

The Availability of Law*

Susan S. Silbey and Egon Bittner

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This article explores the practical skills that agents in the Massachusetts Attorney General's Office of Consumer Protection develop to accomplish their mandated objectives. In the situational structure and processes of discretionary decision making, we find a persistent surplus of enforcement capacity. Although the consumer protection law establishes a variety of sanctions and legal procedures to be used in enforcing the statute agents frequently invoke infractions of other laws in the course of resolving consumer complaints. They have this flexibility only because laws, in general, are imperfectly enforced. This leaves scope in a particular situation for the invocation of a wide variety of potential violations of, for example, safety and building codes, zoning or license rules, and tax laws, all remotely if at all related to consumer protection. This article demonstrates the skill with which consumer protection officials exercise this discretion and argues that an adequate conception of the role of law ought to take account of the different ways in which law enforcement agents draw from this reservoir of unenforced law.

Previous research on law enforcement and discretion has shown how law in action differs from the law on the books. Research has demonstrated that law enforcement is a complex matter in which discretion is inevitable (Davis, 1969, 1975; Kadish and Kadish, 1973; Ross, 1970; Jowell, 1975; Bittner, 1974; Skolnick, 1966; LaFave, 1965). Our research describes the manner in which law enforcement officers in the Massachusetts Attorney General's Office of Consumer

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Protection achieve their mandated and situationally demanded objectives. It is based on daily observations over a four-year period.¹

As a result of this work, we confirm the common observation that the law is less than fully enforced, leaving a persistent surplus of enforcement capacity and discretion. Law enforcement agents do not necessarily use the authorizing norms and powers legislators considered requisite to the task of consumer protection. They instead use law or regulation intended for any purpose that will do the job at hand, which happens to be resolving consumer complaints. They can act in this way because laws and regulations are routinely not enforced. One might say that successful law enforcement in the specific instance depends on failure in the aggregate.

Although law is not routinely and ordinarily fully enforced, this can be more a resource than an embarrassment. The effectiveness of any particular law depends not only on meeting the goals and intentions that inspired the legislation, but also on the uses to which the law can be put. Consumer protection can be enforced via law in general (see National Association of Attorneys General, 1971). However, consumer protection law also becomes part of law in general and thereafter is available for enforcement of other policy goals, for example, control of professional practice. A specific law may be invoked not only in pursuit of its own ends, but also for such other uses as law enforcement or private interests may demand in pursuit of other ends.

Law is a rich, powerful, and proliferating institution. This may be because of its availability as a mechanism for all sorts of problem solving. Neither the purposes nor the uses of any specific law are fully inscribed upon it. Therefore, the meaning of any specific law, and of law as a social institution, can only be understood by examining the ways in which it is actually used. Moreover, these uses are not extraneous to the law; they describe the law.

THE DIVISION OF CONSUMER PROTECTION

The Division of Consumer Protection (CPD) was established in March 1968 in the Commonwealth of Massachusetts, as part of the Office of the Attorney General. At its creation, the office staff consisted of two attorneys and one investigator. In time, the staff grew and changed. By 1974, the total number of people working for the CPD neared thirty, including eight lawyers and about sixteen investigators.

The numerical shift in the staff from legal to investigative competence does not express fully the nature of the division's work. In fact, there was not functional differentiation in the work done by the professional staff. To be sure, when there was technical legal work, it was done by the attorneys. But in terms of day-to-day

routines, lawyers and investigators received the same kinds of assignments. Their approaches to investigation and processing complaints were similar as were the resolutions they sought to achieve. Moreover, the person who received a case, regardless of whether he or she was a lawyer or investigator, did all the work connected with it from the beginning to the end.²

As time passed, it became clear that although the activities of the CPD were within the legal sphere, the activities of its staff were not of the kind requiring law school training for competent and effective performance. Work in the CPD could have developed so that a large staff of lawyers would do a great deal of litigation assisted by a small staff of investigators, but this did not happen.

The CPD adopted a policy of case-by-case negotiation and mediation of consumer complaints as a means of enforcing the Consumer Protection Act. It seemed a reasonable and practical thing to do given the limited resources, lack of administrative and legal experience under the legislation, and cross-pressures of consumer and business lobbying. The CPD could help individual consumers with immediate problems; it was hoped that the cumulative effect of the interventions would eventually change the market and improve the situation of all consumers. At the same time, the agency could begin to educate the business community about its responsibilities under the law, allowing businesses the opportunity to adjust their practices and develop the voluntary compliance that would be necessary to change market conditions. This procedure seemed reasonable and responsive to both the legal mandate and the situation of its enforcement (Silbey, 1984). The agency could have chosen a more programmatic approach: It could have engaged in an industry-by-industry investigation of consumer fraud; it could have begun an extensive educational campaign designed to enlighten both businesses and consumers about their responsibilities under the new law; or it could have chosen to screen complaints for patterns of violation and reserve its resources for investigation and prosecution of selected cases. However, any enforcement strategy required accumulating evidence about consumer complaints in order to identify where protection was needed. This first step became endless and prevented the development of any alternative policy (Silbey, 1981).

The authorizing act was framed with the pious wish that its very existence would keep citizens honest and that it would serve the educational function of guiding people to ever-higher standards of morality in their dealings with one another, but the act is basically a law enforcement instrument. It delegates to the CPD the tasks of investigating consumer complaints about deceptive trade practices, initiating action in courts of equity and law in cases involving deceptive trade practices, promulgating rules and regulations in the area of deceptive trade practices, and enforcing the provisions of the Consumer Protection Act and the rules and regulations promulgated to supplement the act.³

To compel compliance with the law, the CPD is empowered (1) to file suits to obtain injunctive relief, (2) to file law suits for the restitution of damages sustained by consumers due to deceptive trade practices including the demand for treble damages, (3) to file motions requesting the imposition of fines of up to \$10,000 for the violation of injunctions, (4) to initiate process leading to the subpoena of records and persons to uncover deceptive trade practices or to resolve consumer complaints, and to levy fines of up to \$5000 for failure to comply with the investigative process, (5) to demand and to receive binding assurances of discontinuance of allegedly deceptive trade practices, (6) to initiate process leading to the imposition of penalties for violations of specific provisions of the Consumer Protection Act, such as the alteration of automobile odometer settings, and (7) to initiate process leading to the abrogation of the right to engage in business in the Commonwealth for repeated violation of the statute or regulations promulgated under its authority (Commonwealth of Massachusetts, n.d.: c.93A).

With this mandate one could imagine officials of the CPD scurrying in and out of court all the time. However, in the period between March 1968 and December 1974, the CPD managed to function effectively with only minimal use of its formal powers. The office's effectiveness consisted of receiving, investigating, and disposing of between 250 and 400 complaints per week, more than half of which were brought to a conclusion the complaining person found acceptable. These resolutions resulted in about 4 million dollars of restitutions and savings to consumers. Nevertheless, the record of formal legal proceedings entered into by the CPD is infinitesimally small in relation to the number of cases handled. There were altogether thirty petitions for orders of discontinuance and no more than four suits seeking injunctions.⁴

THE POLITICS AND ECONOMICS OF CONSUMER COMPLAINT NEGOTIATION

The disposition of consumer protection cases is achieved by the CPD primarily through a process of negotiation and mediation. At times, this may necessitate the use of subpoena, the threat of more forceful measures, and may even result in assurances of discontinuance. Routinely, however, negotiations are conducted and concluded without employing any formal legal process or employing any punitive or restitutive authority. The accomplishments of the CPD are products of laborious and frequently repetitive bargaining with businesses. This bargaining consists primarily of badgering businessmen – of convincing and often coercing them into making some sort of adjustment to complaining consumers.

