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CLASS CERTIFICATION IN STATE COURT
WELFARE LITIGATION: A REQUEST FOR PROCEDURAL JUSTICE

DAAN BRAVEMAN *

INTRODUCTION

Reginald Heber Smith observed in his treatise on injustice and inequality that the denial of justice to the poor is not attributable to the substantive law, which, "with minor exceptions, is eminently fair and impartial." ¹ Rather the denial of justice is due to "grave defects in the administration of the law." ² As Smith stated in 1919:

There is something tragic in the fact that a plan and method of administering justice, honestly designed to make efficient and certain that litigation on which at last all rights depend, should result in rearing insuperable obstacles in the path of those who most need protection, so that litigation becomes impossible, rights are lost, and wrongs go unredressed.³

Whatever the continuing accuracy of Smith's suggestion that the substantive law is fair and impartial,⁴ it is manifest that his observations of the defects in the administration of the law retain their original validity. The recent experience of welfare recipients in New York is evidence that little has changed in this regard in the past sixty years. The courts continue to place serious obstacles in the path of those who most need judicial protection. The specific evidence that serves as a basis for this perhaps harsh indictment of the New York judiciary is found in those decisions denying welfare litigants the opportunity to use the state's newly promulgated class action rule.⁵ The New York Court of Appeals has repeatedly held that class certification is unnecessary, and therefore class action relief is inapplicable to welfare litigation because the

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1. R. Smith, Justice and the Poor 15 (1919).
2. Id.
3. Id.
doctrine of stare decisis adequately protects nonparty welfare recipients. Unfortunately, stare decisis has been an inadequate substitute for class certification, and reliance on that doctrine has prevented fulfillment of substantive welfare policy. As a result of the method of administering justice adopted by the New York courts, the rights of welfare recipients have been lost, and actionable wrongs remain uncorrected.

The purpose of this article is to examine New York courts' reliance on the stare decisis doctrine, and to explore the need for class certification in state court welfare litigation. It is argued


The court's reliance on the stare decisis doctrine in lieu of class certification applies generally to actions against public officials. See, e.g., Rubin v. Levine, 41 N.Y.2d 1024, 363 N.E.2d 1975, 389 N.Y.S.2d 630 (1977); Rivera v. Trimarco, 36 N.Y.2d 747, 329 N.E.2d 661, 368 N.Y.S.2d 826 (1975). The impact of that determination, however, has been primarily on welfare cases. While New York courts have consistently refused to apply class action procedures to welfare cases, they have shown an increasing willingness to allow class action status in cases against nonwelfare, governmental officials. See, e.g., Knapp v. Michaux, 55 A.D.2d 1025, 1026, 391 N.Y.S.2d 496, 497 (4th Dep't 1977); Ammon v. Suffolk County, 90 Misc. 2d 871, 396 N.Y.S.2d 317 (Sup. Ct. 1977).

7. It is necessary to define the terms used throughout this article. The term welfare refers to public assistance provided by federal and state direct cash transfer and income-in-kind programs. At the federal level, the major cash transfer programs are the Aid to Families with Dependent Children (A.F.D.C.) program, 42 U.S.C. §§ 601-611 (1976), and the Supplemental Security Income for the Aged, Blind and Disabled (S.S.I.) program, 42 U.S.C. §§ 1381-1383c (1976). The A.F.D.C. program was established by the Social Security Act to provide financial assistance to needy dependent children and the parents or relatives with whom they reside, thereby "encouraging the care of dependent children in their own homes or in the homes of relatives." 42 U.S.C. § 601 (1976). The program is financed by both federal and matching state funds but is administered by the states. King v. Smith, 392 U.S. 309, 316 (1968). Under a "scheme of cooperative federalism," states are not required to participate in A.F.D.C.; however, those that do participate must adopt and implement a plan consistent with the federal statutory provisions. Id. See generally B. Brudno, Poverty, Inequality and the Law 579-784 (1976); Lups, Welfare and Federalism: A.F.D.C. Eligibility Policies and the Scope of State Discretion, 57 B.U.L. Rev. 1 (1977).


The federal income-in-kind programs provide services, rather than cash, to eligible recipients. The two major federal income-in-kind programs are the Food Stamp program, 7 U.S.C. §§ 2011-2027 (1976), and the Medicaid program, 42 U.S.C. §§ 1396-1396k (1976). See B. Brudno, supra at 519-20.

In addition to these federal programs, public assistance is available under state financed and administered programs. New York, for example, has established the Home Relief Pro-
that the class action rule performs an essential and instrumental role in transforming substantive welfare rights into actual benefits for welfare recipients. Equally important, it is suggested that application of the class action rule to welfare litigants has intrinsic as well as instrumental value, serving as a judicial statement that welfare recipients are entitled to the same respect afforded litigants enforcing traditional property rights.

Clearly, "few procedural devices have been the subject of more widespread criticism and more sustained attack—and equally spirited defense—[than the class action rule]." 8 When used by legal services attorneys 9 on behalf of the poor, the class action procedure has been characterized as a device that promotes "leftist-socialist causes." 10 The views of former Vice President Agnew, a frequent critic of the class action and law reform litigation by legal services lawyers, 11 have been warmly received by a presiding justice of one of New York’s intermediate appellate courts. In a letter to the former Vice President, he stated:

In my judicial capacity as Presiding Justice of the Appellate Division, Third Department, which comprises twenty-eight counties in the State of New York, I have come to look upon the Office of Economic Opportunity Legal Programs as the creation of another bureaucracy not interested in the complaint of individual litigants, but more interested in bringing class actions for the purpose of

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trying to change not only the legal but the social approach in all sorts of problems, many of which have little, if any, strictly legal basis.\textsuperscript{12}

Despite criticism, class action suits have been successfully maintained on behalf of indigent clients, particularly those challenging the validity of state welfare statutes and regulations.\textsuperscript{18}

Until recently, class action welfare litigation was concentrated in the federal courts;\textsuperscript{14} however, the welfare recipient, like other classes of litigants, has fallen victim to the Burger Court decisions that "bar the federal court house door to litigants with substantial federal claims."\textsuperscript{15} For the welfare recipient, this occurred when the Supreme Court determined that the eleventh amendment prevented a federal court from directing state officials to make retroactive payment of wrongfully-withheld welfare benefits.\textsuperscript{16} While this decision does not completely bar access,\textsuperscript{17} it severely limits the scope of the remedy available to the welfare recipient in federal court.\textsuperscript{18}


In contrast to the critics, a report to Congress by the Comptroller General of the United States recommended greater utilization of class actions by legal services attorneys to achieve law reforms. COMPTROLLER GENERAL REPORT TO THE CONGRESS: THE LEGAL SERVICES PROGRAM—ACCOMPLISHMENTS OF AND PROBLEMS FACED BY ITS GRANTEES 14-18 (1979).


\textsuperscript{14} For instance, see cases cited in note 13 supra.


\textsuperscript{17} The decision does not prevent the federal court from directing prospective injunctive relief. \textit{Id.} at 667-68. See Trainor v. Hernandez, 431 U.S. 434 (1977); Judice v. Vail, 430 U.S. 327 (1977); Warth v. Seldin, 422 U.S. 490 (1975).

\textsuperscript{18} Arguably, the optimal relief for the welfare litigant would include recovery of wrongfully withheld benefits for all aggrieved individuals, as well as a declaratory judgment and an injunction restraining the practice in the future. See Note, The Outlook for Welfare Litigation in the Federal Courts: Hagans v. Lavine & Edelman v. Jordan, 60 CORNELL L. REV. 897, 904 n.40 (1975). Thus, the decision in Edelman v. Jordan, 415 U.S. 651 (1974), prohibits the federal courts from directing an important aspect of the optimal relief— that of retroactive benefits. See text accompanying note 16 supra.

The impact of \textit{Edelman} might be reduced if a federal court declared a state welfare practice invalid, and ordered state officials to notify aggrieved recipients that the state ad-
As a result, welfare recipients were forced to reexamine the state court as the forum in which to resolve their claims. Mr. Justice Brennan observed that "the very premise of the cases that foreclose federal remedies constitutes a clear call to state courts to step into the breach... With federal scrutiny diminished, state courts must respond by increasing their own." 19 Unfortunately for welfare recipients in New York, state courts may have betrayed the trust placed in them by the Supreme Court; they have erected a state barrier to effective class action welfare litigation.

I. EMERGENCE OF STARE DECISIS AS A SUBSTITUTE FOR CLASS CERTIFICATION

In two recent articles,20 Professor Adolf Homburger thoroughly examined the history of the class action procedure in New York. There is no need to retrace that history here. It is sufficient to note that New York retained the ancient Field Code version of the class action rule, which, as Professor Homburger stated, "may well qualify as one of the worst [provisions] in the Code." 21 Class certification was authorized only where there existed a question of "a common or general interest," 22 a phrase that was interpreted

21. State Class Actions, supra note 20, at 613.
as requiring privity among the potential class members. While the feudal concept of privity "defies definition and analysis," it suggests "that there is a jural relation of one sort or another between the parties." Professor Homburger explained that the difficulty with the Field Code class action provision and its judicially imposed privity requirement was that it "failed to respond to an overwhelming social need for a workable collective remedy in situations where there is no consensual relationship between the dispersed, unorganized and unrelated members of a class."

