

Regulation of Automotive Repair Services

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NOTE

REGULATION OF AUTOMOTIVE REPAIR SERVICES

The automotive repair industry, despite the increase in consumer protection activities in recent years, remains a pervasive and consistent source of consumer complaint.¹ The consumer faces two main problems in this area: deceptive practices and mechanic incompetence.² As yet, no effective solutions to these problems have been found.

I

CONSUMER PROBLEMS IN THE AUTOMOTIVE REPAIR INDUSTRY

A. *Fraud and Deceptive Practices*

Consumer fraud and deceptive practices in the automotive repair industry have been the subject of numerous complaints,³ extensive com-

¹ See generally *Hearings on the Automotive Repair Industry Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 90th Cong., 2d Sess., pt. 1 (1969); *id.*, 91st Cong., 1st Sess., pt. 2 (1969); *id.*, 91st Cong., 1st & 2d Sess., pts. 3 & 4 (1970) [hereinafter cited as *Hearings*]. This note deals only with automotive repair services. Several other consumer protection problems in the automotive repair industry exist that are beyond the scope of this analysis. Foremost among these concerns are high costs, even for needed repairs properly done. Other problems involve the design of automobiles for easy maintenance, repair, and safety; the role of independent diagnostic centers; the adequacy of state motor vehicle safety inspection programs; the relationship of insurance to automobile repair costs and practices; and new car defects.

² It is often not easy to differentiate incompetence from deception. For example, in a 1967 New York repair shop survey, 60% of the garages checked turned in erroneous diagnoses of a minor defect that should have been obvious "to a kid in high school mechanics class." *N.Y. Times*, Sept. 27, 1967, at 1, col. 1, at 50, col. 1. Estimates ranged from \$0 to \$40. *Id.* It is quite difficult to determine whether such diagnoses are owing to fraud or incompetence, or both.

³ President Johnson's adviser on consumer affairs indicated in 1968 that the problem "really bugging the American consumer today" was the problem of repairs, principally of automobiles and home appliances." *N.Y. Times*, Feb. 20, 1968, at 31, col. 1.

The Senate subcommittee investigating automotive repairs was told that "circumstances . . . prevent the average American car owner from receiving adequate, safe, economical, and competitive service." *Hearings* 343 (statement of William W. Winpisinger, General Vice President, IAM). When the National Automobile Dealers Association boasted to the committee that two-thirds of its customers were satisfied with repair service, Senator Hart expressed astonishment that fully one-third of the consumers were dissatisfied. *Id.* at 372.

A New York legislative committee has corroborated this dissatisfaction.

Based upon public hearings and widespread complaints received, the Committee unanimously agreed upon the need to regulate automobile and television repair services. It became abundantly clear that many complaints of consumers citing dishonesty or incompetence are legitimate

NEW YORK STATE JOINT LEGISLATIVE COMM. ON CONSUMER PROTECTION, THIRD ANNUAL

mentary,⁴ and occasional legal action.⁵ High costs and inconvenience are undoubtedly factors in some complaints, but serious abuses have been documented as well.

First, automotive repair advertising may be misleading. The "bait and switch" technique involves advertising a very low price for specific repairs to lure the customer into the repair shop. Once the customer arrives, the advertised service is disparaged, its limitations are pointed out, and the customer is urged to "play it safe" and have a thorough job done—at a higher price.⁶ In addition, special services are often advertised that are actually unavailable to the great majority of customers. These services include free towing, use of a replacement vehicle, and availability of credit and financing, the restrictions upon which are not revealed in the advertisement.⁷

REPORT, 1968 N.Y. LEG. DOC. NO. 34, at 46 [hereinafter cited as THIRD ANNUAL REPORT].

For correspondence evidencing consumer dissatisfaction with automobile repair services, see *Hearings* 622-46, 1073-95, 1591-94.

⁴ "Taken as a class, automobile repair men are undoubtedly the most winsome, charming, sympathetic, and ruthless characters ever to band together for the beneficent exploitation of innocence." *Washington Post*, Oct. 10, 1969, at A22, col. 1.

"Dishonest and incompetent repairmen are in the minority, but they are certainly numerous enough to constitute an important area of consumer fraud and to cause legislators to enact protections for car owners." *Los Angeles Times*, April 24, 1970, pt. II, at 6, col. 1.

Unfortunately, the auto service and repair business for years has been viewed by promoter types as an ideal opportunity to get rich quick. . . . [T]hey have been with us for years, merrily fleecing a sometimes gullible public. Only a few of them have been caught and prosecuted. They have robbed the public and blackened the reputation of an entire industry.

Independent Garage Owners of Cal., Inc., Press Release, April 16, 1970, at 2.

See Bennett, *Behind the High Cost of Auto Repairs*, *READER'S DIGEST*, Sept. 1969, at 57; Bresnihan, *Confessions of an Automobile Mechanic*, *PARADE MAGAZINE*, March 22, 1970, at 6 [hereinafter cited as Bresnihan]; Cerra, *The Auto Repair Business: A Call for a New Model*, *Newsday*, Aug. 24, 1970, at 3A, col. 1 [hereinafter cited as Cerra]; Flaherty, *A Ride Through Sucker Territory*, *NEW YORK MAGAZINE*, July 1, 1968, at 38; *N.Y. Times*, Nov. 13, 1967, § III, at 1, col. 1.

⁵ In June 1970, the Federal Trade Commission filed a complaint against AAMCO Automatic Transmissions, Inc., alleging deceptive advertising, refusal to reassemble transmissions if further work was not authorized by customers, failure to disclose when repairs were made with used parts, and other practices which establish an unfair bargaining position. BNA ANTITRUST & TRADE REG. REP. No. 467, at A-20 (June 23, 1970).

In California five test cases were commenced by the state attorney general between March 1968 and April 1969 to enjoin various deceptive practices in the automotive repair industry. *Hearings* 725-27 (statement of Herschel T. Elkins, Deputy Attorney General of California). As early as 1967, fraud prosecutions were initiated in New York City by the Queens County district attorney against three auto transmission repair shops. *N.Y. Times*, Dec. 7, 1967, at 50, col. 5.

⁶ *Hearings* 730

⁷ [T]he advertisement for free towing, free loan car, instant credit or easy monthly payments, sometimes prove[s] illusory. There may be only one loan car and that is being used, one tow truck and that is not operating or it is not free unless

Second, abuses occur with regard to discounts and guarantees. Empty promises, such as "25 percent off," without stating the job price, and "90-day warranty—labor and parts at dealer's cost," where an artificial method is used to determine dealer's cost, are common.⁸ So are situations where, in response to a customer's attempt to enforce a warranty, "the company will routinely allege [that] the car's problem is not related to the work done or that the customer abused his car."⁹

Third, there are estimate abuses. In the case of an "escalator estimate," the customer is given a price for a job. After he consents and work is in progress, he is told that additional repairs are needed that will raise the cost substantially. If he refuses to acquiesce, he is informed that he must still pay the original price to have his car re-assembled, even though it will not have been repaired. In a weak bargaining position, and believing that these more extensive repairs are necessary, the customer usually agrees. Later he may be warned that this extensive job cannot be guaranteed owing to the condition of his car, but that fully guaranteed repairs are available at a further increase in price. A discount may be offered if he resists.¹⁰

The "underestimate/overcharge," on the other hand, involves a specific repair to which the customer agrees but for which a firm price cannot be computed until the job is finished. Upon completion, the price is substantially higher than the customer expected.¹¹ In other cases, an underestimate may intentionally be given to induce consumer consent and then exceeded without explicit permission since the estimate form disclaims binding effect should undefined circumstances or "complications" arise.¹²

the customer accepts the guaranteed job. Instant credit is offered only if the customer pays 90 percent cash.

Id.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 724-25.

The reverse of this technique is also used. After the car is in pieces the owner is told that it needs a major repair which will cost a substantial amount, but which will be fully guaranteed. If he refuses, he is offered a lesser job with a shorter guarantee. If he still refuses, he is offered the "economy" job which is "absolutely essential," briefly guaranteed, and still substantial in cost. If he still refuses, he may be given a box to collect his parts in and ordered to take his car away immediately. *Id.* at 725 (statement of Herschel T. Elkins).