The negotiation of consumer complaints is structured by several factors:

(1) *Consumer protection is passive and reactive.* The activities of the CPD are set in motion by consumer complaints. People who feel that they have been shortchanged in their dealings with tradespeople or merchants, people who think that they have been illegally and/or unfairly deprived of something they felt entitled to in some business dealings, may come to the CPD seeking redress (Best and Andreasen, 1976, 1977; Steele, 1975a, 1975b; Ross and Littlefield, 1978; Schrag, 1972; Nader and Shugart, 1980). Under ordinary circumstances, entering cases receive a cursory review for appropriateness by clerical personnel and are then assigned to the staff of lawyers and investigators. The staff is kept completely occupied by processing, that is, investigating, negotiating, and resolving consumer complaints.

Day-to-day activities of the CPD are reactive rather than the result of deliberately chosen enforcement policies developed in compliance with statutory authorization. Consumer protection activities follow the complainants' perception of where protection is needed. This does not mean, of course, that consumer protection policy is totally responsive. It also does not mean that the office has no enforcement policy to determine, for example, that henceforth complaints about the home improvement industry or about trade schools are to receive more thorough and exhaustive attention. It does mean that consumer protection policy is limited to ordering priorities among incoming business; moreover, it means that even the formulation of these priorities is based on information about enforcement needs obtained from incoming complaints.

(2) *The staff believe that it is their duty to do something for the complaining citizen, if anything at all can be done.* The obligation to help citizens who feel wronged is often spoken of in idealistic terms and at times in self-serving ways; furthermore, the availability of this service to citizens is proudly publicized. In addition, this understanding that the office's job is to provide ready service to consumers controls what staff think they are expected to do from nine to five on any ordinary work day. In other words, when staff members are conscious of being idle, stymied, or ineffective, they realize that aggrieved consumers are being deprived of help.

Staff members conceive their role – mandated by law and expected by the public – as that of ombudsmen for the common man. 'I think we do our job best when we take care of the little guy,' one agent commented. 'There should be at least one place in this government where someone will listen to the citizen and actually try to help him.'⁵ The office's mission is to be the place in government where the consumer can be assured of active representation. 'We are the only place where the little guy gets a chance to be heard. If we can't try to help him, no one else around here is going to.' This does not mean that the consumer receives justice; it does mean that the consumer receives at least a hearing. Mechanisms

that appear to make government services accessible to the public, such as the CPD, moderate stresses and demands on the political system (Easton, 1965; see also Nader and Shugart, 1980). The pressure on the office to maintain this easy accessibility contributes to a predilection to investigate and attempt to find an agreeable solution for every complaint.

(3) *Beyond this strongly felt obligation to the little person, the staff see the ultimate purpose of consumer protection as controlling deceptive practices and driving incorrigible transgressors out of business.* Staff members believe, however, that these objectives are better served by responding to complaining consumers than they would be by strictly punitive law enforcement (see Steele, 1975a, 1975b).

Staff members argue that litigation may force tottering businesses, from whom the agency has been able to wring compromise settlements, into bankruptcy. It may cost more to prepare a case for court than to convince offending businesses to settle. Litigation costs could automatically reduce agency resources for mediating complaints, and the aggregate savings to the state's consumers would be reduced. Therefore, although the CPD is acknowledged to exist for the purpose of banishing illicit practices from the marketplace, its routine work consists of helping complaining consumers recoup losses (see Nader and Shugart, 1980; Steele, 1975a, 1975b; National Association of Attorneys General, 1971). It is believed that with time, intercession by the Attorney General on behalf of consumers will succeed in changing the marketplace. In the meantime, the office is able to produce something tangible for the individual consumer where litigation could produce less.

During the course of this research (1970–1974), the CPD investigated over seventy complaints against a single swimming pool company. Consumers complained that they had given the company down payments of from 1000 to 3000 dollars for the construction and installation of an inground swimming pool. After the initial payment, the contractor began work on the consumer's property, usually by clearing a portion of the land and sometimes excavating for the pool. The complaints began to arrive at the CPD as consumers found it difficult to get the contractor to complete work on the pool. Some consumers were left with gaping holes in their lawns, whereas others had what looked like pools built without any mechanical devices to regulate the water flow. Investigation by the CPD revealed that the company was badly undercapitalized and that the contractor was using the flow of down payments to finance the construction of back-ordered pools. The Attorney General's office was able to help some of the consumers, the early complainants, to get the construction completed, but as the years went on, fewer and fewer pools were built. Eventually the company went

bankrupt. After ten years, the litigation by the individual consumers is still pending. The Attorney General never sued the pool company.

(4) *The desire to help the little person cut his or her losses diverts attention from the technical merits of consumer complaints* (see Cranston, 1979: 92). This works in two ways. On the one hand, the offensiveness in the case of a particularly flagrant violation is blunted when the businessperson appears ready to enter negotiations about possible amends. It is difficult to treat a case as culpable deceit when the accused stands ready to discuss it. At the very least, staff members distinguish between swindlers who persist and swindlers who, without admitting culpability, offer to 'see what they can do.'

For ten years, from its creation in 1968 through 1978, the Attorney General received a continuing flow of complaints alleging 'bait-and-switch' tactics against a national chain of merchandizers. The CPD established a regular working relationship with the local management of the company and was able to obtain refunds for consumers who complained. The company's directors claimed that they were trying to control their salespersons' eagerness and hoped that the CPD would allow them the opportunity to comply voluntarily with the law. As the years went on, different chiefs of the CPD adopted varying approaches to dealing with the company. The company's responses were equally varied and inventive. For example, sometimes the investigations focused on faithful adherence to the terms of what were taken to be misleading advertisements. Other times, investigations focused on sales practices such as hidden incentive systems within the company that might be stimulating overeager sales techniques. After ten years, the company signed an assurance of discontinuance saying that it had not engaged in any illegal sales practices and that it would not engage in any in the future.

On the other hand, attention is drawn from the technical merits of cases because complainants whose losses appear wholly or partly due to their own incompetence or improvidence are, nevertheless, thought to deserve help. Concern for clean and precise legal formulation is not, for example, very important to an agent whose job is to get a garage owner to take another look at a car that still does not run well after several repairs. The owners of the car have paid more than they feel they should have been charged for repairs; the agent's job is to resolve the complaint to the satisfaction of the consumers.

The case of the orthopedic shoes is an example of how the desire to help the consumer materially may work against technical consideration of legal responsibility. Mrs. DP presented a prescription for orthopedic shoes, received from the City Hospital Clinic, to Singer's Shoe Store. Although Mr. Singer repeatedly explained that he did not custom make orthopedic shoes and that this was not the place she was looking for, Mrs. DP insisted on purchasing a pair of expensive shoes, ostensibly to fill the requirement of the prescription. A short time after the

purchase, the shoes did not please Mrs. DP and she demanded her money back. Mr. Singer refused. Mrs. DP complained to the CPD. These facts were agreed on by both parties. Nevertheless, the investigator was harassed by Mrs. DP's repeated calls and he, in turn, harassed Mr. Singer, until he refunded the price of the shoes to Mrs. OP.

