

7 THE CONSEQUENCES OF RESPONSIVE REGULATION

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Introduction

The public regulation of business for the common good has been declared a failure in America. A consensus has developed among scholars that things never quite work out as they ought when legislation is translated into administrative action. Much effort has been devoted to understanding how agencies mandated to serve the public become ineffective and indolent [Lowi, 1969; McConnell, 1966; Bernstein, 1955; Edelman, 1964; Shapiro, 1968; Herring, 1936; Leiserson, 1942; Kolko, 1965; Hamilton, 1957; Orren, 1974; Stone, 1975; Huntington, 1952; Morgan, 1952; Huntington et al, 1953; Argyris, 1978; Lilley and Miller, 1977]. Why do public regulatory agencies seem to serve the interests they were designed to regulate and control?

Various explanations have been suggested. These explanations range from analyses of the symbolic nature of a legislative process that produces inconsistent mandates [Edelman, 1964], to analyses of the segmented structure of a system that encourages a division of the commonweal among interested parties to the exclusion of the unorganized public [Lowi, 1969; 1978]. Examinations of organizational activity emphasize the rational dynamics of decision making and the self-maintenance functions of organizational behavior. Traditional diffidence about

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rigorous enforcement is attributed to limited resources, and sometimes to mediocre personnel. Resource constraints cause litigation delays and encourage a standard of performance that rests upon closing files rather than winning cases [Ross, 1970]. The result is a pattern of enforcement characterized by weak commitment and high turnover in cases and personnel.

It has been suggested that excessive discretion, especially among low ranking "street-level" agents entrusted with day-to-day enforcement responsibilities impedes the efficacy of regulatory schemes [Davis, 1969; 1972; Lipsky, 1976; 1980; Wilson, 1973; 1978]. Uncontrolled discretion undermines the rule of law because, irrespective of resource and organizational capabilities, it leads to lax, inconsistent, and unfair enforcement. Discretion is responsible for the intrusion of nonlegal and political considerations into the regulatory process. The response to the discovery of discretion has been proposals for more formal control through rulemaking to confine, structure and review administrative and law enforcement discretion [Davis, 1969; 1972; Lowi, 1969; 1978].

Kagan suggests that the enforcement style of governmental regulators and inspectorates has changed as a result of demands for greater control of discretion. Where regulators had been flexible and cooperative, they have become inflexible and legalistic. "The shift has been away from a traditional enforcement style that relied heavily on persuasion, warnings and informal negotiations, and towards a legalistic style that stresses strict application of legal regulations and prompt imposition of heavier legal sanctions for all detected violations" [Kagan, 1980:1]. While it is not clear how pervasive this "new" enforcement style is, Kagan is no more sanguine about the prospects of legalistic enforcement for effective regulation than others have been about cooperative efforts.

The thesis of this chapter is that the "failure" of public regulation is the result of the responsiveness of regulatory agencies to their public constituencies. The problems of public regulation are not located solely within the internal structure of the agencies themselves, so that if one reorganized an office, one could predict the consequences for law enforcement. Regulation is produced from the interaction of an agency with other organizations and its environment. Poor organization and inadequate resources may contribute to ineffective regulation but do not fully account for it. It is not simply a matter of excess discretion or legalization; nor can public regulation be adequately described as subversion, dereliction, or incompetence. The apparent failure of public regulation persists because many things happen along the way from mandate to implementation that are reasonable and consistent with empirical as well as legal demands. These activities are seen as evidence of regulatory failure because they produce no unidirectional policy; competing demands engender responses that are not in a single direction.

The daily activities of officials are not specifically authorized by a governing mandate although they are undertaken to achieve it. They are not irrational within

the agent's interpretation of the mandate because they are responsive to articulated demands for service, including the demand for regulation. In fact, they are the agent's interpretation of the mandate. Nevertheless, it does not make sense to think of these activities that fully occupy inspectorates and law enforcement offices as goals of regulation; and the consequences of responsive organizations cannot be measured as a direct relationship between means and ends. This provides an overrationalized conception of organizational behavior. Rather, policy implementation must be viewed as a series of adjustments and responses.