¹¹ *Id.* at 729.

¹² This is sometimes done even without the disclaimer. A Long Island automotive repair shop was charged by the New York attorney general with misrepresentation when it advertised engines installed for \$149, but "in several instances, the actual cost of such installations ran well over the cost advertised." Attorney General Lefkowitz said, "This is a common practice. . . . Often, consumers are shocked to find a bill for materials or

Fourth, unnecessary work is frequently performed. The repairman may tell the customer a false story about "needed" repairs. If inducement is necessary, the mechanic can usually produce a troublesome rattle or noise.¹³ This practice may involve use of the "phantom part," a worn part not from the customer's car, but presented to him to demonstrate the need for repairs.¹⁴

Fifth, used parts are sold as new. The customer is not necessarily told that the parts are new when this device is employed; he merely assumes that they are, not thinking to question his repairman on so basic a matter.¹⁵

Sixth, customers are charged for services not rendered. The customer is led to believe that a major repair has been performed when in fact a minor adjustment or steam cleaning has been the only service.¹⁶ This occurs both when the unperformed service was necessary and when the customer was misled into thinking it was needed.

Seventh, compensation plans for mechanics are often antithetical to consumer interests. Since many mechanics are given a commission on parts they sell, an incentive exists to install as many parts as possible.¹⁷ Other compensation systems, sometimes incorporating commission provisions, are based upon "flat-rate manuals," often criticized as arbitrary and unrealistic.¹⁸ These manuals list the time theoretically required for a specific repair.¹⁹ Since he will be paid on this time basis

services they had no idea were involved." BNA ANTITRUST & TRADE REG. REP. No. 472, at A-19 (July 28, 1970).

¹³ Bring me a new car and I'll show you a loose wheel. How? By jacking up the car in such a way that pressure is taken off the front spring. With the spring pressure gone, any wheel will wobble badly. And when the sucker returns . . . I jack up the car properly and the wheel is solid.

Bresnihan 6.

"One of the biggest bugaboos today is the transmission specialist. . . . Our experience has been that, of all transmission problems encountered, probably 70 per cent have to do with simple linkage adjustments. Yet many people pay for a complete overhaul, or a new transmission. It's become quite a racket in some areas."

N.Y. Times, March 31, 1968, § XI, at 14, cols. 6, 8, quoting Eugene C. Vale, President, Vale Technical Institute.

¹⁴ Hearings 729 (statement of Herschel T. Elkins).

¹⁵ *Id.* at 730.

¹⁶ *Id.* The three 1967 automotive repair fraud prosecutions in Queens (note 5 *supra*) involved charging for a new transmission when the old one was simply spray painted, when only a few small parts were replaced, or when the rebuilt transmission installed was not as good as the one removed. N.Y. Times, Dec. 7, 1967, at 50, col. 5.

¹⁷ Hearings 57 (remarks of Glenn F. Kriegel, President, Auto Analysts, Inc.).

¹⁸ *Id.* at 730.

¹⁹ Several manuals are published, often with varying time allotments for the same work. The major auto makers each issue a manual to their dealers, and several are in-

for the job, rather than on time actually spent, the mechanic is encouraged to "beat the book" and do as many jobs as possible per day.²⁰

The economic consequences of such deceptive practices are substantial, costing the consumer an estimated eight to ten billion dollars each year.²¹ Important safety considerations are also involved. Where used parts are installed or where needed repairs are not performed, the motorist may rely on mechanical safety he does not in fact enjoy.²²

B. *Incompetence*

The problem of unqualified mechanics is also of major proportions.²³ At the Senate hearings on the automotive repair industry the operator of a Denver automotive diagnostic center testified that only one percent of the repairs checked by his center were performed satisfactorily—if they were performed at all.²⁴ An examination of repair work conducted by the Automobile Club of Missouri showed that only sixty-five percent of repairs were performed satisfactorily.²⁵ The Senate subcommittee conducting the hearings was told that ninety percent of a group of cars with new state safety inspection stickers had improperly

dependently published. Such manuals have been criticized as being both too stringent (*see Hearings* 347 (statement of William W. Winpisinger)) and too lax (*see Bresnihan* 6-7).

²⁰ *See Hearings* 347 (statement of William W. Winpisinger). A major problem with the alternative, real time compensation, is that the customer would pay more for the work of an incompetent mechanic than for that of a good one. One answer suggested in the hearings was "to make the rate book more realistic or to train more mechanics." *Id.* at 730 (statement of Herschel T. Elkins). It is doubtful, however that any disinterested party could define with precision what is "realistic" when industry experts have produced such conflicting results. The manuals were defended at the hearings by insurance company representatives, not for their accuracy, but for their necessity in formulating estimates and charging similar prices for similar work. "The flat-rate manuals may not be perfect. But they constitute the best tool available." *Hearings* 1255 (statement of Dean W. Jeffers, President, Nationwide Insurance Companies).

²¹ *N.Y. Times*, March 8, 1970, § I, at 29, col. 1.

²² Research on the causes of automobile accidents is woefully inadequate and thus little accurate and representative data on this safety aspect are available. *See Hearings* 1610-11. Statistics indicate that 14.2% of the accidents involved in one study were attributable to poor maintenance or mechanical defects. *Hearings* 1430 (remarks of Donald A. Randall, Ass't Counsel, Senate Subcomm. on Antitrust and Monopoly).

²³ Consumers put their overall complaint concisely: When the darn thing doesn't work right why can't someone simply tell me what is wrong and fix it—the first time?

Studies showed that this complaint was well-founded. The figures for unsatisfactory repair jobs ranged from 36 to 99 percent. But it is clear that the consumer who got his car fixed right the first time may be just plain lucky. "The Consumer and His Car," remarks of Senator Philip A. Hart to the Society of Plastics Engineers, Detroit, Mich., Jan. 19, 1970, *reprinted in* 116 *CONG. REC. S* 3453-54 (daily ed. March 11, 1970). "[D]espite all this outright dishonesty, it's still the butchers or inexperienced mechanics, however honest, who jack up your repair and maintenance costs more than anybody in the business." *Bresnihan* 7.

²⁴ *Hearings* 55 (remarks of Glenn F. Kriegel).

²⁵ *N.Y. Times*, June 2, 1969, § I, at 1, col. 2.

adjusted headlights, over fifty percent had wheel alignment or suspension defects, and over twenty-five percent had faulty brakes.²⁶

The motorist has no completely reliable way of knowing the competence of his repairman. Because of the technical nature of the repairs, even the "regular customer" may be mistaken in his belief that previous repairs were properly performed. Instances of repeated trips to the repair shop to cure a problem, with a different repair and a new bill each time, are familiar to many motorists. Such episodes raise difficult questions as to whether the initial repairs were necessary, whether the mechanic was simply experimenting until he discovered the problem, or whether there was intentional fraud.

Mechanic incompetence affects the industry as well as the consumer. Even the honest dealer desiring to give good service to his customers may find it difficult to determine initially the competence of the men he hires.²⁷ Facing a drastic shortage of trained mechanics,²⁸ the repair dealer may be forced to hire untrained individuals. There are no entry requirements for auto mechanics,²⁹ and on-the-job training is often the only training a mechanic receives.³⁰ The problems caused by mechanic incompetence can only multiply as automobiles increase in both number and complexity.

The causes of mechanic incompetence are not immediately apparent. Training opportunities do exist. All automobile manufacturers and many major oil companies conduct training programs, although with a primary purpose of providing mechanics for their dealers. General Motors offers a special training program to discharged servicemen.³¹ The Department of Labor conducts manpower retraining

²⁶ *Hearings* 53 (remarks of Glenn F. Kriegel).

²⁷ The usual hiring practice with a man who has no previous experience or references is to allow a 30-day trial period for observation of his work and competence. Cerra 4A, col. 3.