Another example is the case of the mortgage repayment. A consumer complained to the CPD that when he attempted to payoff a \$75,000 mortgage in its second year, the bank charged him a \$666 penalty for prepayment of the loan. Apparently the mortgage contained a clause stipulating the conditions and costs for prepayment. Nevertheless, the investigator negotiated a reduction of the penalty with the bank and the consumer obtained a refund of \$333.

The staff feel justified in disregarding matters of strictly formal legal responsibility and in neglecting to measure cases against formal statutory standards. They believe that the formulations of the authorizing statute are vague. However, since the statute has remained virtually untested in the courts, it is difficult to resist the suspicion that this is a belief of convenience.⁶ Helping people is connected with not looking too closely at the formal merits of cases (see Macaulay, 1979: 126). Furthermore, not looking at these merits is justified in part by thinking that the authorizing statute does not lend itself to this. The truth is probably that the alleged imprecision of the law does not matter much in comparison with the vagueness inherent in the cases themselves.

(5) *The CPD cannot resolve all consumer complaints.* As is true in other settings, cases that project a greater likelihood of successful resolution receive precedence over cases in which this promise is not present (see Lang, 1981; Silbey, 1981). This is true of all law enforcement and remedial activities. Neither the resources of the office nor those of the courts would sustain prosecution of even those complaints that proved to have formal merit. Even if the staff were to adopt a policy of selective prosecution, the complaints and cases not selected would by their volume alone seem to demand that something be done (National Association of Attorneys General, 1971; Lefkowitz, 1969; Best and Andreasen, 1976, 1977; Steele, 1975a, 1975b, 1977; Schrag, 1972; University of Pennsylvania, 1966; Magnuson and Carper, 1968; Baier, 1969; National Advisory Commission Report, 1968; Nader, 1980; Eovaldi and Gestrin, 1971). It is not to the benefit of the office's image and records of success for the agents to spend too much time with complaints that likely will not be settled to the consumer's satisfaction. The economy of work and time induce the staff to pursue the complaints against more – rather than less – accommodating businesses.

The preference for engaging in winnable battles has intriguing implications. The likelihood of gaining satisfaction for an aggrieved consumer is not always consonant with the seriousness of the transgression nor with the public interest in

its control. For example, some complaints are brought against businesses that are intentionally founded upon deception. For the most part, these fundamentally deceptive businesses are marginal operations. Their survival depends on staying one step ahead of complainants and law enforcement agencies. They are unstable businesses without reputations to protect. Generally, they do not respond to approaches from the CPD. Paradoxically, their very inaccessibility immunizes them against strong pressures from the CPD staff. They know that CPD officials know that one cannot get blood from a turnip. Cornered, they will delay and procrastinate. They know that things get lost in the bureaucratic process and that complainants grow weary and sometimes move or die. Businesspersons who violate the law most often become acquainted with limitations on the resources of the office, the capabilities of the staff, and lapses in general effectiveness, and thus they gain a kind of immunity. Their past experiences with the office provide them with a perspective on its activities that allows them to negotiate with the staff from a significantly stronger position.⁷

Dishonest businesspersons, however, are not alone in their use of procrastination. Everyone knows that not doing right away what one must do eventually projects the possibility, however remote, that one may not have to do it at all. Moreover, restitution involves costs; and in business, costs delayed are often costs reduced. Roofers who installed a roof that leaks do not want to fix it on a day for which they have scheduled paid work. It is difficult to fault them for wanting to have as many paid days scheduled as possible, leaving the making of amends for a time when they would have nothing else to do. The combination of what has to be viewed as reasonable business practice and the definition of success adopted by the CPD (helping the little person by resolving complaints) lead to the inevitable avoidance of working on cases in which it is not likely that the complainant will gain restitution. Although it is not possible to assume that all the avoided cases involve more serious transgressions than the nonavoided cases, it would seem plausible that the more intractable violators will be found more often among the avoided than the pursued complaints.

(6) *The level and extent of consumer protection depends, in part, on the goodwill of those against whom the protection is supposed to function* (Silbey, 1984). The CPD made restitution the principal product of its activity and chose informally persuasive methods over formally coercive procedures to do this.⁸ This choice of informal methods of settlement requires that officials be ready to make compromises with those whose cooperation is indispensable for any kind of case resolution. This means a readiness to meet business half way. To be sure, the officials are very far from being helpless or passive in this situation, as we will show in the next section. The CPD must not be denied credit for getting business to move the other half way.

Nevertheless, meeting business half way does not necessarily raise the standard of business practice to a respectable level or even halfway to it. Furthermore, it is not clear that having to make restitution once, or even often, induces purveyors of goods and services to avoid practices that give rise to complaints. It is at least equally likely that the institutionalized presence of the CPD in the marketplace, routinely interceding on behalf of a certain fraction of bilked consumers – the fraction that complains – may itself move toward a steady state and come to be regarded as a calculable part of the overall cost of doing business (see Kagan, 1980). Establishments that routinely deal with regulatory and law enforcement agencies should be able to discover the level of those agencies' actual capacities and will to carry out their mandates. Such businesses should be able to set their voluntary compliance at a level consistent with the agencies' capacities, thereby reducing costs entailed by prompt and full responsiveness to regulatory directives.

(7) *Whether the chosen method of consumer protection involves informal persuasion and negotiation or formal coercion, consumer protection is difficult simply because, as a rule, selling is a far more methodically organized activity than buying.* Because the character of many consumer transactions is haphazard and its terms, conditions, and circumstances unrecorded (see Macaulay, 1963), in any dispute settlement procedure, purveyors are better equipped than the accusing consumer is to render plausible accounts of their side of the story and to support it with written records. Of course, there is no lack of resolute and resourceful consumers who keep records that match the records of business establishments, but they are not usually the ones who need the intercession of the CPD. Moreover, in the lives of complaining consumers, complaining is an unusual endeavor, but for businesses, the handling of complaints is part of doing business.

(8) *The effectiveness of the staff's bargaining power is further limited by the absence of a pattern of forceful regulation.* There is no experience of conspicuous feats of consumer protection for the staff, the public, or the business community that might influence immediate situational options. There is no memory of imposition of sanction that would persuade informed businesses that accommodation is in their best interests.⁹

The consequences of consumer protection practices are not random, nor are they unexpected (Steele, 1975a; Daynard, 1980; see also Galanter, 1974, 1975; Schrag, 1971, 1972). Small but honest businesspersons seem to have the least ability to withstand the demands of the Attorney General's office for restitution of refund. So long as the demands are not beyond their means and are limited to a few individual complaints, the complaint will most likely be resolved to the benefit of the consumer. Small businesses establish themselves as honest and fair by complying with the demands of the Attorney General.