In the early 1970's, the New York Court of Appeals began to urge legislative repeal of the class action provision. Judge Jasen, writing for the court in 1973, underscored the need for "a more liberal procedure." He stated that "[i]n our view there is urgency for early legislation... in light of the general and judicial dissatisfaction with the existing restrictions on class action which in many instances may mean a total lack of remedy, as a practical matter, for wrongs demanding correction."

Two years later, the legislature responded by replacing the old class action rule with article 9 of the Civil Practice Law and Rules modeled on rule 23 of the Federal Rules of Civil Procedure. The Governor of New York observed that repeal of the anachronistic class action rule represented a "historic advance for the people of New York," and would reverse the 125-year trend of "needlessly restricting meaningful access to state courts for countless people." By allowing common questions of law or fact to be litigated in a single forum, the Governor believed "the bill would result in greater conservation of judicial effort."

There was optimism by those representing welfare litigants. Edelman v. Jordan had been decided in the previous year, and appeared to foreclose effective recourse to the federal courts.
Welfare litigants required a state court procedural mechanism that would enable them to obtain effective group relief. Article 9 appeared to provide the requisite mechanism for converting legal rights into effective class-wide remedies. Indeed, Professor Homberger, principal draftsman of the new rule, stated that article 9 had the potential for stimulating increased state judicial receptivity to both group remedies and public interest litigation.\(^35\)

For welfare recipients, such optimism was short-lived. The New York Court of Appeals has steadfastly adhered to its pre-article 9 view that class designation is inappropriate in welfare cases because governmental operations are involved, and that future litigants will be adequately protected by the principles of stare decisis. That judicially created notion was initially advanced in \textit{Rivera v. Trimarco},\(^36\) a nonwelfare case decided six months before the effective date of article 9.\(^37\) Petitioners in \textit{Rivera} instituted proceedings against judges of the Civil Court of New York City. They claimed they were entitled to a manual stenographic record, rather than a mechanically recorded record, of hearings in the Housing Part of Civil Court.\(^38\) The court of appeals dismissed the appeal. In dicta, the court concluded that the lower court erred in granting class certification:

[I]t was an abuse of discretion on the part of the courts below to grant class relief since in the circumstances here presented, governmental operations being involved, on the granting of any relief to the petitioners comparable relief would adequately flow to others similarly situated under principles of \textit{stare decisis}.\(^39\)

This result was subsequently applied to welfare litigation in \textit{Jones v. Berman},\(^40\) another pre-article 9 decision. Petitioners in \textit{Jones} challenged a state regulation\(^41\) that denied emergency welfare benefits when destitution was caused by the loss, theft or diversion

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\(^{35}\) In a letter to Professor Mauro Cappelletti, Professor Homberger stated: The need for effective group and public remedies in the United States is overwhelming. In view of the gradual attrition of public interest litigation in the federal courts under the harsh command of the Supreme Court, it is gratifying that we may perhaps expect a compensating upsurge in the states. Cappelletti, \textit{Vindicating the Public Interest Through the Courts: A Comparativist's Contribution}, 25 BUfFALo L. REV. 643, 674 (1976).


\(^{37}\) Article 9 became effective on September 1, 1975.

\(^{38}\) Petitioners claims were based on N.Y. CIV. CR. ACT. § 110 (k) (McKinney Supp. 1978-1979).

\(^{39}\) 36 N.Y.2d at 749, 329 N.E.2d at 661, 368 N.Y.S.2d at 827.


\(^{41}\) 18 N.Y. C.R.R. § 372.2 (c) (deleted July 3, 1975).
of a previous public assistance grant. The court of appeals held that class action relief was unnecessary. Relying on Rivera, the court concluded without explanation or elaboration that stare decisis principles would adequately protect unnamed class members affected by the unlawful regulation. The court, however, ignored a significant distinction between Rivera and Jones. The stare decisis doctrine is a calculus for deciding cases and governs the conduct of courts, not the conduct of parties to litigation. In Rivera, the conduct of courts and parties overlapped: respondents were judges of the New York Civil Court who would be bound, under stare decisis principles, to follow the dictates of the court of appeals. If the court of appeals had reached the merits in Rivera and held that state law required respondent civil court judges to provide a stenographic record to petitioner Rivera, then a civil court judge receiving a subsequent request would be bound by the higher court's interpretation of state law. Thus, in Rivera, class certification was arguably unnecessary because the very party who had authority to act on petitioner's request was also governed directly by stare decisis principles.

In Jones, however, no such identity existed. Respondents included the Commissioner of the State Department of Social Services, the Commissioner of the Westchester County Department of Social Services, and his counterpart in Albany County. These respondents are not bound by stare decisis. If, after the Jones decision, another welfare recipient in Albany County requests emergency assistance because of a lost welfare check, the Commissioner there is not required by the decision in Jones to provide

42. 37 N.Y.2d at 48, 332 N.E.2d at 305, 371 N.Y.S.2d at 425.
43. Id. at 57, 332 N.E.2d at 311, 371 N.Y.S.2d at 432.
44. Roscoe Pound explained:

"Rightly understood, stare decisis is a feature of the common law technique of decision. That technique is one of finding the grounds of decision in reported judicial experience, making for stability by requiring adherence to decisions of the same question in the past, and allowing growth and change by freedom of choice among competing analogies of equal authority when new questions arise or old ones take on new forms."

45. A prior decision, of course, is not absolutely binding even under stare decisis principles. 3 R. Pound, supra note 44, at 562. As one court concluded after reviewing numerous authorities: "The controlling principle which emerges from these and other decisions is clear—the doctrine of stare decisis is not a vehicle for perpetuating error, but rather a legal concept which responds to the demands of justice and, thus, permits the orderly growth processes of the law to flourish." Ayala v. Philadelphia Bd. of Pub. Educ., 453 Pa. 584, 606, 305 A.2d 877, 888 (1979).
such assistance. Absent class certification, he could continue to deny emergency grants by arguing that the judgment in Jones applies only to the named petitioners. If of course, the hypothetical recipient might bring a lawsuit identical to that initiated by petitioners in Jones, and the court that hears the case might find Jones controlling under stare decisis principles. Until the court decides the subsequent suit, however, the hypothetical welfare recipient will be denied benefits necessary for subsistence. Moreover, if the recipient is unable to obtain counsel and bring a subsequent lawsuit, she will receive no protection under the stare decisis doctrine.

The conclusion of the court of appeals in Jones, that stare decisis is an adequate substitute for class certification, thus cannot be justified by citation to Rivera. Nor is it merely a reflection of the court’s pre-article 9 reluctance to allow class actions. In welfare cases decided after the effective date of article 9, the court of appeals has continued to rely on Rivera in holding class action relief inappropriate. And, with rare exceptions, the lower courts in New York have followed without question the Rivera and Jones

46. Defendants could voluntarily conform their conduct to the court’s decision, but stare decisis does not require them to do so. That public officials would ignore the outcome of an individual suit is not merely a theoretical possibility. See, e.g., Lewis v. Lavine, [1972-1974 TRANSFER BINDER] FED. L. REP. (CCH) ¶ 16,865 (S.D.N.Y. 1973).

47. Even if the welfare recipient prevails, she may not receive her benefits until long after the trial court rules on the petition. By filing a notice of appeal, or an affidavit of intention to move for permission to appeal, a state or local government official automatically secures a stay of proceedings to enforce the appealed order. N.Y. CIV. PRACT. LAW § 5519 (a) (1) (McKinney 1978). The welfare recipient may move to vacate the stay, N.Y. CIV. PRACT. LAW § 5519 (c) (McKinney 1978). Vacatur, however, is discretionary with the appellate courts. J. WEINSTEIN, H. KORN & A. MILLER, NEW YORK CIVIL PRACTICE ¶ 5519.15 (1977).

48. See notes 96-109 & accompanying text infra.

49. E.g., Schimmel v. Reed, 40 N.Y.2d 887, 357 N.E.2d 1016, 389 N.Y.S.2d 361 (1976), aff’d 50 A.D.2d 1085, 377 N.Y.S.2d 313 (4th Dep’t 1975); Dumbleton v. Reed, 40 N.Y.2d 586, 357 N.E.2d 363, 388 N.Y.S.2d 893 (1976); Martin v. Lavine, 39 N.Y.2d 72, 346 N.E.2d 794, 382 N.Y.S.2d 956 (1976); Barton v. Lavine, 38 N.Y.2d 785, 345 N.E.2d 359, 381 N.Y.S.2d 867 (1975), cert. denied, 425 U.S. 985 (1976). Although each of these was initiated under the old class action rule, article 9 was in effect when the court of appeals reviewed the matter. In Barton, appellants argued that the court must apply the existing law at the time the appeal is heard. Brief for Appellant at 22. The court did not address this argument in holding the class certification inappropriate. 38 N.Y.2d at 787, 345 N.E.2d at 840, 381 N.Y.S.2d at 868.