This chapter describes how a particular law enforcement agency responded to the competing demands of its environment by incorporating them within its implementation strategy. It focuses on one aspect of consumer protection practice — the adoption and consequences of a policy of case-by-case mediation of consumer complaints. The mediation of consumer complaints became the behavioral and legal mechanism through which private interests influenced their own regulation, thus constituting cooperation between regulators and the regulated. By meeting the demands of competing constituencies, the Massachusetts Consumer Protection Division (CPD) replicated the relations between consumer and business that public policies were designed to regulate. This thesis suggests that the normal operations of responsive organizations account for the patterns and "failure" of public regulation.

A Mandate for Consumer Protection

The Massachusetts Consumer Protection Act (Mass. Gen. Laws Ann. ch. 93A) was the culmination of a long history of trying to define the rights of consumers under law. The process is older than capitalism itself, and contemporary efforts to provide consumer protection through state regulation are a response to earlier attempts to correct market failures and abuses. These thrived in an environment that was hostile to ventures that would bolster the legal protection of consumer interests at the expense of the prevailing organization of the market.

Consumer protection is not a modern notion. It goes back to classical and medieval times when regulation of trade based upon religious and social precepts was common. *Caveat emptor*, the antithesis of consumer protection, is the by-product and symbol of the emergence of the market economy¹. Neither existed before the last 400 years. They were historically new and radical concepts that, despite concerted attacks by the growth of the welfare state, continue to characterize the moral and social ordering of consumer business relations.

Caveat emptor incorporated the rising spirit of individualism into the law of market relations by expressing the principle that the consumer would heretofore bargain in the marketplace without any legal protection.² It is understood to be an

ordinary rule of prudence, urging the reasonable person to use his or her faculties to assess the quality and quantity of the goods he or she purchases. The significance of the concept lies not so much in the meaning of its words, however, but in the social and economic policy of which it is a graphic symbol³.

Caveat emptor and the market economy were consistent with the dominant philosophy of the Enlightenment and of emerging liberalism — a conscious abandonment of each individual to his or her own devices with a minimum of control, a minimum of standards of fair practice, and consequently, maximal individual autonomy. The belief prevailed that the aggregated consequences of each individual acting independently as agent and arbiter of his own interests achieved the common good of all, which was, after all, the achieving of the unfettered exercise of self-interest and the satisfaction of human wants. The market was the most efficient and effective mechanism for securing individual wants and interests because it was self-regulating. The self-interested buyer would not patronize for long purveyors of shoddy merchandise, thus driving out the unscrupulous and rewarding the honest and productive tradesman.

The context of contemporary consumer protection emerges from two empirical qualifications upon the classical model of the market. First, the self-regulation of the market was a myth. From the outset, the market economy was founded upon aggressive legislative activity, and its self-regulation has always depended upon protective legislation. Measures were needed to control the effects of periodic traumas due to unstable currencies, inflationary spirals, monopolies, and the like. A critical tension emerged between the free market and its consequences.

Second, *if ever there were localized conditions where the model of the free market approximated empirical reality, the modern world is a changed place*. It is questionable whether the consumer's even unencumbered wants are actually reflected in market choices. Technological advances have rapidly increased the development of new and complex products and the cost of information about these commodities has been significantly increased by the subtlety and intricacy of the information. Under present conditions there are too many products, the information is too sophisticated, and the market may not be sufficiently open and competitive in important areas to drive out inferior products and services. Critical expenditures involving large sums of money or life itself may be one-time, nonrepetitive transactions. In these cases errors of information are costly, and yet may not be avoidable. In principle and in fact, all consumer problems are generated by just this issue — the difficulty of obtaining reliable information in order to make rational market choices. Thus, consumer protection activities are about securing more and better consumer information.

Caveat emptor, although firmly established in English and American law, has never been so absolute as to deny the possibility for limited remedies against some market losses [Morrow, 1940; Traylor, 1969]. Private remedies at law for deceit

and misrepresentation, scores of *malum prohibitum* statutes, licensing and registration regulations, federal regulation of business, and assorted claims adjustment services offered a range of remedies for consumers [*University of Pennsylvania Law Review*, 1966; Rice, 1968; *Columbia Law Review*, 1956; Llewellyn, 1936; Williston, 1948]. Yet these private legal remedies, mediating agencies and public attempts at prospective regulation did not effectively meet the needs of consumer protection. The costs were too high, the proof too difficult, the enforcement too inadequate, and the machinery of administration and judicial review too cumbersome.