²⁸ A vice president at Ford indicated that the industry is short 80,000 mechanics (*Hearings* 1432 (letter from J.J. Nevin to Senator Hart, Oct. 31, 1969)), with 18,300 needed at Ford dealerships alone (*id.* at 1434 (letter from J.J. Nevin to Senator Hart, Jan. 26, 1970)). The accepted industry ratio of mechanics to vehicles is 1 to 80. In 1965 the actual ratio was 1 to 129. By 1975 it is expected to be 1 to 154. *Id.* at 144-45 (statement of John P. Kushnerick, Publisher, *Motor Age*). See *id.* at 889 (statement of J. Howard Reed, Executive Secretary, Automotive Electric Ass'n).

²⁹ "Anybody can be an auto mechanic today simply by calling himself one. Few of the country's 800,000 auto mechanics have undergone apprentice training and many lack even basic vocational education in the trade." N.Y. Times, Oct. 19, 1969, § I, at 32, col. 1.

³⁰ "Since they have little or no training, they get their education on the job. They use the trial and error system. And you, the car owner, pay for every trial and every error." Bresnihan 7.

³¹ *Hearings* 1326 (statement of Mack W. Worden, Vice President, General Motors Corp.).

courses.³² Many secondary schools, vocational schools, and trade colleges offer programs in automotive mechanics.³³ Few of these programs, however, are fully enrolled; despite such opportunities, the shortage of competent mechanics remains.

The root of the problem, then, goes beyond training opportunities. One contributing factor is the low esteem accorded the automotive mechanic. His work is dirty and often performed under poor working conditions. He is generally not respected as a trained individual but regarded as the "garage man" or the "grease monkey." Another factor is the low wage rate for mechanics. Mechanics' wages remain low despite the high cost of repairs.³⁴ The average income of auto mechanics in 1969 was estimated to be \$6,500.³⁵

II

PROPOSED SOLUTIONS FOR DECEPTIVE PRACTICES AND INCOMPETENCE

A. *Fraud and Deceptive Practices*

1. *Inadequacy of Existing Remedies*

Consumer concern first arose in the area of defective products, and many state remedial programs have thus aimed at transactions involv-

³² *Id.* at 1723-32 (statement of Dr. E. Grant Venn, Assoc. Comm'r, Bureau of Adult, Vocational, and Technical Educ., HEW).

Right now there is ample training available for people interested in the field. Department of Labor Manpower Training programs will in some cases even pay a person's salary while they [*sic*] are learning auto mechanics. . . . The problem . . . is not that there is a lack of training opportunities, but simply too few people interested in the field.

Cerra 4A, col. 3, 24A, col. 3.

³³ See *Hearings* 1725-32.

The Automobile Manufacturers Association offers considerable guidance and assistance in the operation and establishment of such programs. Their standards indicate a desirable minimum of 1,080 hours of training to qualify as a trainee. AUTOMOBILE MFRS. ASS'N, STANDARDS FOR AUTOMOTIVE SERVICE INSTRUCTION IN SECONDARY SCHOOLS 18 (1965).

³⁴ The garage owner's markup on the labor charge allegedly ranges from 100 to 200%. *Hearings* 345.

³⁵ *Id.* at 145 (statement of John P. Kushnerick).

The average hourly wage for automotive mechanics in retail trade in 1969 was \$3.53. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, HANDBOOK OF LABOR STATISTICS: 1970, at 238 (1970).

In analyzing the situation a Labor Department official said that part of the problem was attributable to wage rates that pay mechanics "less than the unskilled worker . . . who simply bolts the bumpers on a 1970 Ford." *Hearings* 1747 (statement of Malcolm R. Lovell, Deputy Ass't Sec'y for Manpower, Dep't of Labor). The men who bolt bumpers on new Fords, however, are unionized. Auto mechanics, for the most part, are not. The International Association of Machinists has succeeded in unionizing approximately 14% of the nation's 800,000 mechanics. *Id.* at 342 (statement of William W. Winpisinger). An IAM official has said that "the ability of the National Automobile Dealer's [*sic*] Association to keep unions out of the auto repair industry" is responsible for low wages and the resulting severe shortage of skilled mechanics. *Id.* at 345.

ing a product transfer rather than a service.³⁶ Although auto repairs often involve parts as well as service, the abuses frequently do not concern the product itself³⁷ or are not easily discovered by the average motorist.³⁸ Product-oriented protection is therefore inadequate. Similarly, although criminal antifraud and deceptive advertising prohibitions are applicable and occasionally employed,³⁹ they present special difficulties⁴⁰ and provide little relief for the victimized consumer.

Civil antifraud and deceptive practice remedies have become increasingly available in modern consumer protection programs,⁴¹ but even these remedies are difficult to apply to the technical and often undiscovered abuses in an industry as widespread as auto repairing.⁴² The

³⁶ See generally Comment, *The Need for Protection of the Consumer of Services*, 18 BUFFALO L. REV. 173 (1968). Implied warranties and strict tort liability are generally unavailable in the service transaction. "[A]n auto repairman who fixes brakes warrants only that he has the skill of an average repairman but he does not warrant that the brakes are fixed." *Id.* at 174.

³⁷ E.g., the part is adequate, but unnecessary or incompetently installed.

³⁸ E.g., the part is used or rebuilt, but the motorist lacks the capacity to tell the difference.

³⁹ See note 5 *supra*.

⁴⁰ The difficulties include delays due to court backlogs and procedural due process, the burden of proving knowledge and intent, and the hesitancy of courts and prosecutors to attack seemingly respectable businessmen. "If a mechanic is called up on something . . . he can always say he made an honest mistake. But there's a good chance he won't get called up." Bennett, *supra* note 4, at 59, quoting Herschel T. Elkins, Deputy Attorney General of California. See Mindell, *The New York Bureau of Consumer Frauds and Protection—A Review of Its Consumer Protection Activities*, 11 N.Y.L.F. 603, 616 (1965); Note, *Translating Sympathy for Deceived Consumers into Effective Programs for Protection*, 114 U. PA. L. REV. 395, 424-27 (1966).

⁴¹ Such programs generally empower the state attorney general to seek an injunction against deceptive acts or practices. See, e.g., ILL. ANN. STAT. ch. 121½, § 267 (Smith-Hurd Supp. 1971); MINN. STAT. ANN. § 325.907 (Supp. 1971); N.J. STAT. ANN. § 56:8-8 (1964); N.Y. EXEC. LAW § 63(12) (McKinney Supp. 1970); N.D. CENT. CODE ANN. § 51-15-07 (Supp. 1969). An injunction may be speedily obtained, avoiding the scierter requirement of criminal prosecutions, and can issue in advance against one about to engage in deception. An injunction can halt the deceptive practice, whereas a criminal prosecution can only reach individuals after the fact.

The courts are also empowered in some states to order restitution to victimized consumers. E.g., ILL. ANN. STAT. ch. 121½, § 267 (Smith-Hurd Supp. 1971); N.J. STAT. ANN. § 56:8-8 (1964); N.Y. GEN. BUS. LAW § 349 (McKinney Supp. 1970); N.D. CENT. CODE ANN. § 51-15-07 (Supp. 1969).

⁴² There are at least 109,000 specialized automotive repair establishments in the United States, plus 32,000 new car dealers and at least 216,000 service stations, many of which do more than minor repair work. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1970, at 738, 751 (1970). Cf. *Hearings* 1039.

The prevalence of abuses and the large number of repair shops render many state programs incapable of coping effectively with these problems, even assuming abuses might be discovered and proven. Inadequate resources and lack of technical expertise are further causes of this incapacity. "[O]ur office does not have the staff or the budget to investigate all of these [auto repair] companies. . . . Without such an [automotive repair registration]

major obstacle is that the consumer finds it difficult to prove that he has been defrauded. The technical nature of many repairs and the impossibility of determining whether they were necessary are the complicating factors.⁴³ Moreover, these questions of proof only arise when the consumer suspects fraud. A significant number of consumers never realize they have been victimized; for them deterrence is the only protection.

