Philip Schrag and the Forgotten Washing Machine

by Jeff Greenfield

The Second Circuit Court of Appeals in New York's Foley Square looks very much like the courtroom of a law school dream—a high-ceilinged, wood-paneled chamber with a wide, rich bench and an impressive view of Manhattan. Polished tables run the length of the room. In clusters, confident, well-dressed attorneys wait to get their few minutes for oral argument. Only a few hundred feet away, in the Civil Court of New York, sweaty lawyers in Sam's Discount business suits fumble through plastic attaché cases for tuna-stained papers. A short walk further, in the criminal courts, sullen women sit amid wadded-up newspapers waiting to find out if their men are going to jail.

The contrasts go beyond ambience or appearances. In jurisdiction and reputation the Second Circuit is surpassed only by the Supreme Court, and hears some of the best-known and best-paid lawyers in the country. Part of the lure of law is the lure of power and the opportunity for personal public triumph, and as these men argue theory, principle, and constitutional imperative in the nation's highest courts, the individual grievances of the defendants often disappear. All that is left are the advocates, the arbiters, and the law—except when one of the advocates is Philip Schrag.

At 31, Schrag is one of the most knowledgeable consumer protection lawyers in the United States. He is one of those people who makes you feel like you should rush home and reorganize your life. Last December, as I watched my former law school classmate in the Second Circuit, I felt as if a childhood friend's years of backyard dramatics were culminating before my eyes in a prize-winning Broadway performance.

The case itself lent richness to that performance. Mrs. Dorcas Bond, an unskilled worker from Albany, N.Y., was earning $65 a week when she borrowed $275 from the Beneficial Finance Company for a new washing machine. But by 1973, when *Bond v. Dentzer* was called, the contract she had signed to get her money had become the basis for an important constitutional case—and the washing machine had long since been forgotten.

When people like Mrs. Bond need money, they usually go to friendly neighborhood finance companies, which will lend to people who, though steadily employed, have neither income nor credit enough to qualify for a bank loan. These firms protect themselves with wage assignments—written agreements stating that if borrowers default on payments, the finance company can collect directly from their employers. Once a wage assignment has begun, the borrower must go to court to stop it. But most borrowers are unaware of their right to challenge wage assignments, so they stand by helplessly as the moneylenders peck away at their already meager paychecks.

If wage assignments were without question contracts between two private parties, there would be no constitutional issue. But since 1934, New York State's Personal Property Law has explicitly *permitted* them, thereby shifting the legal burden from plaintiff to defendant. The question is whether the state's approval of wage assignments is an example of state action, and, if so, whether it is constitutional.

Most lawyers would agree that a state requiring defendants to bring suits in order to prevent a judgment from being made against them would be violating due process. Our legal system requires the complainant to start things moving. If a New York State law permits private parties to agree to shift that burden, isn't that, even secondhand, also a violation? A federal district court judge had thought so. And so did Philip Schrag.

Courts are unenthusiastic about applying new constitutional interpretations to long-standing and complex business procedures, but at least in Schrag, that reluctance faced a formidable challenger. After graduating from Yale Law School in 1967, Schrag worked on test action consumer litigation cases for the NAACP Legal Defense Fund. In 1969, he was named chairman of New York City's Consumer Advisory Council. He helped write most of the law establish-

---

Jeff Greenfield, a graduate of Yale Law School and former aide to John V. Lindsay and Robert F. Kennedy, is a writer and political consultant in New York City.

Schrag offered the bench three alternatives. "Now I could sketch the other state action theory, or I could address myself to the policy questions, or I could sit down."

"That's a very tempting offer," replied Judge Mulligan.

ing the city's Department of Consumer Affairs and served as its chief enforcer until 1971, when he became a professor at Columbia Law School.