Businesses of reputation and size are assumed by the CPD to be dealing fairly; they are under less obligation to demonstrate their goodwill toward the customer. Nevertheless, complaints against large companies are also likely to be resolved to the satisfaction of the consumer, again, so long as the complaints are handled individually. Major corporations that have large numbers of complaints are not treated or regarded as flagrant violators despite the accumulation of cases. Rather, the number of complaints reflects, according to the staff, a heavy volume of business and organizational, control and communication problems within large firms. The accumulation of complaints simply establishes a practice of continuous negotiation.

The activities of the CPD are least effective with regard to businesses that have little interest in establishing a reputation for fair dealing, responsiveness, or goodwill. These tend to be the most flagrant violators, fly-by-night operators, and insolvent businesses.

THE THREAT OF CONSPICUOUS ATTENTION

Despite the relative imbalance of power between consumers and businesses, the Attorney General's office resolves most of the consumer complaints it receives to the satisfaction of the consumer. It is apparent that the CPD staff must possess resources and skills that account for its high rate of satisfactory dispositions without recourse to formal powers and sanctions.

Observations of negotiations reveal that consumer complaints are often resolved not through the procedures authorized by the Consumer Protection Act but by invoking or threatening (in a very diplomatic and tactful fashion) to invoke some other, formally irrelevant law. The Attorney General's agent makes use of any information, any regulation, or any provision of any law that may supply a tool with which to do the job at hand – resolve specific consumer complaints.

For example, consider the case of the peeling house paint. Eight months after a complainant's house was painted, it began to blister and peel. The painter had given the consumer a guarantee that he would use a nationally known brand of paint containing a bonding compound specifically designed to prevent blistering and peeling. The painter admitted, however, that he had not actually used the product he had described and guaranteed. The paint manufacturer, a large corporation, considered itself morally obligated, although not legally bound, by the painter's guarantee; it was willing to supply enough new paint to redo the house. Good public relations seemed to demand this. The painter was clearly vulnerable; he had been deceptive about the kind and quality of paint used. The case could be resolved, the consumer and the Attorney General satisfied, if the

painter would repaint the house, using the now-donated paint. The contractor was reluctant. However, the investigator was able to convince the painter to repaint by pointing out that the painter had violated a state regulation requiring all businesses to have a business certificate if they operated under names other than the name of the owner. The investigator informed the contractor that his alternative to repainting the house was a \$50 fine for every month of the twenty years he had been operating without certification. The investigator also included a reference to having the Internal Revenue Service look at the painter's financial records.

The moral of this story is that the law enforcement objectives of the CPD have been achieved by employing law that was designed for other purposes. Consumer protection agents use licensing and regulatory provisions to coerce businesspersons to satisfy complaining consumers. The agents' power to coerce corrective performance rests on their ability to invoke any legal rule as a means of dealing with consumer complaints. The case of the peeling house paint is a particularly good example of this; but it is just one of hundreds of similar cases at the Attorney General's office.

The law enforcement officer's coercive power is not unlimited, however. The threat of the legal sanction is real and powerful only insofar as the activities in question fall under some authority's legitimate jurisdiction. The sanction or regulation that is used to coerce compliance can be effective only if it has a reasonable chance of being upheld in court. However, the law that provides the threat of legal sanction need not have anything to do with consumer protection. The successful disposition of a case means only that the consumer has been satisfied and does not mean that the formal provisions of the law used to effect that satisfaction have been met. Investigators do not invoke licensing laws or tax codes to secure compliance with their provisions; instead, they use the delinquency with regard to these laws to secure compliance with the law they are mandated to enforce.

It is evident that coerced compliance is possible only because many laws are less than fully enforced. The provident police officer routinely lets people get away with 'things' in order to get 'something' on them that can be used when circumstances make it necessary (Skolnick, 1966; Bittner, 1974; Davis, 1975; Marx, 1980, 1981). An investigator can use any of hundreds of laws to coerce a businessperson to make a satisfactory settlement in a consumer complaint because, as a matter of course, business practices have not been scrutinized and controlled to make them conform with all legal requirements. Regulations proliferate beyond capacity to enforce them in a general way. It might appear, therefore, that the increasing extent of public regulation increasingly diminishes the effectiveness of

law. Rather, we suggest that the expanse of unenforced regulation creates a pool of enforcement resources.

During the 1970–1971 session, the General Court of Massachusetts passed an automobile title law (Commonwealth of Massachusetts, n.d.: c.90d).¹⁰ The title law, the third such measure in four years, attempted to control the veracity of odometer readings through an extensive procedure for registering title to a motor vehicle. The statute required verification of odometer settings on registration of every vehicle. It carried penalties of 500 dollars and a possible five-year sentence for falsifying this information. The statute was the third state law prohibiting and penalizing falsification of automobile odometer settings. Chapter 266, Sect. 141 of the Massachusetts General Laws Annotated (MGLA), written in 1966, makes the misrepresentation of mileage on used cars a misdemeanor and carries a criminal penalty of a 100-dollar fine and possible loss of a business license. Falsification of odometer settings also constitutes misrepresentation under the Consumer Protection Act, Chapter 93A, a civil statute.

The Attorney General's staff consider these multiple provisions useful. They make enforcement 'easier' and 'more likely.' The several statutes increase the possible procedures and routes of attack against violators, thereby increasing the chances of successful prosecution under one procedure if not under another. Although odometer violations are considered a serious problem in terms of their aggregate costs for consumers and distortion of the market, they are nowhere defined as a felony. Nevertheless, the accumulation of various penalties can increase the costs of violating the law and at the same time, they also increase the negotiating strength of enforcement authorities. The proliferation of statutes, even those governing the same subject and even those irregularly enforced, constitutes a stockpiling of weapons for law enforcement. They are available for use when they are needed.

Interviews with members of the Attorney General's staff provide additional evidence for this analysis. In formally structured interviews, the investigating staff express a civics book conception of the law as a prescriptive and channeling device. Informally, they admit to an entirely different view of the law. According to the formally articulated view, the consumer protection law proscribes punishable activities; it is the agent's responsibility to ferret out and prepare evidence for prosecution against violators of this law. However, they say informally that the consumer protection law does not always provide sufficient weapons with which to accomplish its stated purposes. Agents must do what they can to make it work.

Although the Consumer Protection Act makes deception and misrepresentation unlawful, without limitation or specification, most of the legal staff believed that deception and misrepresentation in general are just too difficult to prove. Of the eight attorneys employed at the time this question was asked, only seven

would reply. Six of them stated that they believed the courts were not ready to alter the traditional presumptions against consumer protection. They feared that the courts would require evidence of intention to deceive even though the statute prohibited any practice that had a tendency or capacity to deceive. The courts, the attorneys feared, would thereby recreate the evidentiary difficulties that had plagued consumer protection before the new law.¹¹

The attorneys saw more direct routes to satisfying complaining consumers, under other, more limited statutes. For example, consumers could recover treble damages, court costs, and attorneys fees under the statute prohibiting alteration of odometer settings. This statute provides that tampering is presumed to be intentional, thereby eliminating the most likely defense. Moreover, violation and recovery under the odometer statute is an automatic violation of the omnibus Consumer Protection Act. Under the Retail Sales Installment Act, consumers may apply to the Supreme Judicial Court to have contracts declared null and void if they violate the disclosure requirements of the statute and may file criminal complaints for the same violation. In contrast, the Consumer Protection Act provides court costs and fees as well as treble damages only if the court determines that the consumer had not already rejected a reasonable out-of-court settlement of the claim. According to the staff, the strategic advantages seemed to be weighted in favor of out-of-court settlement.