Except in cases of clear deception where proof is available, there is no way to prevent fraudulent practices, and little relief is available to the victimized consumer even with a modern consumer protection program. There is a need, then, to increase the demonstrability of fraudulent practices through development of technical expertise and to increase preventive activity to deter and eliminate abuses.⁴⁴

2. *Bureau of Automotive Repair Services*

To protect the consumer of automotive repair services, a state agency⁴⁵ that can exercise a regular preventive check on the practices

agency, there is no way to prevent automobile repair abuses." *Id.* at 727 (statement of Herschel T. Elkins).

⁴³ We get the complaint after the car has been fixed. We do not see the car before it has been handled. In other fraudulent complaints when we get a complaint against a storeowner or door-to-door company or whatever it is; we can handle that pretty easily. We can tell whether someone has been defrauded or not and we can bring appropriate action. But it is extremely difficult because of the technical nature of automobile repair. It is our most difficult problem. It is a matter of proof.

Hearings 747-48.

⁴⁴ The present situation demonstrates that the mere existence of a legal prohibition is not an effective preventative. Yet prevention of deceptive practices is the only practical means of protecting the consumer who is often unaware that he has been cheated. *See* note 58 and accompanying text *infra*. Technical expertise would aid in preventing such activities.

⁴⁵ A state rather than federal agency is proposed because this function falls within the traditional regulatory scope of the state police power. More importantly, an agency as proposed can function most effectively at the state level where it has a broad legislative grant of authority and yet retains the capacity for dealing with large numbers of small operators.

We do not like to set up new agencies. . . . But in order to investigate you have got to have a car to go in just to see what people do with the car. You have to have an expert to see whether the work was really properly done because in many of these cases it does cost a lot of money to fix an automobile. And an honest mechanic often finds it rather embarrassing to tell a customer that it does take that much work.

Hearings 733 (remarks of Herschel T. Elkins).

Proposals for federal legislative action in this area have been introduced in Congress. H.R. 13824, 91st Cong., 1st Sess. (1969), proposed the Motor Vehicle Mechanic Licensing Act of 1969. The Act would provide up to 80% federal funding for state-conducted mechanic training programs conforming with federal standards and require a 10% cutback in federal highway funds for states that do not establish acceptable training programs.

of auto repair shops is necessary. In addition to uncovering actual fraud, such an agency would serve to deter deceptive practices, a function that is crucial to an effective regulatory program. There would be no ill effect on the honest repair dealer; indeed, he would benefit from a better industry reputation.

When complaints indicate that the preventive function is not completely successful in a given instance, however, the remedial function would be available. The agency could aid the victimized consumer by investigating complaints (with a staff of technical specialists expert enough to testify against the dealer), initiating proceedings and demanding restitution where fraud is found. Close examination and testing of a suspected dealer would either convince him to abandon fraudulent practices or penalize him for their use.

A highly successful model exists for the creation of such a state agency. California's Bureau of Repair Services⁴⁶ was created in 1968 in response to major public concern over consumer fraud and deception in the radio and television repair industry.⁴⁷ The California State Senate subcommittee which examined it in 1968 concluded that the Bureau "ha[d] done an outstanding job in reducing Electronic (TV) repair frauds."⁴⁸ Testimony before this subcommittee indicated that prior to creation of the agency a situation existed that was analogous to current consumer problems with automotive repairs. Fraud was com-

115 CONG. REC. 25637-39, 27391 (1969). H.R. 8161, 91st Cong., 1st Sess. (1969), would establish a federal program for the voluntary certification of mechanics by the Department of Transportation, and assist states in establishing programs for the compulsory licensing of automobile mechanics. 115 CONG. REC. 5269 (1969). At least two bills were introduced early in the Ninety-Second Congress proposing establishment of a grant-in-aid program to encourage state licensing of motor vehicle mechanics. H.R. 265, 92d Cong., 1st Sess. (1971); H.R. 1080, 92d Cong., 1st Sess. (1971).

⁴⁶ Formerly the Bureau of Electronic Repair Dealer Registration, established in July 1963. CAL. BUS. & PROF. CODE §§ 9800-80 (West 1964).

⁴⁷ The television repair industry had for many years been left to its own devices, and in consequence, many serious abuses characterized it. The Bureau was created following complaints numbered among the highest in California arising from the service dealer-customer relationship.

Bureau of Repair Services, Fact Sheet, Dec. 11, 1970, at 1.

⁴⁸ Subcommittee on Electronic (TV) Repair, Report (undated), at 1 (on file at the *Cornell Law Review*) [hereinafter cited as Report].

Testimony before the committee indicated that not only had prosecutions eliminated abuses, but also that "[t]he very existence of the Bureau and the *publicity* of its administrative and criminal actions created a great *deterrent* to the perpetration of fraud by TV repair dealers in California who have attempted to pad repair bills." *Id.* at 4 (emphasis added). Publicity is thus an important factor in the Bureau's success both in deterring dealer abuses and in alerting the public that the agency is available to serve them.

mon⁴⁹ and "abuses were difficult for the individual consumer to remedy."⁵⁰

The legislation creating the Bureau and its operational format are quite simple. Every electronic repair dealer⁵¹ is required to register with the Bureau before commencing operations.⁵² The Bureau is empowered to suspend or revoke such registration for cause⁵³ after a

⁴⁹ Fraud was rampant before the passage of the law which established the Bureau. There were many complaints that the dealers replaced good parts in TV sets when they had the sets in for repair. The temptation to do this was great because the dealer could charge more for parts than he could for labor. . . . There was a bad practice of taking a set into a shop without it really being necessary Bait advertising was a wide-spread curse in the industry.

Id.

⁵⁰ "He [the consumer] had a difficult, if not impossible, time going to court and proving his case because of the technical nature of it and the expense therefor." *Id.* at 4-5.

⁵¹ "Service dealer" means a person who, for compensation, engages in the business of repairing, servicing or maintaining television, radio, tape recorders, or phonographic equipment normally used or sold for use in the home." CAL. BUS. & PROF. CODE § 9801(g) (West Supp. 1971).

The employees of the dealer are not required to register. *Id.* § 9802(a). Thus there is no attempt to insure the competency of the repairman.

⁵² *Id.* § 9840. Nearly 6,000 dealers were registered with the Bureau at the end of 1970. Bureau of Repair Services, Statistical Report, Dec. 31, 1970. Amateur home repairs and repairs of equipment used in business or industry are not subject to the law, since in these contexts there is little need for protection from fraud. Similarly, should this regulatory system be applied to automotive repairs, amateur and fleet garages should be exempted.

Service stations engaged primarily in the business of selling motor fuels but performing incidental repairs present a problem. Since there is little danger of fraud in a lubrication or tire change, stations performing only such activities should also be exempted. Those which do more significant repairs, however, should not be exempted, for this would frustrate the purpose of the law. The service "incidental" to fuel sales should be explicitly set forth by regulation to avoid difficulties. *See, e.g.,* Hassett v. Horn, 29 App. Div. 2d 945, 289 N.Y.S.2d 28 (2d Dep't 1968), where "service for automotive wheel alignment and balancing, sale and installation of shock absorbers, reining of automotive brakes and installation of mufflers" were held "incidental" to a retail use and not to constitute a motor vehicle repair shop for zoning purposes. *Id.* at 946, 289 N.Y.S.2d at 30.

The legislature should also provide an exception for work of an emergency nature, which, for example, a non-registered service station should be allowed to perform. The exception should be strictly drafted, however, to allow for only true emergencies, as where the motorist is in distress and no other service is available.