50. See, e.g., Doe v. Greco, 62 A.D.2d 498, 405 N.Y.S.2d 801 (3d Dep’t 1978); Felder v. Foster, No. 76-1406 (Sup. Ct., Monroe Co. Dec. 1, 1977). In Greco the court clearly discerned the limited protection afforded by stare decisis. It stated “that affording plaintiffs relief while allowing defendants to carry out their threat with respect to all other members of the class would leave those class members with little recourse. The doctrine of stare decisis would be of little use at that point . . . .” 62 A.D.2d at 502, 405 N.Y.S.2d at 803.
rationale, and have denied motions by welfare litigants for class certification under the new article 9 provisions.\textsuperscript{61}

The judicially created exception to the availability of class action relief finds little, if any, basis in the language of New York's class action rule. Article 9 contains no provision authorizing the courts to substitute stare decisis principles for the criteria enunciated in the statute.\textsuperscript{62} Arguably such authority may be implied in section 901(a)(5), which permits the courts to consider whether "a class action is superior to other available methods for the fair and efficient adjudication of the controversy."\textsuperscript{63} The subdivision, however, does not sanction a blanket ban on class certification in all welfare cases. Rather, it requires a case by case determination regarding the desirability of a class action.\textsuperscript{64}


52. Section 901 provides:
   a. One or more members of a class may sue or be sued as representative parties on behalf of all if:
      1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;
      2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members;
      3. the claims or defenses of the representative parties are typical of the claims or defenses of the class;
      4. the representative parties will fairly and adequately protect the interest of the class;
      5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy.
   b. Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action.


54. In the Practice Commentary to § 901, Professor McLaughlin states:
   The fifth factor requires a decision that a class action is superior to other available methods for determining the controversy. If, for example, plaintiff seeks to declare a statute unconstitutional there would generally be no need for class action status since, if one person gets relief, it will inure to the benefit of all.
   ... On the other hand, if damages are sought for a large number of people, the class action device may be the best procedure.

55. McLaughlin, Practice Commentaries, N.Y. Civ. Prac. Law § 901, C901:6 (McKinney 1976). Applying article 9, the courts have not recognized this distinction concerning the number of people seeking relief, and have denied class certification even when damages are sought for a large number of people. See Dumbleton v. Reed, 40 N.Y.2d 586, 357 N.E.2d 565, 388 N.Y.S.2d 895 (1976); Martin v. Lavine, 59 N.Y.2d 72, 446 N.E.2d 794, 382 N.Y.S.2d 956 (1976); Schimmel v. Reed, 50 A.D.2d 1085, 377 N.Y.S.2d 313 (4th Dep't 1975), aff'd, 40 N.Y.2d 887, 357 N.E.2d 1016, 389 N.Y.S.2d 361 (1976). The suggestion by Professor McLaughlin that there would generally be no need for class designation if only declaratory relief were sought ignores the instrumental role of the class action rule, and disregards the intrinsic value of that procedure. See text accompanying notes 63-186 infra.
The legislative history of article 9 does not suggest that welfare officials as defendants should be exempted from the statutory provisions. To the contrary, the sparse history reveals that state officials assumed they would be subject to the new class action rule. The acting commissioner of the State Department of Social Services plainly expected that the class provisions would apply to cases against his department. In a memorandum to the governor's counsel, the acting commissioner commented that "[t]his bill will probably result in increased expenditures of Social Service funds because of the likelihood increased of numbers [sic] of cases brought as class actions. Possible increased costs will also result from the notice requirements and awards of attorneys' fees . . . ." 55 The state attorney general strongly urged approval of the class action bill, recognizing that the "class action has become an important legal device in many areas, particularly consumer protection, civil rights, environmental protection, securities regulation and anti-trust." 56

The courts' refusal to certify class actions in welfare cases is not supported by decisions interpreting rule 23 of the Federal Rules of Civil Procedure. Some federal courts have held that class certification was unnecessary when public officials were sued for injunctive and declaratory relief. 57 Whatever the wisdom of such a policy, 58 it has been limited to lawsuits requesting an injunction or declaratory judgment, and not applied where plaintiffs seek damages. 59 This construction of federal rule 23 has usually been applied only when the public official defendant affirmatively assured the court that the terms of the final judgment would apply

55. New York State Dep't of Social Services, Memorandum Accompanying Comments on Bills Before the Governor (June 13, 1975).
56. L. Lefkowitz, Memorandum for the Governor, Re: Assembly 1252-B, at 3 (June 4, 1975) (emphasis added).
58. Class certification is necessary even when welfare litigants request only declaratory or injunctive relief. In such circumstances, class designation eliminates the serious risk of mootness. Hoehle v. Likins, 538 F.2d 229, 231 (8th Cir. 1976); see text accompanying notes 77-80 infra.
59. See United Farmworkers v. City of Delray Beach, 493 F.2d 799, 812 (5th Cir. 1974); Galvan v. Levine, 490 F.2d 1255, 1261 (2d Cir. 1973), cert. denied, 417 U.S. 936 (1974). Although plaintiffs in Galvan sought monetary restitution, the Second Circuit held that the district court could conclude that equity did not require such relief. 490 F.2d at 1262. The court then ruled that class action designation was unnecessary to resolve plaintiffs' remaining request for an injunction. Id.
to all persons similarly affected by the challenged policy.\textsuperscript{60} By contrast, state courts in New York have refused to certify class actions even in those cases in which monetary relief is sought, or in which public officials fail to give their assurance that all potential class members will be afforded the benefit of the judgment.\textsuperscript{61}

The decision of the court of appeals, that stare decisis is an adequate substitute for class certification, finds no support in the language of article 9, the legislative history of the class action statute, or federal cases construing similar language in federal rule 23. Moreover, the court's notion appears contrary to its previous request to the legislature for enactment of a "more liberal procedure for class actions."\textsuperscript{62} Finally, the court's repudiation of the class action rule disregards both the instrumental and intrinsic values of the procedural device in welfare litigation.

II. The Instrumental Role of Class Certification

Class certification in welfare litigation is not a mere formality, but serves as a catalytic device that allows the "[transformation of] legal rights into effective remedies."\textsuperscript{63} Unlike the stare decisis doctrine, which serves no instrumental role, the class action procedure provides the litigant with remedies in three related ways. First, class certification avoids the pitfalls of the mootness doctrine and ensures that welfare claims can be fully litigated. Second, the class mechanism serves as a legal aid device, providing effective access to the courts for the majority of welfare recipients unable to obtain counsel. Finally, class designation enables final judgments to be enforced without recourse to separate and independent lawsuits. In this manner, the class procedure and the availability of classwide relief deter misconduct by state welfare officials and contribute to the "full realization of substantive policy"\textsuperscript{64} embodied in state and federal welfare statutes.

A. Mootness

The hazards presented by the mootness doctrine are too fa-

\begin{footnotesize}
\textsuperscript{61} See note 54 supra.
\textsuperscript{64} Developments in the Law—Class Actions, supra note 8, at 1359.
\end{footnotesize}
miliar to those engaged in welfare litigation. During the course of a lawsuit, the named plaintiff might obtain employment, marry, relocate or experience some other change in circumstances that renders her ineligible for public assistance, even if she prevails in the case. More frequently, defendants will attempt to moot a case and avoid a decision on the merits by providing relief to the named parties. In a recent case, Aid to Families with Dependent Children (A.F.D.C.) recipients challenged a New York regulation that permits public assistance grants to be terminated or suspended prior to an administrative hearing when the issue is one of law or policy. On the day opposing papers were due on plaintiffs' motion for preliminary relief, the court was informed that by "an obviously expedited process" defendants had made a decision after the administrative hearing and confirmed the reduction of plaintiffs' benefits. Although plaintiffs' request for injunctive relief was mooted, the class action was found to be proper, and a preliminary injunction was issued, restraining application of the disputed regulation. Similarly, in an action challenging the notice provisions sent to welfare recipients terminated for fraud, state officials attempted to moot the case by offering to reinstate and provide retroactive benefits to the named plaintiffs. A federal court viewed "with dismay" such repeated attempts by the state to avoid review of its welfare provisions. So too, a state court observed that despite the "theoretical effect of stare decisis" individual lawsuits do not correct the underlying problems, because the state "can always concede each case is moot when it is ultimately cornered by simply affording the relief."

The risk that welfare claims will be rendered moot is further increased by the fact that the mootness barrier may be erected at

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65. Even in a class action, defendants can render a case moot by amending the challenged statute or regulation to fragment or eliminate the members of the aggrieved class. Kremens v. Bartley, 431 U.S. 119, 130-34 (1977) (challenge by Pennsylvania mental health facility patients of state commitment statute).

66. 18 N.Y.C.R.R. § 358.8 (c) (1) (1975).


68. Id. at 1307.

69. Id.

70. Id. at 1313.

71. Lugo v. Dumpson, 390 F. Supp. 379 (S.D.N.Y. 1975). Class certification was found to be appropriate notwithstanding the actions of state welfare officials. Id. at 381-82.


various stages in the litigation. The plaintiff's claims may become moot prior to commencement of the lawsuit, during the pendency of the litigation in the trial court, or even while the matter is before an appellate court. A "properly certified class" substantially reduces the likelihood that public officials will successfully invoke the mootness doctrine to avoid review of their welfare policies. Upon certification, the unnamed class members acquire a legal status separate and distinct from that asserted by the named plaintiff. A continuing controversy between class members and defendants ensures an adversarial dispute and permits the trial and appellate courts to reach the merits of the underlying claim.