Schrag prepared intensively for his oral argument for the *Bond* trial. "I'd read everything the three judges had written in the last ten years on state action," he said. "I didn't know until three days before the argument who the panel would be, but I'd researched the entire bench. Then, in our clinical law seminar on public interest advocacy, we broke down the oral argument in great detail. We had five different people argue one key section and we videotaped it, looking for facial expressions, hand gestures, everything."

The bench Schrag did face was impressive. Judges Irving Kaufman, Walter Mansfield, and William Mulligan would decide whether to uphold the district court ruling that the wage assignment law was unconstitutional.

The attorney for the finance companies, John DeGraff, was first to present his case. He argued that the 1934 law was actually a consumer *protection* device restricting wage assignments with procedural limits. If that device were struck down, he said, finance companies would be forced to sue for garnishment of wages, which would increase costs for defendants and ultimately, for all borrowers. Moreover, DeGraff contended, wage assignments are essentially private affairs. "If this is state action," he said, "so is *everything*. If this were a race discrimination case, it might be different; but this is undue interference with freedom of private contract."

One of DeGraff's colleagues was more blunt. "They hired the money, didn't they?" he asked, quoting Calvin Coolidge. If these poor people had enough wit to go out and borrow money and sign the agreement, he asked, what's wrong with holding them to their word?

With a bushy head of hair and a moustache, my old friend Schrag looked more like a law student in moot court than an advocate before an imposing tribunal. But any sympathy for a supposed underdog soon vanished. Schrag began to correct some of the opposing counsel's misstatements, but he didn't get far. In the Second Circuit no lawyer expects to get more than three minutes to state his crucial arguments. The rest of the time he faces a barrage of questions, objections, musings, and rebuttals from judges, who are either signaling their displeasure or attempting to clear their own thinking on difficult points.

Schrag's most difficult questions came from a judge who he had expected to be an ally. As a district judge Walter Mansfield had ruled that McSorley's Ale House in New York could not bar women from its premises. Since the establishment held a liquor license, he decided, state action was involved. But in this case he challenged Schrag, asking, "Where is the state action here?"

"There's state action in three ways," Schrag answered.

"Three ways?" queried Mansfield.

"He means three kinds," offered Kaufman.

Schrag began to explain that New York's wage assignment law froze the common law, which could have evolved in such a way as to further protect the consumer. The law also prevented local units of government from modifying wage assignment agreements. For instance, Schrag said, New York City's Department of Consumer Affairs might have given debtors more protection but for the state legislation, which must surely be an example of state action.

"But the private law could have been changed to give creditors more rights, couldn't it?" asked a clearly skeptical Mansfield.

"Yes," replied Schrag, "but the trend has been the other way."

"Well," commented Mulligan, "it's not much of an argument anyway."

Again and again Schrag tried to demonstrate that the state was an integral part of a process that forces defendants to come forward to protect themselves. Finally, he offered the bench a set of alternatives. "Now I could sketch the other state action theory, or I could address myself to the policy questions, or I could sit down," he ventured.

"That's a very tempting offer," replied Judge Mulligan.

The sparring match continued, and Schrag was brilliant, but not brilliant enough. On March 13, 1974, the Court ruled 2-1 against Mrs. Bond. Mulligan relied heavily upon DeGraff's argument that the wage assignment law was written to help debtors. Kaufman, the lone dissenter, accepted Schrag's theory that the state had delegated to private parties a job usually done by sheriffs.

Inspired in part by Kaufman's dissent, Schrag filed a petition for *certiorari* with the Supreme Court. With the number of similar cases that had been heard around the country, he hoped the Court would at least be willing to hear the case. On October 15, Schrag received bad news from Washington. Someone will have to find a stronger case to bring wage assignments before the Supreme Court. But it's not the end of the line for Phil Schrag and the forgotten washing machine, and the battle will probably move to the state legislature. Fortunately for Mrs. Bond, and all borrowers, Schrag's performing days are far from over, even if he hasn't yet had a chance to play the Palace. □