The time had come for a new approach: the climate was ripe for consumer protection. By this time, the Commonwealth of Massachusetts had three years experience with a consumer's council of advisors to the governor, and a small consumer protection agency in the attorney general's department that was established by administrative fiat, without statutory authority. In recent sessions of the legislature, several bills had been submitted urging study and investigation of the laws relative to unfair methods of competition and deception in the Commonwealth [Silbey, 1978: chap. 3]. These were symptomatic of the general attention consumer protection received during the 1960s. Ralph Nader had begun his campaign against unsafe automobiles and developed this interest into a sustained research and publicity effort directed at the efficacy of government regulation for consumers. In 1963, David Caplovitz's *The Poor Pay More* was published and commanded attention as the first systematic inquiry into the plight of low-income consumers. In 1966 Congress passed five consumer laws, whereas it had passed only two between 1962 and 1965. Consideration was given to creating a department of consumer affairs, and Senator Warren Magnuson was conducting investigations into what he called the "dark side of the marketplace" [Magnuson and Carper, 1968]. In 1964 the president appointed a committee on consumer interests to monitor and report on consumer problems [Nadel, 1971].

The consequences of these efforts were to mobilize public support on behalf of consumers and to raise to the fore two principal concerns: (1) the inability of consumers to obtain satisfaction either through the market in terms of reliable products and services or to obtain satisfaction through existing remedies for the failure of these products and services, and (2) the especially acute economic plight of less advantaged consumers whose position was exacerbated through lack of knowledge on how and where to shop, lack of capital to make cash purchases or obtain favorable credit, lack of access to alternative markets, and lack of access to the legal system.

Massachusetts had taken a large step toward providing broader statutory protection for consumer interests the year before with the passage of a truth-in-lending retail installment sales act. The lines of battle had been drawn; consumers had won when the bills had been passed over vociferous and organized opposition. Now in

1966, some members of the legislature wanted to provide a resource to handle consumer problems in a general and comprehensive manner. But, the passage of Chapter 93A of the Massachusetts General Laws cannot be said to represent any clear set of interests. True, it was designed by its author, and supported by the Federal Trade Commission (FTC), in order to provide a new kind of remedy for consumers through programmatic prosecutions against consumer frauds, and through intervention in unsatisfactory transactions where fraud was often a rarity.

But the leadership of the Massachusetts legislature could hardly have been considered consumer advocates, and yet, without their support there would have been no consumer protection act. The leadership rose from the ranks of the Democratic party regulars whose base of support lay in the inner core of the state's cities. By 1967, they were an entrenched, yet threatened leadership, who appeared to be conservative, lethargic, and corruption-ridden collaborators with powerful business and private interest groups in the state. The party leadership was challenged by a growing coalition of representatives who, supported by the burgeoning suburban middle class, were seeking to wrest control of Massachusetts politics from the State House politicians [Litt, 1965; Mayhew, 1968]. Consumer protection seemed to be an inevitability; it was just a matter of how and when. Therefore, it was an issue that the leadership had to support; they could worry about its implications at some future, less observed, moment. The legislation was finally enacted with support from both liberal and conservative factions.

When there is unanimous assent for a piece of legislation, the how and when — the technical mechanics and details — become extremely pertinent. In this instance, the supporters of the bill joined the bill's natural opponents in rewriting it to accommodate the claims and demands of represented, organized interests. Major corporations in the state resolved, through the Associated Industries of Massachusetts, to support the legislation while working to limit its effect. Language was inserted that gave businessmen opportunities to challenge and delay enforcement.

Nevertheless, the bill almost died, not from public exposure and public opposition, of which it received very little, but because it was buried in the deepest recesses of the legislature. Various explanations have been offered to account for the fact that a bill that apparently had public support from all quarters was languishing deep in the legislative process: organizational rivalries between the Better Business Bureau and an aggressive new consumer protection agency, fear of a power grab by the popular attorney general, and undercover opposition by business groups unwilling to publicly denounce the bill. Its eventual passage has been attributed to the power of appeals to the public interest and to the demands of political ambition. It was just not the time to oppose consumer protection. The threat of public notice on those who were bottling it up after bipartisan consensus had been reached was sufficient to bring it to the floor for the unanimous vote.