⁵³ CAL. BUS. & PROF. CODE § 9841 (West Supp. 1971). The Bureau may revoke or suspend registration for "acts or omissions done by himself or any employee, partner, officer, or member of the service dealer and related to the conduct of his business" *Id.* Acts that may result in revocation or suspension of registration include: (1) authorizing false or misleading advertising; (2) falsely inducing a customer to authorize repairs; (3) acting for more than one customer to a transaction without the consent of all parties; (4) performing any other fraudulent or dishonest act; (5) gross negligence; or (6) failing to comply with the Act and its regulations. *Id.* §§ 9841(a)(1)-(6).

hearing,⁵⁴ and may also seek injunctions against specific abuses.⁵⁵ The Bureau receives and investigates consumer complaints,⁵⁶ but may also initiate its own investigations,⁵⁷ and performs "spot checks" using "test" televisions.⁵⁸ The Bureau may also informally mediate dealer and consumer disagreements.⁵⁹ Certain requirements are outlined by statute⁶⁰ and implemented by regulations.⁶¹ Violators of the regulations or the

⁵⁴ Section 9848 incorporates by reference the procedural provisions of the California Government Code (CAL. GOV'T CODE §§ 11500-28 (West 1964)), providing for a hearing and appeal before revocation or suspension of registration.

Although they have at times resulted in delayed enforcement, procedural delays have not been significant factors and the Bureau's evidence has eventually prevailed in the majority of cases. Letter from Raymond Reid, Chief, Bureau of the Repair Services, to the *Cornell Law Review*, Jan. 14, 1971. Of seven cases closed after administrative hearings in 1970, there were six revocations and only one dismissal. Of 15 cases criminally prosecuted in 1970, there were 14 convictions and one acquittal. Bureau of Repair Services, Statistical Report, June 30, 1970; *id.*, Dec. 31, 1970. Suspension and revocation proceedings constitute only a small part of the Bureau's activities.

The main function of the Bureau is not in the gathering of information for criminal action (although they have been very successful and very helpful in this), but rather in the correction through administrative action. Administrative action against fraudulent dealers has been extremely successful. . . . For every criminal action they conciliate seventy cases.

Report 5.

⁵⁵ CAL. BUS. & PROF. CODE § 9851 (West 1964).

There is no provision allowing the Bureau to seek restitution for victimized consumers together with an injunction, as is now provided by consumer protection legislation in several states. See note 41 and accompanying text *supra*. Such a provision would give the Bureau more effective remedial capabilities.

⁵⁶ CAL. BUS. & PROF. CODE §§ 9860-62 (West 1964).

The Bureau received 2,213 complaints in 1970. Bureau of Repair Services, Statistical Report, June 30, 1970; *id.*, Dec. 31, 1970.

⁵⁷ CAL. BUS. & PROF. CODE § 9812 (West 1964).

⁵⁸ *Id.* When a dealer is to be tested, a marked and thoroughly inspected set with a controlled malfunction is placed with an operative (usually a housewife). The operative then calls the repairman. The dealer never knows when he is being tested. When a violation is suspected, normally at least two marked sets are run through the shop during the investigation. Bureau of Repair Services, *supra* note 47, at 3.

⁵⁹ CAL. BUS. & PROF. CODE § 9863 (West 1964).

Informal adjustments are made in approximately 35% to 40% of all cases referred to the Bureau. Letter from Raymond Reid, *supra* note 54.

⁶⁰ CAL. BUS. & PROF. CODE §§ 9841-46 (West 1964, Supp. 1971). In addition to the grounds for revocation presented in § 9841 (note 53 *supra*), the service dealer is required to provide an invoice "describ[ing] all service work done and all parts supplied," clearly stating if used parts were utilized. *Id.* § 9842. All replacement parts must be returned to the customer except those specifically exempted. *Id.* § 9843. Upon customer request, a written estimate of repair costs must be made which may not be exceeded without customer consent. *Id.* § 9844. Employee compensation may not be based on the value of replaced parts. *Id.* § 9845. Use of "g[uarantee]" and similar terms must be in accordance with regulations. *Id.* § 9846.

⁶¹ CAL. BUS. & PROF. CODE § 9814 (West 1964).

There are currently 25 regulations dealing primarily with definitions of trade terms and practices. CAL. ADMIN. CODE tit. 16, §§ 2700-24 (1970). The regulations are promulgated

statute, including those who fail to register, are subject to criminal punishment.⁶² The Bureau is financially self-supporting, operating exclusively on registration fees.⁶³

Such a regulatory scheme could easily be applied to the automotive repair industry. Both the television and automotive repair industries have large numbers of small dealers performing technical services. The Bureau of Repair Services was designed to cope with the type of fraud problems now prevalent in the automotive repair industry,⁶⁴ especially questions as to the necessity of repair and the technical aspects of proof of fraud. Expert personnel and the spot check method have been demonstrably effective in solving these problems.⁶⁵ Bureau regulations could apply as effectively to automotive repairs as they have to television repairs in areas of warranties,⁶⁶ advertising,⁶⁷ estimate abuses,⁶⁸

by the Director of the Department of Consumer Affairs, the nominal head of the Bureau of Repair Services, which in turn is under the operational control of the Bureau Chief. A five-member advisory board exists. This board recommends regulations and policy to the Bureau. Although the board has no binding authority, in practice it has recommended most of the regulations adopted. Letter from Raymond Reid, *supra* note 54.

⁶² CAL. BUS. & PROF. CODE § 9850 (West 1964). A service dealer may be charged with a misdemeanor for a violation of the requirements of §§ 9842-46, but his employee may be charged only for a violation of § 9840 (acting without registration). 45 OP. ATT'Y GEN. CAL. 65 (1965). Knowledge and intent are not elements of the offense (*id.* at 70), and a dealer may therefore be held criminally liable for an offense committed by his employee. The dealer is thus the focal point of the law in fulfilling its purpose—to eliminate fraudulent practices.

⁶³ CAL. BUS. & PROF. CODE §§ 9870-74 (West 1964, Supp. 1971).

⁶⁴ See note 49 *supra*.

⁶⁵ See note 58 *supra*; note 78 *infra*.

⁶⁶ "The use of 'guarantee' and words of like import shall conform to the regulations adopted by the director." CAL. BUS. & PROF. CODE § 9846 (West 1964).

The use of words such as "guarantee," "guaranteed," "no fix-no pay," or words of like import, are prohibited unless the terms of qualifications are clearly and completely stated including the disclosure of:

(1) The nature and extent of the guarantee as to time, parts, and/or labor.

(2) The identity of the guarantor; e.g. clearly identifying whether the service dealer, the manufacturer, the retailer, or any combination thereof is the guarantor.

CAL. ADMIN. CODE tit. 16, § 2723(b) (1970).

⁶⁷ An electronic repair dealer's registration may be revoked for "[m]aking or authorizing any statement or advertisement which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading." CAL. BUS. & PROF. CODE § 9841(a)(1) (West Supp. 1971). The regulations on advertising further require clear identification of the dealer and disclosure of terms or conditions to an advertised service. CAL. ADMIN. CODE tit. 16, § 2723 (1970).

⁶⁸ If a customer requests an estimate for labor and parts necessary for a specific job, the service dealer shall make such an estimate in writing and may not charge for work done or parts supplied in excess of the estimate without previous consent of the customer. The service dealer may charge a reasonable fee for making the estimate.

CAL. BUS. & PROF. CODE § 9844 (West 1964).

No service dealer shall, in filling out an estimate or an invoice, withhold there-

used parts,⁶⁹ mechanic commissions,⁷⁰ or "deceptive practices" in general.⁷¹

With industry participation in the regulatory process⁷² and safeguards against rash or arbitrary actions,⁷³ there seems little reason for industry fear or opposition. The oil companies and the major auto makers, however, have strongly opposed any regulation,⁷⁴ despite its potential to "clean up" their industry. The argument that regulation is not needed⁷⁵ fails in light of the documented abuses, and the argu-

from or insert therein any statement or information where the tendency or effect thereby is to mislead or deceive customers, prospective customers, or the consuming public.

CAL. ADMIN. CODE tit. 16, § 2710 (1970).

⁶⁹ The service dealer shall return replaced parts to the customer excepting such parts as may be exempted from this requirement by regulations of the director and excepting such parts as the service dealer needs to return to the manufacturer or distributor under a warranty arrangement.