The more statutes and regulations there are proscribing very specific patterns of deception and misrepresentation, the more successful the division can be in meeting the needs of the consuming public. There is always the need, agents state, for more law and more regulation. This position is agreed to by every member of the office. Each additional statute provides yet another possible and useful tool for the tasks assigned, and thereby increases the arsenal available for consumer protection.¹²

The consumer protection staff use the odometer statutes for a variety of purposes. For example, they were used as the justification for a mass raid on used car dealers throughout the state. A large-scale coordinated effort resulted in simultaneous on-site investigations of dozens of dealerships across the state. The raid produced evidence of hundreds of violations of the odometer laws. It also produced several assurances of discontinuance under Chapter 93a; it produced no prosecutions, fines, or injunctions. None of the investigations was followed up during the next six years. The raid also produced extensive and favorable media coverage (Consumer Reports, 1969). The publicity alerted the public to the dealers' practice of altering odometer settings; it also alerted the public, and the used car dealers, to the growing reputation of the Attorney General as an aggressive law enforcement officer.

As a routine affair, odometer readings are used by the consumer protection staff to pressure and harass used car dealers to resolve complaints. If investigators are having difficulty settling complaints with a dealer, though these have nothing to do with the car's mileage, they make a personal visit to the dealership and begin an 'odometer check.' This involves noting the odometer settings of the vehicles on the lot, recording the vehicle registration, and later inquiring of the previous owners about the mileage when they sold the car to the dealer. The beginnings of this process are often sufficient to induce dealers, even if they have nothing to hide, to make satisfactory settlements of outstanding consumer complaints.

In addition to licensing regulations and statutes governing odometer readings, the staff make use of dozens of other statutes in order to resolve and dispose successfully of consumer complaints. The staff regularly check criminal records, building permits, and trade and banking regulations. Each staff member establishes relationships with staff in other agencies who can provide informational levers with which to negotiate the settlement of consumer complaints.

Not all regulations used to coerce corrective performance end up being ignored on termination of a complaint. Some cases are resolved because the transactions involve violations of the truth-in-lending law, or the retail sales installment act. Here, the provisions of the law that provide the threat of sanction are enforced at the same time as the complaint is resolved.

For example, consider the case of the proprietary career school. A young man enrolled in a Large Engine Repairs course at a local career school. He was dissatisfied with the program because the curriculum, teachers, and facilities turned out to be very different from their description by the school's 'registration officer.' In addition, he had been promised, at the time he signed a contract with the school and made a down payment, a full refund if he was not totally satisfied with the school's program. He wanted to cancel the contract he signed with the school, but the school refused to refund any money and demanded payments under the original purchase agreement.

The 'Buyer's Remorse' Law requires that all contracts made in a place other than the seller's place of business may be cancelled by the buyer not later than three business days following the execution of the agreement. This stipulation must appear on the face of all sales agreements made in the state, whether they are made at the place or business or not. Any contract without this statement is void. Further, violations of this provision carry criminal and civil penalties.

In this case, the consumer wanted the contract cancelled because the registration officer misrepresented the school's program; misrepresentation is a violation of the consumer protection act. The contract was finally voided, not because of the deception, but because it did not contain a 'Buyer's Remorse' clause. The

Attorney General's agent informed the school that the contract was invalid; the consumer was not liable for any further payments or any default payments. In cases like this, the company will eventually revise its contracts, but until the company does so, the staff can resolve consumer complaints on the grounds of a violation of the 'Buyer's Remorse' law.¹³

Investigators also use the truth-in-lending law to resolve consumer complaints because retail sales agreements with undisclosed interest rates are also voidable under state law. These cases, like cases resolved under the 'Buyer's Remorse' clause, use statutory regulation of conditions and terms of sales agreements to resolve complaints generated by issues unrelated to the form of the sales contract. In these cases, unlike others such as the case of the peeling house paint, prohibited activities are corrected.

Consider a complaint against another career school. A student left school and stopped tuition payments midterm in a year-long programming course at a proprietary school. When the school sued the student's family for the remainder of the fees under the enrollment contract, the student complained to the CPD. The Attorney General's investigator discovered, upon reading the contract, that it excluded refunds for early withdrawal from school. The student thus offered no legitimate grounds for complaint under the Consumer Protection Act. Nevertheless, he was relieved of his contractual obligations by the intercession of the CPD because of other violations in the contract. The contract purported to be a cash sale but it contained a 10% discount for full payment of fees within thirty days from enrollment. The discount was interpreted by the staff to disguise a finance charge; disguised finance charges violate the full disclosure requirements of Chapter 255D of the General Laws. The statute helped to resolve a transaction that was unsatisfactory, although legal in all other regards save the disclosure of interest rates.

Businesspersons as well as consumer advocates have been concerned about this 'uncalled for' availability of law. For example, with regard to the federal banking laws, representatives of Citibank claim that lawsuits under the truth-in-lending laws have been used as a specious defense against legitimate sellers. Industry leaders maintain that most suits are won on technicalities and on behalf of consumers who simply do not want to pay their debts. Consumer advocates do not deny this, but they argue, in the words of one Atlanta-based legal services lawyer, that 'creditors complain that they get caught on technicalities, and in some cases this is true. But in most cases there is an inherent problem with the transaction, and it may be easier to defend the consumer with Truth-in-Lending than to go directly after the fraud' (Cerra, 1977: 22). Landers (1977: 676) states that 'although written for other purposes, in many jurisdictions, the truth-in-lending laws are the most effective remedy for consumer grievances of any type.'¹⁴

Consumer advocates frequently debate the costs and benefits of generalized provisions allowing agencies discretion and adaptability to changing circumstances versus detailed regulations and strict liability. We suggest, however, that whatever the intentions of law reformers and authors, enforcement agents use the law as a dense network of overlapping remedies. Schrag's work (1971: 1597) with the New York City Consumer Protection Agency led him to conclude similarly that effective law enforcement required both a judicial model and a direct action model. In general, the New York City division was most successful when it sought to prevent fraud or obtain refunds on its own rather than in court. This realization was a sad one for those staff with an idealized vision of rule enforcement that just did not work.

Of course, enforcement styles vary. The general rule seems to be that agents may use whatever approach seems to work, within limits. Law enforcement officers are subject to specific and explicitly defined norms that limit their authority and to which they can at all times be held accountable. Activities can be kept within legitimate and reasonable bounds, with sufficient mobilization of resources and mechanisms, by the fact that agents are without power to act effectively without a review of their activities. Unlike the police, who are authorized to use immediate and frequently summary force, the Attorney General's staff members are without authority to use force. They are without power to impose penalties or sanctions, if challenged, without a demonstration in court. The limits of the consumer law enforcement officer's responsibility are well defined by the authorizing mandate. Of course, this may be an ideal that depends on sufficient resources for its realization; nevertheless, it is a real definition of position because it is always a possible limitation on official action.¹⁵

The limitations on unauthorized action that come from increasing restrictions and technical refinements subject to judicial review seem to invite circumvention of law. Enforcement officers and violators alike navigate the avenues created by the interstices of legal regulation (Holmes, 1897; Fisher and Fairbanks, 1967). For example, Schrag (1971, 1972) suggested that the limitation of legal technicality drove agents out of the courts making pigs out of lawyers; Langbein (1978) suggests that plea bargaining and torture are rational adaptations to excessively stringent requirements of proof of criminal liability. Law develops out of the dynamic tension created by a rule and its circumvention.