These principles are derived in part from the case or controversy requirement imposed on federal courts by article III of the United States Constitution. That requirement, of course, does not serve as a restraint on the state court's power to decide cases. New York courts, like other state courts, have determined that a matter will not be considered moot "when the underlying questions are of general interest, substantial public importance and likely to

77. Kremens v. Bartley, 431 U.S. 119, 133 (1977). "[I]t is only a 'properly certified' class that may succeed to the adversary position of a named representative whose claim becomes moot." Id. at 132-33.
78. See Greklek v. Toia, 565 F.2d 1259 (2d Cir. 1977), cert. denied sub nom. Blum v. Toomey, 98 S. Ct. 3081 (1978). In Greklek, the Second Circuit concluded that the district court properly granted plaintiffs' class action motion "since only class certification could avert the substantial possibility of the litigation becoming moot prior to decision." 565 F.2d at 1261. As the court observed, "[t]hat very development [mootness], we are told, prevented an earlier adjudication of the issues involved here from averting the necessity for this action." Id. (footnote omitted).
81. The mootness doctrine is also derived from the "policy rules often invoked by the Court 'to avoid passing prematurely on constitutional questions.'" Franks v. Bowman Transp. Co., 424 U.S. 747, 756 n.8 (1976) (quoting Flast v. Cohen, 392 U.S. 83, 97 (1968)).
arise with frequency . . . ." 85 The New York Court of Appeals has stated that when questions are important and likely to recur they are "properly entertainable by this court, irrespective of any allegation of mootness." 86 Accordingly, class certification may be unnecessary, since in appropriate circumstances the state court will review claims notwithstanding the absence of a continuing controversy between the original parties to the proceeding.

The proposed "important question" exception to mootness must be rejected for two reasons. The public interest doctrine described in Jones is the exception rather than the rule. More important, reliance on the exception to the requirement of a continuing controversy between the parties may preclude state court welfare litigants from seeking Supreme Court review, which is dependent on the continued existence of an article III case or controversy. 87 This consideration is especially important to plaintiffs in welfare cases, who frequently allege that a state statute or regulation violates the Federal Constitution or is inconsistent with the Federal Social Security Act. Having been forced by Edelman to bring those claims in state court, the welfare litigant's only opportunity for federal court consideration of her constitutional or federal statutory claims lies with an appeal to the United States Supreme Court. Absent class certification, that opportunity is foreclosed if the representative party's individual claims are moot at the time review is sought.

The Supreme Court's decision in DeFunis v. Odegaard 88 illustrates the risk confronting state court litigants who fail to obtain class certification in cases raising federal claims. DeFunis commenced an individual action in a state court alleging that the University of Washington Law School's admission policies discriminated against him in violation of the fourteenth amendment. At the time of oral argument in the Washington Supreme Court, DeFunis was in fact attending the law school. 89 Nevertheless, that court did not consider the case moot "[d]ue to the conditions under which plaintiff was admitted and the great public interest in

466 (Fla. 1957); Lawyer's Ass'n v. City of St. Louis, 294 S.W.2d 676, 680 (Mo. 1956); Bush v. Levine, 63 N.J. 551, 564, 507 A.2d 571, 573 (1973); DeFunis v. Odegaard, 82 Wash. 2d 11, 23 n.6, 507 P.2d 1169, 1177 n.6 (1973), vacated as moot, 416 U.S. 312 (1974).
89. 82 Wash. 2d 11, 23 n.6, 507 P.2d 1169, 1177 n.6 (1973).
the continuing issues raised by this appeal . . . .” 90 The United States Supreme Court recognized that as a matter of state law the case was saved from mootness because of the public interest in the issue.91 It held, however, that even when cases are commenced in state court, mootness under article III is a federal question, which a federal court must resolve.92 Because DeFunis was attending the law school at the time the case reached the Supreme Court, his individual claims were found moot.93 Moreover, since the case was not certified as a class action, and did not fall within two narrow exceptions,94 there was no case or controversy that the Court could review.

A similar fate awaits the state court litigant who is denied class certification in a case challenging a state welfare policy as unconstitutional or inconsistent with federal law. If circumstances of the representative party change, or if the defendants afford the named plaintiff full benefits, the state court might nevertheless entertain the case because of its public importance. The Supreme Court would lack power under article III to review the matter; however, the welfare recipient, compelled to initiate her case in

90. Id.
91. 416 U.S. at 316.
92. Id.
93. Id. at 317.
94. “There is a line of decisions . . . [by this Court] standing for the proposition that the 'voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot.'” Id. at 318 (quoting United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953)). This proposition is premised on the fear that a defendant might change his policy, but then “return to his old ways” upon dismissal of the case. United States v. W.T. Grant Co., 345 U.S. at 632. The doctrine applies only if the mootness question is based on the defendant's unilateral change with relation to the challenged policy. DeFunis v. Odegaard, 416 U.S. at 318. If instead, as in DeFunis, the question on mootness arises from a change in the named plaintiff's circumstances, or because the defendant has agreed to provide benefits to the named party (although not changing the underlying policy), the W.T. Grant exception does not save the suit from the mootness bar. Id.

In DeFunis, the Court also noted that an otherwise moot case may be adjudicated if it presents a question that is “'capable of repetition, yet evading review.'” Id. at 318-19 (quoting Southern Pac. Ter. Co. v. I.C.C., 219 U.S. 498, 515 (1911)). That exception applies only to questions “which, by their very nature, are not likely to survive the course of a normal litigation.” Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 8 (1978) (emphasis added). As the Court explained in Weinstein v. Bradford, 423 U.S. 147 (1975) (per curiam):

[In the absence of a class action, the “capable of repetition, yet evading review” doctrine was limited to the situation where two elements combined: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again.]

Id. at 149. Accordingly, these exceptions are unavailing to the welfare litigant who is provided the requested benefits, or who is no longer eligible for public assistance because of a change in personal circumstances.
state court, would be denied any opportunity for federal court consideration of her federal claims.

The class action rule thus plays an instrumental role in welfare litigation not otherwise performed by the stare decisis doctrine. Class certification removes the mootness barrier to adjudication of issues at both the trial and appellate levels and prevents premature termination of the litigation. In so doing, the procedural device permits claims to be fully litigated and thereby assists in the definition and effectuation of the values served by the substantive public assistance provisions.

B. Access to Courts

Opponents of class certification in welfare cases might argue that the role of the class action rule in preventing mootness has been overemphasized. They would maintain that if the named plaintiff is reinstated by welfare officials and provided retroactive benefits, she has little, if any, interest in prosecuting the lawsuit. Moreover, other recipients are available to challenge the purportedly unlawful policy. If no other individuals are aggrieved, class certification would have been denied in the first instance for failure to satisfy the numerosity requirement. Thus, the argument would continue, substantive welfare policy can be vindicated by a subsequent lawsuit without class certification in the initial action.

This line of reasoning is superficial at best. It ignores the possibility that, to prevent a decision on the merits, public officials might attempt to moot subsequent cases by providing relief to the representative party. The argument also erroneously assumes that other welfare recipients can readily gain access to the courts. To the contrary, the inability of such individuals to obtain legal representation and initiate individual lawsuits is one reason why class certification is essential in welfare litigation. Notwithstanding the efforts of the National Legal Services Corporation and its predecessor, the Legal Services Program, most of the poor have either

95. To fulfill the numerosity requirement, the class must be "so numerous that joinder of all members whether otherwise required or permitted is impracticable." N.Y. CIV. PRAC. LAW § 901 (a) (l) (McKinney 1976).
98. For purposes of this section, the poor include those persons who would satisfy the financial eligibility requirements promulgated by the National Legal Services Corporation. For all states (except Alaska and Hawaii) the maximum income levels are as follows:
no access, or grossly inadequate access, to legal representation. The statistics are disquieting. Dean Roger Cramton, Chairman of the Board of Directors of the National Legal Services Corporation, reported in 1976 that 12 million people—forty percent of the poor—live in areas that are not covered by legal services programs.99 Of the remaining 17 million poor people, nearly 6 million reside in areas that have less than one legal services attorney for every 10,000 poor persons.100 Ten million of the poor live in areas where there is only the equivalent of one or two legal services attorneys for every 10,000 poor individuals.101 Increases in congressional appropriations for the National Legal Services Corporation have led to expansion in the number of indigent persons served by legal services programs.102 Recent statistics, however, reveal that the national average of one legal services lawyer for every 8,787 poor people remains well below the estimated number of attorneys serving the general population.103

In New York, as elsewhere, the poor are denied meaningful access to legal representation. Because legal services programs are lacking in nineteen of the state's sixty-two counties,104 the poor residing in these counties are effectively barred from obtaining access to the courts. Even in those counties covered by legal services programs, the number of lawyers falls far short of that required to adequately serve the indigent population.105

<table>
<thead>
<tr>
<th>Size of Family Unit</th>
<th>Dollar Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>3713</td>
</tr>
<tr>
<td>2</td>
<td>4913</td>
</tr>
<tr>
<td>3</td>
<td>6113</td>
</tr>
<tr>
<td>4</td>
<td>7313</td>
</tr>
<tr>
<td>5</td>
<td>8513</td>
</tr>
<tr>
<td>6</td>
<td>9713</td>
</tr>
</tbody>
</table>

For family units with more than six members, $960 is added for each additional member. 42 Fed. Reg. 24,271 (1977) (to be codified in 45 C.F.R. § 1611).

100. Id. at 673.
101. Id.
103. There are 14 attorneys for every 10,000 persons in the general population. Id. at 895 n.47.
104. Letter and attached material from Stephen S. Walters, Deputy General Counsel, Legal Services Corporation to author (May 23, 1978). Data provided reveal that the following counties are not being served by federally funded legal services offices: Genesee, Fulton, Wyoming, Saratoga, Livingston, Warren, Ontario, Washington, Wayne, Montgomery, Yates, Seneca, Tompkins, Tioga, Oswego, Jefferson, Otsego, Delaware, and Schoharie. The following counties are partially served: Erie, Cortland, Madison, and Chenango.
105. Id. Data indicate that 155,714 poor people reside in areas that are not presently served by the National Legal Services Corporation. Some of these individuals may have access to locally funded legal aid offices; however, these offices rarely undertake classwide law reform litigation on behalf of welfare recipients. See generally J. Handler, E. Hollingsworth & H. Erlanger, Lawyers and the Pursuit of Legal Rights 19 (1978); E. Johnson, supra note 4, at 3–9.
106. Letter, supra note 104. The following chart provided by the National Legal Services Corporation reveals the number of federally funded attorneys in each of the counties served by the corporation.

