats, however, can bring themselves to preside over the contraction or liquidation of their bureau.

Furthermore, the fundamental reforms that are necessary to make the Commission effective—the power to award reparations, in order to motivate consumers to bring their complaints to the agency; a greater separation between the prosecutorial and adjudicative functions; greater delegation of authority to the local field offices, so that they can act promptly and effectively against essentially local frauds; power to obtain preliminary injunctions; and deemphasis (if not complete discontinuance) of its fur, wool, and textile enforcement activities—would, if implemented, have the interesting effect of making the Commission less like the conventional federal administrative agency that it is today and more like a court system with its characteristic remedies, decentralized structure, clear separation of functions, and freedom from detailed surveillance responsibilities. Pursuing this line of thinking a step further, I would urge that more attention be given to reliance on market processes, and on the system of judicial rights and remedies that provides the framework of transactions in the market,<sup>162</sup> as an alternative to the Trade Commission. A comparison of institutional arrangements reveals some interesting contrasts between courts and the Commission. One is in regard to capacity for modernization and reform. During the more than 50 years that the FTC has been adrift in its backwater, enormous strides in reducing the cost and increasing the efficacy of judicial processes have been made. Judicial procedure has been radically simplified; small claims courts have been created; new rights of action have been declared—recently, at the state level, in one of the areas where the FTC has been floundering (protection against fraud);<sup>163</sup> and Neighborhood Legal Services have been created to assure meaningful legal remedies for poor people. One can criticize some of these developments, and certainly much remains to be done. In particular, it is shocking that successful litigants are generally unable to recover their legal expenses from the losing party. Still, it is interesting that the updating of the judicial process should

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<sup>162</sup> I include here the enforcement of the antitrust laws by the Antitrust Division. For reasons that I have discussed elsewhere, there is considerable question as to the adequacy and appropriateness of the private rights of action created by the antitrust laws. Posner, *supra* note 47, at 1589-90.

<sup>163</sup> These are discussed in Rice, *Remedies, Enforcement Procedures and the Duality of Consumer Transaction Problems*, 48 B.U.L. REV. 559 (1968).

be proceeding more rapidly than the reform of the administrative process.

A particularly important source of strength in the judicial process is the prestige that judges enjoy in our society. It is significant that judicial appointment is normally a terminal appointment rather than a steppingstone. In the federal court system, certainly, it is rare for judges to leave the bench for private practice. This is not to imply that members of administrative agencies should be given life tenure. Considering the caliber of the appointees, which is unlikely to be improved materially by such a system, the results would be disastrous. For reasons apparently deeply rooted in the attitudes of lawyers, it is impossible to attract many first-rate people to a long-term, let alone lifetime, career as a member of an administrative agency. Until those attitudes change, life tenure for agency members is out of the question and judicial enforcement of rules against fraud will continue to have this marked advantage over administrative: In striving to establish a proper balance between the rights of sellers and consumers, judges, with rare exception, are not going to be influenced by considerations of the impact of their decision upon a future career at the bar.

In the real world, a choice among institutional arrangements for dealing with social problems is a choice among highly imperfect alternatives. A free market backed up by private judicial remedies will not eliminate all frauds, nor will the Antitrust Division acting through the courts eliminate all restraints of trade. It does not follow, however, that the administrative process is a sound alternative or supplement to these approaches. On what evidence we have, the costs of having a federal trade commission appear to exceed the benefits.