CAL. BUS. & PROF. CODE § 9843 (West 1964). Such a requirement would face practical problems with large auto parts. Larger parts could be exempted from the requirement, but clear notice should be required if any of these used parts are supplied to another customer. This notice is required in the invoice under the California law ("If any used parts are supplied, the invoice shall clearly state the fact." *Id.* § 9842, but prior notice and consent of the customer should also be required.

⁷⁰ "A service dealer may not make the compensation of any employee, partner, officer, or member dependent upon the value of parts replaced in any equipment by, or with the consent of, such employee, partner, officer, or member." *Id.* § 9845.

⁷¹ A catch-all provision providing license revocation for "[a]ny other conduct which constitutes fraud or dishonest dealing" (*id.* § 9841(a)(4) (West Supp. 1971)) provides a basis for attacking abuses not covered by specific prohibitions.

⁷² Industry presence on the advisory board (*see note 61 supra*) provides a powerful voice for industry interests. To allow industry dominance, however, might be detrimental to the public interest. There is a danger that industry domination of the agency might result in weakening control of abuses. *See Barron, Business and Professional Licensing—California, A Representative Example*, 18 STAN. L. REV. 640 (1966).

⁷³ Regulations under the California law may be established only in accordance with the applicable provisions of the California Government Code. CAL. BUS. & PROF. CODE § 9814 (West 1964). The government code (CAL. GOV'T CODE §§ 11371-445 (West 1966)) requires that such regulations may be adopted only after 30-day notice (*id.* § 11423) and hearing (*id.* § 11424) and that they become effective 30 days after adoption, amendment, or repeal of regulations (*id.* § 11426). In addition, any interested person may seek declaratory relief on the validity of a regulation. *Id.* § 11440.

⁷⁴ California State Senator Alan Short, who authored the Electronic Repair Dealer Registration Law, proposed similar legislation to license automobile repair shops and mechanics ((1970) Sen. No. 263 (Mr. Short & Mr. Sherman)) but "[q]uite simply the legislation failed because of the opposition of the large oil companies, the new car dealers and automobile manufacturers." Letter from Senator Alan Short to the *Cornell Law Review*, Dec. 9, 1970. Significantly, the Independent Garage Owners of California, Inc. (IGO) vigorously supports regulatory legislation and attributes its defeat to the "overt and very powerful" opposition of the "major oil companies and the motor car dealers." Letter from Peter S. Carberry, Executive Vice President, IGO, to the *Cornell Law Review*, Dec. 2, 1970.

⁷⁵ In expressing opposition to any licensing of shops or mechanics, Mack W. Worden, General Motors Vice President for Marketing, told the Senate hearings:

A license has never been an assurance of quality and, at best is a marginal assurance of performance. . . .

ment that it will be ineffective⁷⁶ overlooks the success of the Bureau of Repair Services in an analogous area.

The structure of the Bureau lends itself to easy integration elsewhere.⁷⁷ The Bureau has been effective⁷⁸ and popular.⁷⁹ Each state should establish a similar agency to provide effective protection for the consumer of automotive repair services.⁸⁰

In the long run, competition and the need for repeat business are the best incentives for competence in any service outlet.

Hearings 1329. The argument that regulation is unnecessary disregards the abuses that competition has failed to prevent.

⁷⁶ The establishment of a consumer protection office to deal with dishonest practices would only encourage much of the public to complain about *minor incidences* [sic] and disputes between themselves and garage operators and *probably do little to solve grievances*. It would cost the small garage or service station operator much time and effort in answering charges that *in far too many cases would be groundless*.

Hearings 422 (Letter from Nat'l Congress of Petroleum Retailers, Inc., to Mr. Don Randall, Ass't Counsel to the Subcomm. on Antitrust and Monopoly, Nov. 30, 1968) (emphasis added).

⁷⁷ For example, in New York the agency could become a division of the Bureau of Consumer Fraud and Protection or of the Department of Motor Vehicles, or the registration and enforcement functions could be divided between them. In California an agency paralleling the Bureau of Repair Services could be established in the Department of Consumer Affairs. The crucial factor is not placement, but effective operations. Only a financially independent, specialized agency is likely to concentrate adequate resources and expertise to deal effectively with abuses.

⁷⁸ "All of these abuses and kinds of practice have come to a halt or at least a sharp decline by virtue of the activities of the Bureau." Report 5.

The Bureau has been highly successful in carrying out the legislative intent by sharply reducing fraud in the electronic repair industry . . . The agency has saved the public, conservatively, between \$11½ million to \$19 million annually in unnecessary TV repair bills.

Id. at 3-4.

In 1963 and 1964, the Bunco (Fraud) Section of the Los Angeles Police Department received approximately 300 complaints per year against TV repairmen. After formation of the Bureau, the number of complaints dropped to about 40 a year. *Id.* at 5-6.

Among the reasons for the Bureau's success is its variety of remedies. Each of four 1970 New York State legislative proposals to regulate automotive repair shops neither contained provisions for informal adjustments, injunctions, or restitution, nor referred to the powers of the attorney general as a means of enforcing its provisions. (1970) Sen. No. 6866 (Mr. Ferrall); (1970) Assy. No. 3331 (Mr. Miller); (1970) Assy. No. A 4176 (Mr. Harwood); (1970) Assy. No. A 5929 (Mr. Lill). Unlike California's Electronic Repair Dealer Registration Law which provides that the agency "shall" investigate licensees, conduct spot checks, and act on each complaint (CAL. BUS. & PROF. CODE §§ 9812, 9860-63 (West 1964)), these proposals provided only a "power" to investigate licensees and act on complaints. Thus, there is a danger that an agency created by such proposals would become merely a passive registration agency rather than an effective regulatory agency actively involved in preventive and remedial consumer protection.

⁷⁹ Testimony before the Subcommittee on Electronic (TV) Repair from law enforcement officials, Bureau personnel, industry associations and publications, and consumers was "unanimous that the Bureau has done an excellent job and is being copied throughout the United States." Report 3. Testimony indicated that the Bureau had "gain[ed] the support of a majority of the dealers." *Id.*

⁸⁰ Legislation modeled on the Electronic Repair Dealer Registration Law was intro-

B. *Mechanic Incompetence*

Since the problem of mechanic incompetence has causes different from the problems of fraud and deceptive practices, its solution does not lie in the regulatory system proposed to combat fraud. To solve the problem of mechanic incompetence, minimum standards of qualification and performance are necessary.⁸¹ Three methods of providing such standards are available.

duced in both the New York ((1970) Sen. No. 668-8 (Mr. Lentol)) and California ((1970) Sen. No. 11 (Mr. Beilenson)) legislatures.

The California Senate Subcommittee on Electronic (TV) Repair recommended study of the possibility of similar regulation for automobile repairs (Report 2), and the California attorney general's office has also supported the creation of a special regulatory agency for automotive repair fraud. *Hearings 727* (statement of Herschel T. Elkins).

New York Attorney General Lefkowitz has expressed strong support for regulation of automobile repairs. New York Att'y Gen., A Consumer's Bill of Rights, Sept. 20, 1970. Legislation to license automobile repair shops in New York was first introduced in 1959 by the Joint Legislative Committee on Motor Vehicles, Traffic, and Highway Safety (REPORT, 1967 N.Y. LEG. DOC. NO. 81, 1968 N.Y. LEG. DOC. NO. 83, at 16), and in 1968 the New York Joint Legislative Committee on Consumer Protection offered a comprehensive program on the licensing of repair services, calling for licensing of automotive repair dealers, automotive mechanics, and television repair dealers. None of these proposals was enacted. (THIRD ANNUAL REPORT 29-34.)

In both his 1968 and 1969 annual messages to the legislature, Governor Rockefeller advocated licensing auto repair shops (N.Y. Times, Feb. 26, 1968, at 39, col. 8; *id.*, Jan. 9, 1969, at 18, col. 5) and the Democratic leaders of the legislature did likewise in their legislative proposals for 1969. *Id.* Feb. 20, 1969, at 40, col. 4. Despite such expressions of support no regulatory legislation has yet been enacted in New York.