**New York State Legal Services Program**

**Service Areas and Number of Attorneys**

**Fiscal Year 1977**

<table>
<thead>
<tr>
<th>Program &amp; Name</th>
<th>No. of Attorneys per 10,000 Poor</th>
<th>No. of Attorneys</th>
<th>Service Poverty Population</th>
<th>Service Poverty Population Increase</th>
<th>Service Areas (counties)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legal Aid Society of Albany, Inc. Albany, N.Y.</td>
<td>3.30</td>
<td>17</td>
<td>51,427</td>
<td>—</td>
<td>Schenectady, Albany &amp; Rensselaer</td>
</tr>
<tr>
<td>Orleans Legal Aid Bureau, Inc. Albion, N.Y.</td>
<td>8.84</td>
<td>3</td>
<td>3,393</td>
<td>—</td>
<td>Orleans</td>
</tr>
<tr>
<td>Broome Legal Assistance Corp. Binghamton, N.Y.</td>
<td>2.12</td>
<td>4</td>
<td>18,809</td>
<td>4,218</td>
<td>Broome &amp; Chenango (partial)</td>
</tr>
<tr>
<td>Neighborhood L.S., Inc. Buffalo, N.Y.</td>
<td>1.89</td>
<td>13</td>
<td>68,507</td>
<td>—</td>
<td>Erie (partial)</td>
</tr>
<tr>
<td>Chautauqua County L.S., Inc. Dunkirk, N.Y.</td>
<td>2.35</td>
<td>4</td>
<td>16,960</td>
<td>—</td>
<td>Chautauqua</td>
</tr>
<tr>
<td>Chemung County Neighborhood L.S., Inc. Elmira, N.Y.</td>
<td>5.27</td>
<td>6</td>
<td>11,369</td>
<td>1,818</td>
<td>Chemung &amp; Schuyler</td>
</tr>
<tr>
<td>Nassau County Law Services Committee Hempstead, N.Y.</td>
<td>1.66</td>
<td>21</td>
<td>125,821</td>
<td>—</td>
<td>Nassau &amp; Suffolk</td>
</tr>
<tr>
<td>Legal Aid Society of Rockland County, Inc. New City, N.Y.</td>
<td>4.20</td>
<td>5</td>
<td>11,891</td>
<td>—</td>
<td>Rockland</td>
</tr>
<tr>
<td>Community Action for Legal Services New York, N.Y.</td>
<td>1.43</td>
<td>167</td>
<td>1,164,673</td>
<td>—</td>
<td>Kings, Queens, Richmond, New York &amp; Bronx</td>
</tr>
<tr>
<td>Niagara County Legal Aid Society, Inc. Niagara Falls, N.Y.</td>
<td>1.55</td>
<td>3</td>
<td>19,348</td>
<td>—</td>
<td>Niagara</td>
</tr>
<tr>
<td>Mid-Hudson L.S., Inc. Poughkeepsie, N.Y.</td>
<td>2.72</td>
<td>19</td>
<td>69,641</td>
<td>—</td>
<td>Green, Columbia, Sullivan, Ulster, Duchess, Orange &amp; Putnam</td>
</tr>
<tr>
<td>Monroe County Legal Assistance Corp. Rochester, N.Y.</td>
<td>.90</td>
<td>7</td>
<td>77,009</td>
<td>—</td>
<td>Monroe, Cattaraugus, Allegany &amp; Steuben</td>
</tr>
<tr>
<td>Onondaga Neighborhood L.S. Syracuse, N.Y.</td>
<td>3.13</td>
<td>13</td>
<td>41,404</td>
<td>11,621</td>
<td>Onondaga, Cayuga &amp; Cortland (partial)</td>
</tr>
<tr>
<td>Legal Aid Society of Oneida County, Inc. Utica, N.Y.</td>
<td>2.37</td>
<td>6</td>
<td>25,291</td>
<td>14,029</td>
<td>Oneida, Lewis, Herkimer &amp; Madison (partial counties)</td>
</tr>
<tr>
<td>Westchester L.S., Inc. White Plains, N.Y.</td>
<td>2.76</td>
<td>15</td>
<td>54,274</td>
<td>—</td>
<td>Westchester</td>
</tr>
<tr>
<td>North Country L.S., Inc. Wilmington, N.Y.</td>
<td>—</td>
<td>—</td>
<td>—</td>
<td>38,331</td>
<td>St. Lawrence, Franklin, Clinton, Essex &amp; Hamilton</td>
</tr>
</tbody>
</table>

Total 1.72 305 1,759,817 69,657
The human consequences must not be obscured by these statistics. As Dean Cramton has observed:

It is easy to lose sight of the poor themselves and their legal problems in the welter of statistics about the poor and their need for legal services. While the statistics are compelling, behind the numbers are real people . . . . They are clients who might never dream of entering the office of a private attorney since they have no money to do so.107

Dean Cramton’s observations are particularly applicable to welfare recipients who, by definition, are living at, or below, a subsistence level. The monthly budget of the recipient includes no money for a private attorney; consequently, she must rely completely on free legal representation. Without access to such representation, her statutory and constitutional rights become unenforceable and, in many respects, meaningless.108 The bounds of welfare recipient rights are no longer defined by statute or constitution, but become solely dependent on the interpretation adopted by the welfare agency. Administrative determinations become final and unreviewable for those recipients denied access to the courts.109

The class action rule is a salutary procedural tool for providing legal assistance to the poor and ensuring protection of substantive rights.110 A welfare recipient who is unable to obtain representation because she fortuitously resides in an area without a legal services office, or without an adequate number of legal

107. Cramton, supra note 99, at 672.

108. The conditions, under which our customary system requires litigation to be conducted, impair rights guaranteed by substantive law because law is not self-enforcing; only through application in the courts does the law have life and force. The most fundamental rights remain idle abstractions unless the courts are able to give them efficacy through enforcement.


109. An administrative “fair hearing” procedure may be invoked by the recipient to request the state agency to review a decision by local social services officials. N.Y. Soc. Serv. Law § 131 (9) (McKinney 1976); 18 N.Y. C.R.R. § 358. That procedure is most effective when the individual is challenging the particular application of a valid policy. It is less effective when the recipient is contending that a statewide statute or regulation is unconstitutional or inconsistent with federal law. See Cordova v. Reed, 521 F.2d 621 (2d Cir. 1975). Moreover, without legal representation, the recipient is effectively barred from obtaining judicial review if the state agency’s fair hearing decision confirms the construction of the challenged policy by the local welfare official.

services attorneys, nevertheless will have her interests protected as a member of a certified class in a class action suit. The final judgment will embrace all persons the court found to be members of the class.

The class action rule also removes the necessity for duplicative lawsuits by those who secure representation, since in one suit the court may resolve the claims of all individuals similarly affected by the challenged policy. Plainly, this prevents a needless drain on judicial resources as well as the limited resources of the legal services offices and the welfare agency. Regulations recently promulgated by the National Legal Services Corporation acknowledge this role of class actions, and credit a properly administered class action rule with the economical and effective delivery of legal assistance.

In contrast, the stare decisis doctrine neither acts as a legal-aid device nor assists in conserving the resources of the court or parties. Since that doctrine governs the conduct of courts, it may not be invoked until a recipient has filed a subsequent lawsuit. Only then may the litigant assert that a prior decision is controlling. Reliance on the stare decisis principles encourages successive litigation, and protects only those able to gain access to a judicial forum. In this regard, stare decisis is the antithesis of, rather than a substitute for, the class action procedure.

A recent case clearly illustrates the advantages of the class action rule, as well as the inadequacies of the stare decisis doctrine, as a legal aid mechanism. In 1977, the New York Legislature

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111. The class action procedure also protects the interests of those recipients who are reluctant to challenge a policy and thereby upset the relationship between them and the agency. See Handler, Controlling Official Behavior in Welfare Administration, 54 Calif. L. Rev. 479, 494 (1966) ("In short, in calculating whether to fight the [agency's] decision... the [welfare] mother has to weigh the costs to her on-going relationship with the local agency... ").