CONCLUSION: THE AVAILABILITY OF LAW

The Commonwealth of Massachusetts provides consumer protection to its citizens through a division of the Attorney General's office. Even though the CPD was created to implement a statute, the day-to-day work of its staff is set into

motion by citizens; complaints are lodged by consumers alleging deceptive practices and requesting recovery of their losses. Because the staff believe that the aims of consumer protection are best served by methods of amicable resolution of conflicts, and because they feel responsible for 'helping the little person,' the problems they deal with do not receive precise legal definition. While this sometimes helps outright swindlers look as if they merely made a careless error, it also helps the incompetent shopper who was quite legally outwitted.

Adopting the method of complaint resolution as the principal method of enforcing the provisions of the Consumer Protection Act has the further consequence of drawing the bulk of staff efforts toward cases that project a high likelihood of satisfaction for the complaining citizen. But there are no assurances that the most serious consumer problems will be addressed in this way. Moreover, to a remarkable extent, the effort to create as many settlements as possible causes the enforcement effort to depend on the cooperation of those it is supposed to control.

The staff of the CPD overcame the disadvantage resulting from their disinclination to proceed with methods of coercive enforcement by making use of irrelevant legal norms. Thus, for example, a craftsperson can be induced to repair a faultily performed service by drawing attention to the fact that his or her place of business is not in compliance with industrial safety standards. This is only possible, of course, when large areas of underenforcement are permitted to exist. Insofar as this condition exists, law enforcement agents are equipped with more than the norm that authorizes their activity. They usually have a large inventory of legal measures they can marshal against offenders. The display of those capacities is especially useful when agents must induce concessions from the persons against whom they proceed.

It might appear to the casual observer that the proliferation of public regulations is, among other things, redundant. Moreover, it cannot add to the majesty of the law to fill the statute books with unenforced regulations. Yet the popularly recognized unenforceability of certain laws does not prevent them from remaining on the statute books. Some argue, of course, that these laws, especially sumptuary laws, represent a consensus on community values (Durkheim, 1949; Gusfield, 1963; Erickson, 1966). It is more accurate to recognize, however, that these laws remain on the books because they are helpful in the general enterprise of social control. For instance, unenforced laws may be useful in controlling certain activities of organized crime. They may be needed, according to police sources, in cases where undesirable persons cannot be apprehended under any other rule (Bittner, 1970). However, this general availability and usefulness of legal devices is not limited to criminal law enforcement or peacekeeping functions of the police.

Lawrence Friedman (1967) suggests that a similar phenomenon of underenforcement of rights and obligations exists with respect to many private legal relationships. The costs of litigation and the expedient and efficient use of legal resources allow, even require, deviations from expected obligations. The result of these minor infractions of duty is the creation of 'networks of reciprocal immunities that help define and stabilize many continuing relationships.' For example, landlords and tenants may violate provisions of leases, safe in the knowledge that high costs deter the injured party from invoking the law. When the stakes are high, the violated rights can be vindicated legally, but under ordinary circumstances 'they remain below the threshold of that enforcement rate which would seriously disturb social relations among the parties' (Friedman, 1967: 807).¹⁶

One implication of Friedman's analysis is that nonenforcement benefits the ongoing arrangements of society, in our case, the relationship between business and consumers. Only when some viable and compelling political demand is made can we expect enforcement to be attempted, or threatened, to redistribute the balance of interests and power.¹⁷ This analysis implies (much to the possible chagrin of the consumer) that, were the law to be consistently upheld to the letter, it could not long serve or be available to serve those interests. Without further explicit formulation of new rights and obligations, there would no longer be a reservoir of untapped legal resources.¹⁸

To the extent that our observations are correct, they would seem consequential for ideas about the very nature of law. If practice – certainly unopposed practice, even if not explicitly sanctioned practice – is to have any bearing on our conception of what the law is, then it would appear that the law is an amenity of less certain and specific sense and purpose than is commonly thought to be the case. Generalizing, one must say that laws have – in addition to their specifically intended import – other, unintended capacities or uses and that the range of such capacities and uses depends on the imagination and resourcefulness of the law's users, whoever they may be.

Although the unpredictable and unintended uses of law are well known, they are generally perceived as lurking around the periphery of legality. Careful legislative draftspersons keep a cautious eye on possible abuses when they write laws. It is not a secret, for example, that although the Internal Revenue Code secures funds for the operation of the government, it can be, and often is, made to serve other aims. It can be used effectively as a crime controlling instrument against persons who for various reasons cannot be convicted using provisions of the penal codes. In fact, some tax legislation is enacted not with the aim of raising revenues but to bar or discourage some activities.¹⁹ Even the American realists, who view law in terms of its uses, have not gone so far as to suggest that the meaning of the Internal Revenue Act must be found in the entire range of its

possible uses. This range is, of course, open in a changing society. Therefore, most – we are tempted to say all – jurists tend to look for precision and specificity in the law solely in the semantics of verbal formulations.

We propose that the legal ambiguity, or at least the potential for ambiguity, is located not in language or abuse of law but in the domain of legitimate use. We propose that every provision of law, once set loose, is a candidate for any use to which it might lend itself. Lawyers, judges, and above all, legislators will probably be very uncomfortable with the idea that they can never be certain of what they beget no matter how carefully they attend to the act of creation. Legislators, after all, create certain law enforcement authorities, and they invest them with precisely measured amounts and kinds of duties and powers to implement the carefully formulated mandate. But circumstances appear to play havoc with these designs, and the likelihood of this happening increases with the conscientiousness of the law enforcement agents. It is odd that legislators should find this state of affairs alarming; they understand very well that laws have history within which their meaning and use change, often quite radically (Chambliss, 1964; Hall, 1935). If history is to take place, then law must necessarily be a multiuse contrivance with a permanently uncertain meaning. All law enforcement operates on this basis.

The view we propose entails a somewhat different ontology than would seem to underlie most philosophies of law. According to common conceptions, valid law is constantly ‘in force.’ It makes theft continuously punishable, and the prosecution of thieves merely makes the episodic effects of this permanent presence visible. Like the force of gravity, which is present even while nothing is falling, so the force of law abides in its realm. Contrary to this view, we propose to find the reality of law contained wholly in its uses; it exists, so to speak, solely in being wielded.

Of course, people do not become oblivious to the existence of the law in between its uses. Quite the contrary; they ordinarily conduct their affairs in more or less calculated anticipation of possible use (see Holmes, 1897), but this calculation of possible use looks to law in action. For our purposes it is of central importance that while much of the use that will actually come to pass can be anticipated, a great deal cannot be anticipated.