The Senate hearings disclosed that proposals to "regulate the automobile repair industry" were under consideration in at least nine states: California, Colorado, Louisiana, Massachusetts, Montana, New Jersey, New York, North Carolina, and Wisconsin. *Hearings 1562-63* (Letter from Albert M. Perry, Legislative Att'y, Am. L. Div., Legislative Reference Serv., Library of Congress, to the Senate Subcomm. on Antitrust and Monopoly, May 20, 1969). Only four states presently have legislation regulating automobile repairs. Connecticut requires only that a repairman be "qualified" and then deals at length with the location of the business. It is more a zoning law than a consumer protection law. CONN. GEN. STAT. REV. §§ 14-15 to -15(a) (1958). Rhode Island has a provision requiring the licensing of auto body repair shops (R.I. GEN. LAWS ANN. §§ 5-38-1 to -21 (1968)), "[e]nacted as an anti-theft measure and understood to be ineffective as a regulatory statute." *Hearings 1562*. Alabama licenses garages for revenue purposes. ALA. CODE tit. 51, § 466 (1958). Colorado has a provision for licensing repair dealers (COLO. REV. STAT. ANN. § 13-13-6 (1964)), but "[i]t is understood that the omnibus statute of which this measure was a part was declared unconstitutional." *Hearings 1962*.

⁸¹ The need for corrective action has been widely recognized. A 128-page report on automotive standards issued in February 1970 by the Federal Trade Commission proposed the licensing of automobile mechanics at the state and local levels to "correct the abuse of automobile servicing by unqualified servicemen . . ." BNA ANTITRUST & TRADE REG. REP. No. 450, at A-19 (Feb. 24, 1970).

Significantly, an industry trade magazine, *Motor Age*, had strongly taken up the call for action.

Most sane people agree that certification of professional competence among

Proposals have been offered in several states to require all auto mechanics to pass licensing examinations.⁸² Those who could not qualify would be excluded from the industry. The simplicity and directness of such a plan, however, are outweighed by significant disadvantages.⁸³ First, occupational dislocation would result. The high standards and strict enforcement necessary to achieve the goal of the program would necessarily disqualify many mechanics presently working in the industry. This dislocation would aggravate the existing shortage and could possibly make adequate service more difficult and more costly to obtain. To avoid this result special exemptions might be necessary,⁸⁴ allowing those presently in the industry to remain. Such exemp-

the men who service cars is needed. It would do two things: make the profession honorable; contribute to assuring that only safe cars are driven on the nation's highways.

MOTOR ACE, Feb. 1967, reprinted in 115 CONG. REC. 3475I (1969).

⁸² California: (1969) Sen. No. 263 (Mr. Short & Mr. Sherman); New Jersey: see *Hearings* 622. Seven such proposals were introduced in the 1969-70 session of the New York legislature: (1970) Sen. No. 7416 (Mr. Ferrall); (1969) Sen. No. 4444 (Mr. Guiffreda); (1969) Sen. No. 2203 (Mr. Sentucci); (1970) Assy. No. 2889 (Mr. Dowd); (1970) Assy. No. 674-A (Mr. Ginsberg); (1969) Assy. No. 3067 (Mr. Kraf); (1969) Assy. No. 1244 (Mr. Ginsberg). See also note 80 *supra*.

The Province of Ontario, Canada, has required since 1944 that all mechanics be "certified" and complete an apprenticeship program. This, however, "is more a labor law, regulating wages and apprentices and related matters, than it is designed to regulate qualifications." THIRD ANNUAL REPORT 38. Nevertheless, the program "has resulted in a considerable upgrading of skills in the repair trade." Letter from E. J. Wadham, Wadham Publications Ltd., Toronto, Canada (publishers of *Automotive Service in Canada*) to the *Cornell Law Review*, Nov. 24, 1970. See *Hearings* 951 (remarks of Dean H. A. Constable in *Transcript of Nat'l Educ. Television's Your Dollar's Worth No. 30—"Points and Plugs"*).

California requires that all mechanics installing, adjusting, or inspecting motor vehicle pollution control devices be licensed by the Commissioner of the Highway Patrol. CAL. VEHICLE CODE §§ 2501, 2522 (West Supp. 1971). The Commissioner is also required to license automotive lamp or brake adjusters (*id.* § 2501) and "official" lamp or brake adjusting stations. All automotive brake or light adjustments must be performed in "official" stations which must "normally" have available a licensed adjuster. CAL. ADMIN. CODE tit. 13, §§ 601(a), (c) (1970). This somewhat anomalous program imposes more stringent requirements on persons installing pollution control devices (all must be licensed and meet prescribed qualifications) than on those installing brakes.

⁸³ Senator Phillip Hart, who early in his investigations had indicated support for state licensing of all mechanics (N.Y. Times, Oct. 19, 1969, at 32, col. 1), has recently indicated that he now feels "licensing of all mechanics may cause more problems than it would solve—such as raising the overall repair bill by prohibiting the use of trainees and apprentices for simpler repair work." 116 CONG. REC. S 3454 (daily ed. March 11, 1970). See *Hearings* 1749 (statement of Malcolm R. Lovell).

⁸⁴ "The problem of an adequate supply of auto repair mechanics, regardless of their competence, requires the inclusion of 'grandfather clauses' in any licensing bills." 1969 REPORT OF THE NEW YORK STATE JOINT LEGISLATIVE COMMITTEE ON MASS TRANSPORTATION, 1969 N.Y. LEG. DOC. NO. 86, at 43. At least in theory, this premise is questionable, for an adequate supply of incompetent mechanics is an empty benefit.

A further problem with general licensing was indicated by a Maryland state official

tions, however, would frustrate the goal of the licensing program and could lock in incompetence. Further, any mandatory requirement of training or qualification will necessarily raise entry barriers to prospective new mechanics and impede efforts designed to eliminate shortages. In addition, administration would be difficult. Minimum standards and requirements for licensing would have to be established. If categories recognizing specialties and levels of experience are to be established,⁸⁵ as they should be, definition of these categories and testing and training programs for each must be developed. Although such a system could probably be devised, the industry is so diverse that the task would not be easy. Finally, many such licensing systems have been criticized as a means of limiting the number of new entrants into a trade to perpetuate strong union bargaining power and high wages.⁸⁶ It is not certain that these problems would develop in a mechanic licensing program, yet no examination of the likely effects of such a program has been made. Thus the wisdom of a mandatory licensing program at this time is somewhat questionable.

The automotive repair industry itself has not been silent while government action has been proposed. Voices within the industry have long called for self-regulated programs.⁸⁷ This call has echoed widely as the alternative of government action becomes more likely.⁸⁸ Follow-

who told the Senate hearings that his state had once tried a licensing program for mechanics, "but all mechanics failed the test." *Hearings 1765* (remarks of Ejner J. Johnson, Ass't Comm'r of Motor Vehicles, State of Maryland).

⁸⁵ The automotive repair industry has many specialty shops which work, for example, only on transmissions, ignition and electrical systems, brake and front end repairs, springs, or body work. One trained in a specialty need not know the other areas to do competent work in his field, and thus should be licensed, but restricted to work in his own specialty. Likewise, mechanics with proven competence and experience deserve recognition above apprentices and new entrants.

⁸⁶ Barron, *supra* note 72, at 649-57; Note, *Title VII of the Civil Rights Act of 1964 and Minority Group Entry into the Building Trade Unions*, 37 U. CHI. L. REV. 328, 329-32 (1970).

⁸⁷ Your image, and the image of your industry is besmirched by the fact that anyone who wishes to call himself a mechanic may do so. The degree of Automotive Technician is the only one that can be self granted. This allows individuals of untested ethics and unproven competency to operate or work in garages and other service outlets. The industry is hurt in three ways: (1) Public distrust is generated when unqualified people charge for, but fail to correct malfunctions; (2) The industry fails to attract and hold bright young men who can perpetuate the independent automotive service industry; (3) The image of the qualified and ethical service dealers is dragged down to the lowest denominator.