Professor Handler suggests that the behavior of welfare officials is better controlled by strengthening the administrative process rather than by emphasizing the adversary system. Id. at 510. He concedes, however, that in some circumstances recourse to the courts will be necessary. Id. at 496. One might quarrel with Professor Handler about the degree of reliance he places on the administrative system, and the specific circumstances when judicial review will be essential. See Reich, Individual Rights and Social Welfare: The Emerging Legal Issues, 74 Yale L.J. 1245, 1252 (1965). Once the welfare litigant determines that judicial review is required, she should be afforded the same class action opportunities available to litigants seeking to enforce traditional property interests.


amended the Social Services Law to limit the amount of increases in the monthly shelter allowance available to any recipient who received a grant in a prior three month period. Welfare recipients immediately filed a lawsuit, alleging that the amendment denied them shelter grants sufficient to meet their housing needs. The parties claimed that the amended statute violated the federal Social Security Act as well as the New York and United States Constitutions. Upon cross motions for summary judgment, the trial court concluded that the challenged legislation contravened the New York State Constitution. The court ordered each named plaintiff and intervenor to be paid the sum each was denied because of the operation of the unconstitutional statute. Relying on Jones v. Berman, however, the court denied plaintiffs' class action motion, stating that "a class action would be inappropriate and not superior to other available methods." The court's reference to Jones indicates that it was alluding to the stare decisis doctrine. Consequently, only the named parties received retroactive benefits despite the unconstitutional statewide application of the statute. Other welfare recipients must file identical lawsuits to recover the wrongfully withheld benefits. This will lead to a proliferation of lawsuits, an increase in the courts' workload, and additional expenditure of funds by all parties. Less fortunate recipients who are unable to obtain representation and commence independent actions are prevented from recovering their public assistance.

In these circumstances it is disingenuous to suggest that class certification is unnecessary and that stare decisis will protect non-party welfare recipients. Class action designation in cases like

116. The court held the legislation unconstitutional under art. 3, § 1 of the New York Constitution "in that it constitutes an impermissible delegation of [legislative power]." Id. at 150, 400 N.Y.S.2d at 33.
117. Id., 400 N.Y.S.2d at 32.
120. At least one such lawsuit was filed subsequent to the Sherwood decision. Judson v. Blum, No. 78–4759 (Sup. Ct., Monroe Co., filed April 27, 1978).
121. It might be argued that the fair hearing procedure will protect those recipients unable to initiate judicial proceedings. See note 109 supra; Barton v. Lavine, 54 A.D.2d 350, 354, 389 N.Y.S.2d 416, 418 (3d Dep't 1975). The administrative hearing, however, is conducted by the State Department of Social Services and provides no protection if the state agency insists on continued application of the challenged policy. Judicial review is necessary in those instances to compel the state to uniformly alter application of its policy.
Sherwood would avoid a multiplicity of lawsuits, and the concomitant drain on resources. At the same time, it would effectively guarantee that impoverished individuals who are foreclosed from initiating a proceeding would have an opportunity to be heard.

C. Enforcement

The class action procedure is superior to the doctrine of stare decisis as a catalyst permitting judgments to be enforced economically and effectively. Perhaps underlying the New York courts' reliance on stare decisis is the belief that welfare officials will obey court orders and that declaratory or injunctive relief will shield the rights of the members of a proposed class. The courts apparently assume that if officials are enjoined from applying a policy to one individual, they will voluntarily cease application of that policy to others similarly situated, and enforcement proceedings will be unnecessary. Examination of the actual conduct of welfare officials in New York belies any such assumption.

Plaintiffs in Doe v. Lavine challenged a New York statute requiring female welfare recipients to identify the putative father of their children, and establish paternity as a condition of eligibility for welfare benefits. The court held that "binding precedent compelled the conclusion" that the state law was contrary to the

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122. Sherwood is only one of many illustrations of the inability of the stare decisis doctrine to perform a legal-aid function and assist in conserving judicial resources. Perhaps the most dramatic example is provided by litigation challenging a previous New York method for calculating rental allowances for families containing both S.S.I. and A.F.D.C. recipients. Because New York courts refused to certify welfare suits as class actions, and because welfare officials failed to treat lawsuits by individual recipients as binding in subsequent cases challenging the same state practice, welfare litigants were forced to commence at least nine separate actions attacking the state's policy. See Schimmel v. Reed, 40 N.Y.2d 887, 357 N.E.2d 1016, 389 N.Y.S.2d 361 (1976), aff'd 50 A.D.2d 1085, 377 N.Y.S.2d 313 (1975); Barton v. Lavine, 54 A.D.2d 350, 389 N.Y.S.2d 416 (3d Dep't 1976); Bus v. Berger, No. 75-11928 (Sup. Ct., Queens Co. Mar. 24, 1976); Peterson v. Berger, 84 Misc. 2d 517, 377 N.Y.S.2d 887 (Sup. Ct. 1975); Robinson v. Reed, No. 75-8479 (Sup. Ct., Monroe Co. Dec. 15, 1975); Tanner v. Lavine, No. 75-10876 (Sup. Ct., Broome Co. July 22, 1975); Cummins v. Lascaris, No. 75-3159 (Sup. Ct., Onondaga Co. June 30, 1975); Burton v. Lavine, No. 74-9546 (Sup. Ct., Albany Co. Oct. 18, 1974); Wimbush v. Lavine, No. 74-9547 (Sup. Ct., Albany Co. Sept. 23, 1974). In each case, the court held that the New York method for calculating shelter allowances conflicted with the federal statute, 42 U.S.C. § 602(a)(24) (1973). Only the named petitioners, however, recovered the wrongfully withheld welfare benefits.

123. Morgan v. Sieloff, 546 F.2d 218, 222 (7th Cir. 1976).

124. "W]here governmental practices have been challenged, class action certification is inappropriate since a presumption exists that a determination will be adhered to as binding upon the state in similar cases...." Community Serv. Soc'y v. Welfare Insp. Gen., 91 Misc. 2d 383, 389, 398 N.Y.S.2d 92, 97 (1977).

Social Security Act; however, the court denied class relief on the ground that a declaratory judgment “should be sufficient to induce obedience.” This assumption “turned out to be an illusion.” The state continued to deny benefits to those individuals who refused to comply with the unlawful statute, and as a result, a second lawsuit was initiated challenging the identical provision. In the subsequent suit, the court recognized that state welfare officials had not reconciled their conduct with the judgment in *Doe*:

The welfare department decided after *Doe v. Lavine* to continue to enforce its policies throughout the state against everybody except *Doe* complainants, and so provided, through an administrative letter . . . pertaining to the court's prior decision and preliminary injunction and restricting the operation of the preliminary injunction only of the named complainants in the action.129

The court did not understand how the state could “in good conscience . . . deny equal treatment to its citizens equally situated,” and held that class certification was necessary.130

Unfortunately, these cases are not isolated incidents of recalcitrance by welfare officials. One commentator has observed that “[p]overty lawyers have experienced great difficulties in getting welfare officials to comply with current decisional law and even injunctive provisions.” While the problem has been “particularly acute” in New York, it has not been limited to that jurisdiction.131

Disregard of court orders and decisional law by public officials may be due to administrative obstacles or outright intransi-

126. Id. at 361.
127. Id. at 362. The court did not explain how declaratory relief would assist those entitled to benefits but unable to initiate proceedings on their own behalf.
129. Id.
130. Id.
133. See id.
gence.\textsuperscript{135} In either event, enforcement proceedings may be required to obtain compliance with a previous judgment. If, as in \textit{Doe v. Lavine},\textsuperscript{136} a court declares a statewide statute invalid but denies class certification, providing relief only to the named plaintiffs, and if, despite the declaration, welfare officials continue to enforce the invalid statute against all recipients other than the representative parties, additional proceedings will be required to obtain compliance. Having received their benefits, the named plaintiffs may have little incentive to undertake enforcement action. Even assuming the requisite incentive, they may be prevented from prosecuting a contempt proceeding by the mootness doctrine.\textsuperscript{137} Other individuals similarly affected by the unlawful statute will be forced to seek post-judgment intervention \textsuperscript{138} or commence independent lawsuits. Once again, reliance on stare decisis leads to a proliferation of cases and expenditure of scarce resources. Reliance on stare decisis also effectively precludes relief for those individuals unable to obtain counsel for the intervention application or independent suit.

The class action procedure provides a more satisfactory response to the enforcement problems.\textsuperscript{139} The representative party and her attorney have an obligation to protect the interests of the unnamed class members, and enforcement proceedings can be initiated without the necessity of intervening new parties or instituting additional lawsuits.\textsuperscript{140} The threat or reasonable likelihood of a class action proceeding may itself be sufficient to induce compliance with the court's order. The interest of judicial economy would be served and, equally important, the underlying substantive values would be preserved.

D. \textit{The Relationship Between Class Action Procedure and Substantive Law}

The functions served by the class action rule are not only laudable in themselves, but also serve as a means to a more urgent


\textsuperscript{137} \textit{See} Lasky v. Quinlan, 558 F. 2d 1128 (2d Cir. 1977).


\textsuperscript{139} 5 H. Newberg, \textit{Class Actions} 498 (1977).

\textsuperscript{140} N.Y. Civ. Prac. Law \textsection{} 901 (a) (4) (McKinney 1976).
goal—the realization of underlying welfare policies. Procedural devices contribute to the development of substantive law, \textsuperscript{141} and the class action procedure is plainly no exception.\textsuperscript{142} By removing mootness barriers, by serving as a legal aid device, and by allowing economical enforcement of judgments, the class procedure deters unlawful conduct by welfare officials and assists in the development of substantive welfare law. Unfortunately, in rejecting the class procedure, New York courts have ignored the symbiotic relationship between the procedural rule and substantive law.

In examining this relationship it may be useful to designate the class of persons affected by a policy in mathematical terms as the following set: \((A^1, A^2, A^3, \ldots, A^n)\).\textsuperscript{143} The focus of a lawsuit challenging the policy is not on any individual member of the set, as in the traditional litigation model.\textsuperscript{144} Instead, the subject matter of the action concerns "whether or how a government policy or program shall be carried out." \textsuperscript{145} It matters little whether \(A^1, A^2\), or any other member of the class commences the lawsuit. So, too, litigants \(A^1\) and \(A^2\) are no more entitled to relief than \(A^3, A^4, \ldots, A^n\). Each is affected in similar fashion by the contested provisions.