Who could have predicted that the action of *replevin*, which was devised in medieval England for the protection of agricultural leaseholders against landlords who detained their cattle, would lend itself to use by landlords against leaseholders engaged in lumbering in nineteenth-century Wisconsin? (Pollock and Maitland, 1968: 577–78; Hurst, 1964: 345). In between those uses, or any other uses that may have taken place in between, the action of *replevin* cannot be said to have existed in an effective sense. Of course history, the memory of past events, the continuity of jurisprudence, the lawyer’s skill, and so on kept it potentially

available. But no one could say with any degree of assurance what it might avail to an inventive user. These considerations are the stock in trade of legal historians, and all lawyers know enough about it to accept its truth unquestioningly. But the idea that present law must be capable of change is much more difficult to accept, though it is perfectly clear that change does not come about through deliberate enactments and abrogations alone.

Our view is that laws have at the incident of their creation a specifically intended design; in times past when legal norms were contained in decisions, the case contained the design, which led to the formation of a jurisprudence of precedent. It should not come as a surprise that a law's intended use is prominent among its actual uses, especially in those cases in which the intended use is financed by being made some people's occupation. But there are always other users who may lay claim to the law in ways that suit their purpose, including people to whom the possibility of invoking the law serves as an all-purpose threat or polemic leverage. We think that definitions of the law that take into account solely that meaning that is expressed in patterns of intended use, while disregarding meanings that emerge from the study of actual use, fall far short of acceptable standards of empirical inquiry. In fact, they fall short of the practical wisdom of the person who engages a lawyer in the expectation that the lawyer will find some legal basis for doing whatever he or she has in mind. To that person the invoked provision of the law will surely mean what it does for him or her, and he or she will have only an idle interest in what it may have meant to its maker.

We end on a note of caution. It is most certainly not our view that all provisions of law are open to all kinds of uses at all times. In fact, with respect to this problem our views are probably much more conservative than those of the classics of American Realism. At any moment, the use of the law for various purposes is, even if quite varied, quite stringently limited, and we think it is owing to this circumstance that one can earn a handsome income in the skilful practice of law.

NOTES

1. The data on which this article is based were collected as part of an extensive study of the Massachusetts Attorney General's Office of Consumer Protection. Participant observation, interviewing, and record searches were employed to describe and document the operations of this agency. Observation was conducted on a daily basis for one year, followed by three years of monthly and then quarterly visits. All cases that came to the Attorney General's office between 1968 and 1974, and for which records existed, were reviewed along with the accompanying reports of investigators and attorneys. A minimum of four hours of private interviews were conducted with each member of the staff, whose numbers increased

during this time from fifteen to over thirty persons. Members of legislative committees, other divisions in the Attorney General's office, and other consumer protection agencies in the Commonwealth were also interviewed. The research was undertaken to answer, within the context of a single case study, several questions about the availability and uses of legal resources including the patterns and organization of law enforcement work.

2. Lack of functional differentiation became a problem for the division. The lawyers' morale fell as they began to question their professional contribution and role in the division. Turnover was high, much higher than among the investigators. Lawyers in the Attorney General's office regarded their job as a first step on an ambitious career ladder but found the experience disappointing. Although the job provided opportunities to develop associations and contacts that would help develop a successful legal career, the actual work in the office did not seem to require or develop the legal skills necessary to succeed in a legal career. Katz (1978) observes that it was also difficult for legal services lawyers to sustain involvement because of the 'pressures toward routine handling of cases that derive from the expectations of clients, their adversaries, and opposing counsel,' which were also present in the CPD.

3. The Massachusetts CPD is similar to agencies in many other states, although the authorizing mandate in Massachusetts, at the time of its enactment, was considered by the FTC and the Committee on Suggested State Legislation to be the most far-reaching consumer protection statute in the nation. Equally strong and broadly conceived legislation has been adopted in five other states. Ten states have adopted similar legislation, with slightly altered wording, that supplements state fraud statutes. The agency that Steele (1975a) studied operated under this more limited mandate. The Illinois bureau, however, was one of the best financed and staffed in the nation. The Massachusetts CPD, in contrast, operated with one-third the number of attorneys, one-third the clerical help, and two additional investigators. In relation to other consumer protection agencies, Massachusetts' staffing exceeded that of 25 states. Its policy of case-by-case resolution of individual consumer complaints was also similar to policies in other states (National Association of Attorneys General, 1971: 399,417). Spanogle and Rohner (1979: 559) suggest that a strong and comprehensive consumer protection statute should provide mechanisms to deal with present, past, and future consumer transactions. An agency should have procedures (1) to discover violations, to obtain compliance, and to inform the public; (2) to seek redress of past violations, to enjoin enforcement of prohibited contract clauses, to require refunds for overcharges, and to obtain rescission or cancellation of prohibited contracts; (3) to serve as a strong deterrent to future violations. The Massachusetts statute contained some but not all of the provisions Spanogle and Rohner propose. The statute did not provide for the agency to recover its own investigatory or litigation expenses and thus did not provide to fend off dilatory tactics by violators. The statute provided a limited deterrent only in terms of treble damages and possible abrogation of the right to do

business in the commonwealth. Enforcement practices quickly mitigated the force of even this deterrent.

4. From 1970 through 1975, the Consumer Protection Division logged 65,525 consumer complaints. The files of complaints were very uneven in content and no pattern could be discerned to explain their variation. Moreover, the statistical records of the office were equally uneven and the workload numbers that are offered are derived from both in-house estimates, our own counting, and the officially published response of the Attorney General (Silbey, 1981). These figures are the result of a complete search of the Attorney General's records. However, no file could be found that recorded the formal litigation of the office, the assurances of discontinuance, bills of complaint, judgments, injunctions obtained, subpoenas served, and so forth. Indeed, no separate record was kept. There were no records of formal litigation whatsoever, except those that were serendipitously found within the records of consumer complaints. A search of the records in the Superior Court produced 26 assurances of discontinuance from 1968 through 1971. Further inquiry revealed that there were considerably fewer assurances obtained during the next three years, and the memories of staff members could support evidence of only three additional actions. Further inquiry produced no additional results. The last correspondence (July 1977) from the Chief of the Consumer Protection Division stated: 'The statistical material you inquired about, bills of complaint, assurances etc. were never kept.' The office's accounts are helpful, nonetheless. They provide a picture of the marketplace of consumer transactions and grievances: 30% of all complaints involved the automobile industry, 10% involved home improvements, and the remaining 60% were distributed over twenty other industries, with none receiving more than 3% of the complaints. The distribution of complaints by industry is suggestive in terms of areas of particular concern to consumers; it may not, however, depict actual occurrences of deception as it suggests the importance of particular transactions in terms of cost, perception of misrepresentation and availability of remedy, and effect on life style and the like (see Best and Andreasen, 1976, 1977).