MOTOR AGE, Jan. 1967, reprinted in 115 CONG. REC. 34751 (1969). *Motor Age* urged action to strengthen the industry's trade associations in order to "solve the certification program [sic] and allow automotive technicians to display meaningful credentials to the public." *Id.* See note 81 *supra*.

⁸⁸ "We are definitely committed to establishing a certification program . . . and we

ing the well-publicized Senate hearings on the automotive repair industry,⁸⁹ two powerful industry associations, the Automobile Manufacturers Association (AMA) and the National Automobile Dealers Association (NADA),⁹⁰ responded by announcing a project to develop automotive mechanic skills tests⁹¹ as an initial step toward a voluntary mechanic certification program.⁹² Projects such as this have the advantage of private action, at private expense, and if effective should be encouraged. The motivation is suspect, however, since the industry failed to act for so long a time.⁹³ Motivation aside, the most serious problem with a totally voluntary industry program is that it would lack the mandatory force of law. It would not be able to compel compliance where it is needed most, among the marginal mechanics. It has been argued that public awareness and competitive forces would cause uncertified mechanics to go out of business.⁹⁴ But this argument is questionable. The shortage of mechanics would ensure the continued

would like this to be considered as a substitute for licensing." Cerra 4A, col. 3, quoting Frank McCarthy, Executive Vice President of NADA.

⁸⁹ Note 1 *supra*.

⁹⁰ These groups represent, respectively, "major American automobile manufacturers and a large majority of the nation's franchised new car dealers." Automobile Manufacturers Ass'n, Press Release, April 3, 1970. See also *Hearings 1769-70* (statement of NADA).

⁹¹ *Hearings 1770*. The project is to be performed by the Educational Testing Service of Princeton, N.J.

⁹² *Id.*

⁹³ In contrast to the outright opposition of General Motors (note 75 *supra*), Ford takes a more conciliatory public position on mechanic licensing proposals.

We are not convinced that mechanic licensing . . . will in itself contribute substantially to improving auto service. . . .

We . . . believe that if such legislation is to play a constructive role, it must meet certain criteria. Licensing should be administered by a public agency that will encourage free entry of competent persons and guard against the establishment of licensing standards that have no demonstrable relationship to the ability to perform on the job. Examinations for licenses should be based on practical knowledge and the views of the automobile manufacturers; and of those engaged in the auto repair industry should be considered in establishing rules, standards, and procedures. Licenses should be granted for special fields such as electrical, transmission, or bodywork, as well as for general mechanical work. Equitable hearing and appeal procedures should be provided, and the administrative agency should have no jurisdiction over dollar charges, time allowances, or labor rates for repairs.

Hearings 1429 (statement of John J. Nevin).

A Chrysler spokesman at the hearings suggested a voluntary mechanic certification program as an "interim step" since "little is known about the consequences" of a general licensing program. *Id.* at 1536 (statement of Byron J. Nichols, Vice President, Marketing Chrysler Corp.). The American Motors representative took a somewhat equivocal position on mechanic licensing (*id.* at 1529 (statement of William S. Pickett, Vice President, Sales, American Motors Corp.)), while the President of Volkswagen of America supported such licensing (*id.* at 1454 (statement of Stuart Perkins, President, Volkswagen of America, Inc.)).

⁹⁴ *Hearings 1329* (remarks of Mack W. Worden).

existence of a portion of the industry ready to cater to consumers interested in cheap rather than good repairs. Consumer safety is as much the goal of the program as is financial protection; this goal would be frustrated if some consumers continued to endanger themselves and others.⁹⁵

There is a third alternative, one that combines the best features of an industry program with the needed force of law. That is a state program for voluntary mechanic certification⁹⁶ with a requirement that each shop have at least one certified mechanic.⁹⁷ A certified mechanic supervising and checking all work and signing a statement of satisfactory completion⁹⁸ provides a double check on the competence and performance of the uncertified mechanics in the shop. The requirement provides a measure of security not presently available and which would not be provided by a totally voluntary certification program.

Certification standards are crucial and would have to assure that

⁹⁵ The compelling reason for the legislatures of this country to enter this area, is to set minimum standards of competence and quality for those individuals who charge themselves with the ability to repair what is still the most dangerous instrument with which man comes in contact and which continues to be *murderously unsafe for the conditions under which it is operated*. If repaired without experience, the safety of all in that vehicle and those vehicles with which it comes in contact, is placed in jeopardy.

Hearings 734 (statement of State Senator Edward J. Speno, Chairman, N.Y. State Joint Legislative Comm. on Mass Transp.) (emphasis in original).

⁹⁶ Legislation creating a voluntary mechanic certification program passed the New York State Senate in the 1970 session, but died in Assembly. (1970) Sen. No. 746-C (Mr. Speno).

⁹⁷ This was not a feature of Senator Speno's bill, but was included in a similar measure in New York offered by Senator Lentol ((1969) Sen. No. 568-8) which died in committee. Such a requirement has been discussed and advocated elsewhere (116 CONG. REC. S 3454 (daily ed. March 11, 1970); *Hearings 1531* (statement of William S. Pickett)), and has long existed in the aviation industry.

In the air transport industry work must be performed by or under the supervision of a thoroughly trained, licensed mechanic. Only licensed mechanics may certify that a plane is airworthy before it may fly.

In the auto repair industry there are no required standards of training. . . . And yet the average American's exposure to and risk from auto travel is about 400 times greater than his exposure to and risk from air travel.

Id. at 349 (statement of William W. Winpisinger).

⁹⁸ Investigators from a state agency should conduct spot checks of repair facilities to ensure that the certification procedure is not merely a formality, but that the repairs have in fact been checked by the certified mechanic. Improper inspection or negligence on the part of the certified mechanic should result in revocation of his certification.

A statute should expressly provide, however, that neither the mechanic, the certifier, nor the service dealer shall incur tort liability as a result of the certification procedure. To permit the certification program to alter traditional tort principles would diminish its credibility and overly burden parties unable to bear such risks. Likewise, certification should not be a defense to a tort action. It may be, however, of some evidentiary value.

the certified mechanic is thoroughly competent in his field. Since this competence would be officially recognized, certified mechanics would have occupational prestige and should receive higher wages. This would induce mechanics to seek certification through training programs and attract new men into the field. Those remaining uncertified would still be subject to minimum standards and supervision.

Standards for certification of mechanics would be set by the state agency with the advice of an advisory board, but the agency should be empowered to grant certification to those passing an approved industry-sponsored training and testing program. The agency would be able to prescribe various types and classes of certificates, but would also be able to approve existing or proposed industry classifications if they are deemed satisfactory. In this way the certification agency would promote and encourage the development of additional industry-sponsored mechanic training, apprentice, and continuing education programs. It could require more than one certified mechanic where the volume or diversity of work performed in a particular shop so required.⁹⁹

Such a program would avoid the massive occupational dislocation of a mandatory licensing program, recognize the present mechanic shortage, and rely heavily upon the industry itself to fill in the details. Although this compromise does not assure the competence of every mechanic, it does provide supervision of every mechanic's work and thus greater consumer protection and public safety.¹⁰⁰

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⁹⁹ The mechanic would have to be certified for each type of work done in the shop for this control to be effective. An advisable exemption from this program would be routine service station work requiring little skill and entailing little danger, e.g., oil changes and lubrications. Stations doing more extensive repairs, however, should not be exempted. See note 52 *supra*.

¹⁰⁰ Some smaller repair shops with few employees, none of whom is able to obtain certification, might be forced to close as a result of this program. The availability of repairs, however, would not necessarily be adversely affected. The mechanics employed by the small shops so closed could seek employment elsewhere and would then work under the supervision and training of a certified mechanic, with improved service to the customer resulting.

It must be recognized that any improvements in mechanic qualifications and competence will depend heavily on bettering the lot of the mechanic generally to attract capable men into the industry. See notes 35 & 81 and accompanying text *supra*. The higher wages necessary for this must be accepted as a likely cost of the desired improvements.