Viewed in this way, the relationship between the application of the class action rule and substantive welfare policy is apparent. The underlying welfare policy is more likely to be enforced by welfare officials as the cost of noncompliance increases.\textsuperscript{146} For officials who elect to deny welfare benefits to \(A^1, A^2, A^3, \ldots, A^n\), the cost of noncompliance is relatively small if class certification is denied and court-ordered relief applies only to \(A^1, A^2, A^3\), the few members of the proposed class able to initiate a lawsuit. Absent the threat of classwide relief, welfare officials will have a financial incentive to ignore or redefine the legislative mandate expressed in state or federal statutes. This results in an alteration of legisla-


\textsuperscript{142} \textit{See Developments in the Law—Class Actions}, \textit{supra} note 8, at 1359, 1371.

\textsuperscript{143} Professor Hazard uses this mathematical set to represent an indefinitely large number of similarly aggrieved individuals. Hazard, \textit{supra} note 141, at 310–11.

\textsuperscript{144} \textit{See Chayes, The Role of the Judge in Public Law Litigation}, 89 \textit{Harv. L. Rev.} 1281 (1976); Hazard, \textit{supra} note 141, at 310.

\textsuperscript{145} Chayes, \textit{supra} note 144, at 1295.

\textsuperscript{146} The cost of noncompliance includes not only the amount of the retroactive benefits wrongfully withheld, but also the attorney's fees that may be awarded in class actions under article 9; N.Y. CIV. PRAC. LAW § 909 (McKinney 1976).
tive policy and the legislative role is shifted from legislators to administrators.\textsuperscript{147}

Recent litigation challenging New York's method for calculating A.F.D.C. benefits highlights the extent to which denial of class certification breeds administrative disincentives to comply with substantive law. In the Social Security Amendments of 1972,\textsuperscript{148} Congress added a section providing that an individual receiving benefits under the S.S.I. program\textsuperscript{149} should not be regarded as a member of a family when determining the family's grant under the separate A.F.D.C. program.\textsuperscript{150} The amendment was designed to prevent reliance on "cooperative budgeting" techniques that result in lower total welfare grants to a family unit. Congress provided that the amendment "shall be effective on and after January 1, 1973."\textsuperscript{151} Despite this explicit congressional directive, welfare officials in New York continued to enforce their cooperative budgeting regulation well after January 1, 1973.\textsuperscript{152} As late as August of that year, families were being denied the increased grants that would result from calculations based on the new Social Security Amendments. Plaintiffs in Barton v. Lavine\textsuperscript{153} challenged New York's regulation as inconsistent with federal law and invalid under the supremacy clause. Defending the agency's action, the Commissioner of the State Department of Social Services apparently argued that when Congress said "January 1, 1973" it really meant a later date.\textsuperscript{154} The court of appeals found the agency position untenable:

The amendment to the Social Security Act in issue here . . . is plainly effective as of January 1, 1973. It would have been appropriate to resort to legislative history for clarification were the effec-

\textsuperscript{147} It has been argued that because of an increased cost of noncompliance, the effect of class certification may be to overdeter public officials, and force them to settle even a frivolous lawsuit. Developments in the Law-Class Actions, supra note 8, at 1361. Such a fear is unrealistic in welfare litigation. The danger that class certification will lead to overdeterrence is most prevalent in cases involving complex factual issues and substantial litigation expenses. Id. at 1364--65. The focus of this article is on welfare cases in which the issues concern questions of law, and the cost of litigation is relatively minimal. In such circumstances, there is little likelihood that class certification will result in over-deterrence and premature settlement of frivolous claims.


\textsuperscript{149} 42 U.S.C. §§ 1381-1383c (1976); see note 7 supra.

\textsuperscript{150} 42 U.S.C. § 602 (a) (24) (1976).


\textsuperscript{152} 18 N.Y. C.R.R. § 352.2[e] (1) (1974).


\textsuperscript{154} Id. at 787, 345 N.E.2d at 339-40, 381 N.Y.S.2d at 868.
tive date ambiguous upon the face of the statute. "January 1, 1973" could scarcely be more unambiguous. We decline the invitation to sit as a committee on revision.\textsuperscript{155}

The court of appeals affirmed the denial of petitioners' class action motion, however, stating that "[w]e do not find a class action appropriate in these circumstances."\textsuperscript{156} Thus, Ms. Barton and some of the other litigants who initiated lawsuits obtained relief,\textsuperscript{157} while thousands of other individuals in New York were denied welfare benefits mandated by Congress.\textsuperscript{158} Although the welfare officials were unsuccessful in the lawsuit, they effectively prevailed in altering the intended scope of the congressional policy. Moreover, by denying class certification, the court joined the administrators in sitting as a "committee on revision" and amended the social security provision to provide increased benefits only for those A.F.D.C. families who challenged the state's unlawful regulation.

Failure to afford class action status in cases like Barton encourages official disregard of substantive law, and places a judicial imprimatur on the administrative usurpation of legislative power.\textsuperscript{159} With relative immunity, welfare officials can avoid or adopt contrived interpretations of substantive law, and thereby redefine the boundaries of the legislature's mandate. As the California Supreme Court recently stated, conduct of an administrative agency in such circumstances is "reminiscent of a journey into the fictional

\textsuperscript{155} Id.

\textsuperscript{156} Id. The decision was rendered after the effective date of article 9, but the court did not mention the relevancy of the new provision. See note 49 \textsuperscript{supra}.

\textsuperscript{157} See, e.g., Brown v. Lavine, No. 76-1855 (Sup. Ct., Monroe Co. 1976). But see Fingland v. Lavine, 88 Misc. 2d 1085, 390 N.Y.S.2d 353 (Sup. Ct.), aff'd, 54 A.D.2d 1096, 389 N.Y.S.2d 560 (4th Dep't 1976). Petitioners in Fingland were denied relief because their fair hearing request was made 63 days after the state was required to cease application of its cooperative budgeting regulation. State law provides that the hearing request "must be made within sixty days after the date of the action or failure to act complained of." N.Y. Soc. SFRv. LAW § 135-a (McKinney 1976). The court rejected petitioners' argument that the local commissioner's "failure to act" was his failure to make corrective retroactive payments. 88 Misc. 2d at 1086, 390 N.Y.S.2d at 354. The court also found unpersuasive the contention that Barton tolled the statute of limitations for members of the proposed class "upon the commencement of the proceeding." \textit{Id. Contra}, American Pipe & Constr. Co. v. Utah, 414 U.S. 533 (1974). "[T]he commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class. . . ." \textit{Id.} at 554.

\textsuperscript{158} Id. Ms. Barton contended in the court of appeals that approximately 11\% of the A.F.D.C. families in New York were underpaid as a result of New York's adherence to its unlawful regulation. Brief of Appellant Barton at 10. The state conceded that the underpayment to A.F.D.C. families was approximately $9.7 million. Brief of Respondent-Appellant Lavine at 47-48.

\textsuperscript{159} Similarly, denial of class certification encourages state legislators to disregard applicable federal law and thus allows the state to usurp Congress' power to establish the bounds of the federal welfare programs. See note 9 \textsuperscript{supra}.
realms visited by Alice through the looking glass.” \(^{160}\) That court observed:

In the fanciful world of Lewis Carroll, the inhabitants could turn fact into fiction and fiction into fact by mere ipse dixit. As Humpty Dumpty scornfully informed Alice, “When I use a word it means just what I choose it to mean—neither more nor less.”

“The question is,” said Alice, “whether you can make words mean so many different things.”

“The question is,” said Humpty Dumpty, “which is to be master—that’s all.”

Like Humpty Dumpty, the department confronts us with the question “which is to be master”—the department or the Legislature? The department’s position is as precarious and untenable as Humpty’s seat on the wall.\(^{161}\)

The tragedy of decisions like Barton is that they thwart actual legislative policy and bring “all-too-real hardships to very real children.” \(^{162}\)

III. THE INTRINSIC VALUE OF CLASS CERTIFICATION

The stare decisis doctrine fails to perform any of the functions served by the class action rule and impedes the conversion of substantive rights into actual remedies. Nevertheless, New York courts adhere to the notion that class certification is unnecessary in welfare cases and that stare decisis principles will protect non-party recipients. The automatic application of the Jones rationale is not, and could not be, premised on a realistic comparison of the relative merits of the stare decisis doctrine and the class action procedure. While the decisions assert the superiority of stare decisis, they do so without enumerating the advantages of that doctrine over class action designation. The manifest instrumental benefits of the class action procedure, and the absence of any explanation for the court’s contrary conclusion, force the litigant to speculate on the reasons for the courts’ continued observance of the fiction enunciated in Jones.\(^{163}\)


\(^{161}\) Id.

\(^{162}\) Id.

\(^{163}\) State courts generally are reluctant to certify class actions. See State Class Actions, supra note 20, at 643. That reluctance does not explain the narrow construction by the New York courts of article 9 in welfare cases, since judicial influence helped initiate liberalization of the class action rule. See text accompanying notes 27–28, supra.
One possible explanation for the exclusion of welfare cases from the application of article 9 may be the court's reluctance to order relief that will have a significant fiscal impact on state and local governmental units. An award of retroactive benefits to an entire class, or a judgment directing a classwide increase in benefits prospectively, would impose a financial burden on state and local resources. Increases in recent welfare costs have generated considerable opposition and, in some instances, court challenges by local government officials. Judicial aversion to use of the class action rule in welfare cases may reflect an unwillingness to exacerbate fiscal problems.