5. The quotes are from staff members, whenever not otherwise referenced.

6. Most cases that come to the CPD do not involve easily identifiable and recognized illegal practices. In many cases there are no clear or unquestionable rights or illegal practices involved on either side. Most issues fall in a gray zone of yet unspecified deceptions, probable deceptions, and disagreements that have not been sufficiently generalized to be categorized as deceptions. They await codification as recognized or specific misrepresentations either through litigation or regulation. Common consumer complaints are often the product of the breakdown of consumer business relations for which the law provides no clear or possible remedy (see Ross and Littlefield, 1978; Caplovitz, 1963; Andreasen, 1975; Best and Andreasen, 1976; Nader and Shugart, 1980). The specific strengths of the Massachusetts statute and the motivation behind its enforcement strategy (Silbey, 1981) reflected a widely shared belief that a certain number of consumer business disagreements were inevitable. No one was to blame for them (see Greenberg, 1980; Ryan, 1976; Silbey,

1978). Nevertheless, there was little reason to believe that the law would have been vague under judicial interpretation. True, the prohibitions are broad and were intended to be so, requiring successive delineations with experience and time. However, the records of the legislative committee author and supporters of the original bill are clear about the intended meaning of this language (Greenberg, 1967, 1968; Meade, 1968; Dixon, 1966). Moreover, the terms of the statute correspond to the language of the Federal Trade Commission Act, and while its provisions may not be the best illustration of clarity (Spanogle and Rohner, 1979), there are forty years of case law to support it. The staff of the CPD – an inexperienced legal staff for a long time – felt unsure of their own skills and often attributed their reticence to proceed formally to the language of the law.

7. Knowledge of the procedures and activities of the CPD is not general: some businesspersons are not well enough informed about the office's practices to give them the upper hand in negotiations. This lack of information augments the bargaining position of the CPD. First-time offenders and infrequent violators of the law incur greater liabilities because of their lack of knowledge and experience of the office's methods. Small businesses are also more likely than large ones to accommodate to the demands of the CPD because legal resources, skills, and knowledge of the system are proportionately more expensive for them to acquire (Galanter, 1974, 1975; see also Newman, 1956).

Consider, for example, the remarks of two private attorneys who had different experiences with CPD. An attorney with a prestigious law firm who had only one experience with the division stated: 'I was under the impression without checking into it that the Division was quite aggressive. They certainly call often enough; in fact they do not leave you alone even when it's just a simple matter.' The annoyance of demanding phone calls is indeed one of the staff's major tactical weapons; it creates the image of aggressive enforcement. Another attorney who represented a national corporation against whom there was a continuing series of complaints gave this advice: 'Just go along with them on each case, nothing much will happen'.

8. Although an emphasis on resolving complaints need not necessarily lead to restitution goals, it may suggest equal treatment to both sides. Nevertheless, equal treatment also suggests a transformation from a mechanism for advocating consumer interests to a mechanism for compromising business and consumer claims. In principle, the agency could turn against a consumer, and therefore against restitution. This is done by not accepting some complaints on the grounds that they are totally without need or justice. Once accepted, however, resolution necessarily means obtaining some refund, service, or savings.

9. In a study of the procedures used by automobile dealers to alter the balance of power between themselves and the manufacturers who franchise them, Macaulay (1966) argued that the effectiveness of formal licensing systems prompted the development of effective informal systems of settlement and compromise. He suggested that the informal systems were much more effective than formal hearings and judicial review. Nevertheless, without those formal mechanisms, the informal negotiating system would never have developed.

10. See Massachusetts Legislative Documents (1970: H.5645, 1971: H.4043, 4047, 4250, 4252) plus seven other bills that became H.5089.

11. The omnibus consumer protection statute, without a list of specific prohibitions and with the broad definition of proscribed practices (any practice that has the capacity or tendency to deceive), was specifically designed to remedy the disadvantages to enforcement and litigation inherent in a list of named proscribed behaviors contained in fraud statutes. Similar considerations were also at work with regard to truth-in-lending legislation (see *Iowa Law Review*, 1967; Traylor, 1969; Callman, 1950: 310; Landers, 1977).

12. There is no intention here to imply any crusading motivation among the staff. Zeal may be present in one or another case but is rarely an accurate description of their attitudes toward consumer protection generally. The officials' advocacy of increased statutory regulation of business practices is a direct response to the difficulties they encounter in negotiating settlements. Perhaps it is also a product of the political climate (1968–1974). Their difficulties arise both from their belief in the novelty of this statute, and therefore from the fear of pushing too hard lest the courts strike it down, and from their own operating practices and policies. Marver Bernstein (1955) noted a similar reluctance to test new legislation on the part of independent regulatory commission staff. Moreover, the perception that more regulation is needed is ironic, because it stands in opposition to the staff's more general support of business interests and existing organization of the market.

13. This activity will decrease as such regulations become incorporated into normal practice. The increasing notification to consumers by businesses of their rights and opportunities under such laws is a signal of this normalization.

14. Landers (1977) suggests that few consumers begin a truth-in-lending suit with a genuine disclosure problem. He surveyed 45 such suits to determine how they originated. He found that 21 (46%) began because the consumer was simply unable to pay the debt because of financial difficulties; 14 (31%) were the result of contractual or warranty issues having to do with dissatisfaction with the product or service; the rest of the cases fell into several categories having to do with unsatisfactory credit terms and factual disputes about whether the consumer was behind in payments. Very few consumers actually were aware of their rights under the law and brought actions directly because of this knowledge.

15. See generally, Jaffee (1965). It is well known that the zealous agent who runs out of authorized means tends to fall back on the use of unauthorized means. This raises all sorts of problems that are beyond the scope of this essay. We focused on the fact that the law itself is available for these purposes. Admittedly, the inequality of ability to hold agents to strict accountability or total stringency in law enforcement is a reflection of the liberal dilemma inherent in formal systems of law. We leave that aside for the moment. We also leave aside the effect of official corruption and abuse.

16. See Sally Moore (1973: 728) 'Were it not for the legal right of the contractor to collect promptly the bills owed him by the jobber, his restraint in not pressing for collection would

not be a favor. It is because he has the legal right to collect and does not do so that he has something to give.'

17. A story on the CBS program *60 Minutes* illustrated in a graphic and dramatic fashion the policies of the CPD. The story concerned the practices of a home-building company operating in Massachusetts. After consumers made down payments and purchased homes built by this company, their houses were either not completed, or they found that the workmanship and condition of the houses were not as they had been represented at the time of sale. The houses also did not conform to the company's advertised building standards and some houses, although approved by the building inspectors, failed to meet building codes. The homes were sold by a local and well-known realtor who disavowed any knowledge of a history of poor business practice by the contractor. Reporters for CBS interviewed members of the Attorney General's office. They were told that the company was under investigation. CBS implied in the analysis that the realtor should have known more about the houses when she sold them. A week later, the realtor wrote to CBS and stated that when she inquired with the Attorney General about the contractor, the CPD refused to provide information. The Attorney General's staff replied to CBS that indeed they do not disclose to inquiring citizens anything about investigations in progress. Until the exposé by CBS, the Attorney General had handled this case in a manner consistent with its ordinary case practices. After the story appeared on television, the CPD announced that it was filing suit against the contractors. Without the national publicity, it is unlikely that the case would have received any unusual attention. Moreover, when the publicity subsides, it is most likely to be dropped or settled without further litigation. This situation has occurred in the past. The only difference this time, and it may be a considerable difference, will be the perseverance of CBS and the costs to the Attorney General of further adverse publicity (see Silbey, 1981).

18. Compare this notion to that of the pluralist theorists with respect to the less than full mobilization of the electorate as a check on radical change and as a reservoir of political resources that encourage political stability (e.g., Dahl, 1961, 1967; Lipset, 1959).

19. As is well known, the imposing edifice of our drug control laws was erected on the foundation of a tax measure (Lindesmith, 1967).

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