This can serve as only a partial explanation, however. In non-welfare cases, involving traditional property interests, the New York judiciary has not refrained from directing relief that has had a burdensome economic impact on government units. For example, the court of appeals declared unconstitutional the Emergency Moratorium Act of 1975, despite the adverse impact of such a decision on the dire economic situation of New York City. Similarly, fear of a fiscal crisis did not deter that court from holding invalid a statute designed to ease the fiscal burden on local governments and "prevent possible disruption of municipal functions." One lower court has explained: "The fiscal crisis that now confronts most of our cities and school districts—and even the state itself—may not be used as a vehicle for the design of laws that circumvent the Constitution.”

While these cases do not present class certification questions, they reveal a judicial willingness to render decisions that have sig-

significant fiscal consequences for governmental operations. When contrasted with welfare cases, they suggest an explanation for judicial fidelity to the *Jones* doctrine. The unarticulated concern in the welfare decisions is not simply a reluctance to impose classwide relief that may have severe fiscal impact; it is a reluctance to direct such relief *on behalf of welfare recipients*.

The New York courts are making both a procedural determination and a judgment about the very nature of welfare benefits.\(^{172}\) Whether or not intended, the decisions suggest that welfare is a gratuity\(^ {173}\) subject to state legislative or administrative whim, and that the rights of welfare recipients need not be protected in the same fashion as traditional property interests.\(^ {174}\)

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172. Cf. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. Chi. L. Rev. 28 (1976). Professor Mashaw argues that administrative procedures not only perform a utilitarian function ensuring the accuracy of decisions, but also foster dignity and equality values. He suggests that a decision denying social security benefits, for example, is "a judgment of considerable social significance, and one that the claimant should rightly perceive as having a substantial moral content." *Id.* at 51. See also L. Tams, *supra* note 82, at 502-03 (due process requirements are valued for both their intrinsic and instrumental character).

173. *Compare* Goldberg v. Kelly, 397 U.S. 254 (1970) *with* Wyman v. James, 400 U.S. 309 (1971). In Goldberg, the Court described welfare as "more like 'property' than a 'gratuity.'" 397 U.S. at 262 n. 8. The Court believed that important governmental interests are promoted by affording recipients a pre-termination evidentiary hearing. From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders. We have come to recognize that forces not within the control of the poor contribute to their poverty. This perception, against the background of our traditions, has significantly influenced the development of the contemporary public assistance system. Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community. At the same time, welfare guards against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity. Public assistance, then, is not mere charity, but a means to "promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity."


Moreover, while the *Jones* rationale purportedly applies to cases involving any governmental operation, *see* note 6 *supra*, it has been enforced more consistently in lawsuits against welfare officials. In actions involving other governmental bodies, the courts have
sions on the procedural issue fortify public attitudes that recipients are not entitled to the same regard afforded nonrecipients, and reinforce the stigma attached to public assistance. It reconfirms the individual recipient's own conception of herself as a suppliant, obliged to submit to the extensive authority conferred on the social services agency.

In contrast to the New York courts' stance on class certification and their impression of the underlying substantive right is the position taken by the California courts in welfare cases. Courts there have adopted a debt theory of welfare, which was described over thirty years ago:

The obligation to pay [public assistance becomes] a debt due from the county to the applicant as of the date the latter was first entitled to receive the aid. . . . The bare fact that an applicant has by one means or another managed to ward off starvation pending receipt of the payments to which he was previously entitled provides no sufficient excuse for a county to refuse to make such payments. To hold otherwise would . . . provide a money-saving device for the counties at the expense of those of our citizenry least able to bear the burden thereof.

Having concluded that public assistance is a debt owed by the public to the recipient, California courts have readily awarded retroactive benefits, attorneys' fees, and prejudgment interest on the amount of the wrongfully-withheld grant. Consistent with the view of welfare as an entitlement deserving judicial protection, shown an increasing willingness to apply article 9 criteria on a case-by-case basis, rather than automatically denying certification. See, e.g., Knapp v. Michaux, 55 A.D. 2d 1025, 1026, 391 N.Y.S.2d 496, 497 (4th Dep't 1977); Ammon v. Suffolk County, 90 Misc. 2d 871, 395 N.Y.S.2d 317 (Sup. Ct. 1977).


181. But see Griffith v. Detrich, 448 F. Supp. 1137, 1141 (S.D. Cal. 1978) (applicants for general relief do not have a "'property interest' or 'legitimate claim of entitlement' to the desired aid.'"
the courts have held that class certification is proper in welfare cases, and that classwide relief is warranted.\textsuperscript{182} It is especially interesting to note that the courts have reached this determination despite the state’s retention of the Field Code version of the class action rule.\textsuperscript{183} New York has rejected that form of the class rule as too restrictive and unresponsive to contemporary litigation models,\textsuperscript{184} yet, in welfare cases the courts apply the modern article 9 provisions much more narrowly than California courts apply the older Field Code provision. This disparate treatment of class certification results from dissimilar conceptions of the underlying values sought to be protected by welfare litigation.\textsuperscript{185}

It is perhaps futile to attempt to ascertain the actual reason for New York judicial denial of class action designation in welfare cases. It is difficult, if not impossible, to ascertain the true motives of the judges. These motives are, however, somewhat irrelevant. The significant fact is that the opinions and their misplaced reliance on stare decisis create the impression that the articulated reason for denying class certification is simply a veil concealing an unarticulated hostility to welfare claims.

Courts in New York, as elsewhere, should recognize that the class action rule has intrinsic, as well as instrumental, value in welfare litigation. A decision that welfare litigants constitute a legitimate group within the class action provisions is a statement about public assistance and recipients of public aid. It is a pronouncement that such individuals are entitled to the “equal concern and respect”\textsuperscript{186} afforded those litigants asserting other property interests. And that declaration has significance well beyond the functional benefits of the class procedure.


\textsuperscript{183} See CAL. CIV. PROC. CODE § 382 (West 1973).

\textsuperscript{184} See text accompanying notes 21-23 supra.

\textsuperscript{185} The New York Court of Appeals recently held that article 17 of the New York State Constitution imposes an affirmative duty on the state legislature to aid the needy, and that such aid “was deemed to be a fundamental part of the social contract.” Tucker v. Tola, 43 N.Y.2d 1, 7, 371 N.E.2d 449, 451, 400 N.Y.S.2d 728, 730 (1977). Subsequently, the court narrowed its interpretation of article 17 and concluded that the principle enunciated in \textit{Tucker} relates only “to questions of impermissible exclusion of the needy from eligibility for benefits, not to the absolute sufficiency of the benefits distributed to each eligible recipient.” Bernstein v. Tola, 43 N.Y.2d 437, 449, 373 N.E.2d 238, 244, 402 N.Y.S.2d 342, 349 (1977).

\textsuperscript{186} R. DWORKIN, TAKING RIGHTS SERIOUSLY 273 (1977). Professor Dworkin uses the phrase “equal concern and respect” in describing the concept of equality.
CONCLUSION

It is not suggested here that all welfare cases be certified as class actions. Rather the proposal is more modest—welfare litigants should be given the same opportunity to use the class action procedure as provided other litigants. A class action motion in a welfare case, as in any lawsuit, should be decided on the basis of the criteria described in the class action statute, not on the basis of an unsupported assumption that stare decisis principles will protect unnamed parties. To continue to hold otherwise prevents vindication of substantive welfare rights and, equally disturbing, perpetuates distinctions between welfare recipients and those individuals not compelled to rely directly on the public for subsistence.

While the immediate proposal is moderate, the ultimate concern is a much more fundamental concern for the concept of "procedural justice." Cappelletti and Garth have recently described that concept:

In the context of our formal courts and procedures, "justice" has essentially meant the application of the correct rules of law to the true facts of the case. This concept of justice was the standard by which procedures were measured. The new attitude toward procedural justice reflects what Professor Adolf Homburger has called "a radical change in the hierarchy of values served by civil procedure"; the paramount concern is increasingly with "social justice," i.e., with finding procedures that are conductive to the pursuit and protection of the rights of ordinary people.

The class action rule is precisely the kind of procedural device that contributes to the pursuit and protection of substantive welfare rights. It is a mechanism that promotes procedural justice for the poor.

187. In 1977, State Assemblyman Mark Siegel and State Senator Joseph Pisani introduced bills (A. 7018 and S. 4560, respectively) that would amend Section 901 of the Civil Practice Law and Rules by adding the following subsection: "It shall not be grounds for denial of class relief that the action or proceeding in which such relief is requested is against a governmental body or officer." Enactment of such legislation would provide a welcome termination of the Jones doctrine. The courts, however, need not await legislative action. The exemption of welfare cases from article 9 was judicially created, and may be judicially abrogated. Cf. Ayala v. Philadelphia Bd. of Pub. Educ., 453 Pa. 584, 600, 805 A.2d 877, 885 (1973) (courts have not only the power but the duty to abolish a judicially imposed doctrine that is unsound and unjust).

188. Many of those individuals who do not rely directly on welfare are nevertheless beneficiaries of government aid. See Reich, supra note 166.

189. Cappelletti & Garth, supra note 141, at 240–41 (footnote omitted) (emphasis added).