It is not accurate to say that the Consumer Protection Act fulfilled a single or unidirectional purpose. In any case, statutes are best understood as opportunities, not prescriptions. This much was clear to the participants active in the process of writing and promulgating Chapter 93A. The statute seemed to open the way for aggressive action on behalf of consumers and came to be regarded as a very progressive piece of legislation. Observers understood, however, that the law's effectiveness would depend upon the nature of its enforcement [National Association of Attorneys General, 1971: 441; Steele, 1975a]. As an opportunity, the statute itself created only a pressure on the political system, rather than channels or fixed routes for public administration. The interesting issue concerns how enforcement policy was organized, structured, and worked out in practice.

Implementing a Mandate for Consumer Protection: Case-by-Case Mediation of Consumer Complaints

The major contribution of the Consumer Protection Act was the establishment of an agency, under the attorney general, specifically mandated to protect the consuming public from deceptive and misrepresentative trade practices. The legislation delegates to the CPD the tasks of investigating consumer complaints concerning 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 supplementary rules and regulations.

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 of treble damages); (3) to file motions requesting the imposition of fines of up to \$10,000 for the violation of injunctions; (4) to initiate a 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 \$5,000 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 a 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 a 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 [Mass. Gen. Law. ANN. ch. 93A].

To implement the Consumer Protection Act, the attorney general's staff adopted a policy of attempting some resolution of all consumer complaints re-

ceived. Case-by-case investigation and negotiation of complaints is a widely used mode of enforcement [Palamountain, 1965; Cox, 1969; Bardach and Kagan, 1982]. Although other complaint handling agencies seem regularly to screen complaints [Nader, 1980; Serber, 1980], government agencies whose primary function is consumer protection generally do so less frequently [Steele, 1975a; 1975b; King and Mc Evoy, 1976; NAAG, 1971; Cranston, 1979]. The policy of the CPD was typical in this regard.

A policy of case-by-case investigation means that the activities of the CPD are set into motion by complaining consumers. Thus, for example, people who feel that they have been shortchanged in their dealings with trademen or merchants, or people who feel that they have been illegally and/or unfairly deprived of something they felt entitled to in some business dealings, came to the CPD seeking redress. The lawyers and investigators spent of their time processing cases: investigating, negotiating, and resolving consumer complaints. The agency's activities were reactive and followed the victimized consumer's perception of where protection was needed rather than the more direct enforcement policies that are explicitly authorized by the act. As a result, consumer protection was limited to ordering priorities in incoming business.

A case-by-case approach to consumer protection was responsive to several demands. First, it provided immediate help for consumers, thus overcoming the inadequacies of earlier consumer protection efforts which relied upon criminal enforcement or private legal actions [*Harvard Law Review*, 1967; *University of Pennsylvania Law Review*, 1966; Ball and Friedman, 1965; Kadish, 1963; Callman, 1948]. Criminal sanctions were rarely enforced and provided no redress for individual losses. Private legal actions were so costly as to be largely unavailable. The successful resolution of a consumer complaint by the attorney general's office meant that the consumer received a specific saving or refund. Consumers as a class have an interest in ending deceptive trade practices; but individual consumers who suffer a loss due to a misrepresentative transaction are primarily interested in what can be done for them. Effective consumer protection had to meet these individual consumer interests as well as deal with the generalized patterns of abuse. The CPD decided to become that place in government where the consumer could be assured of representation. As a first step, the agency chose to focus on the consumer's immediate demand for redress, on dispute resolution rather than law enforcement, on the needs and demands of the complaining consumers rather than the violation of standards of business conduct as such.

At the same time, case-by-case mediation of consumer complaints was responsive to a highly politicized environment. The attorney general was sensitive to the interests of active and supportive constituents such as the Associated Industries of Massachusetts. He did not wish to alienate the business community without whose support he could not be reelected and without whose cooperation he could not affect the nature of routine business transactions. Business interests had little

reason to feel threatened. Faced with the demands of vocal consumer groups and the fears of powerful business interests, the policy of case-by-case mediation eliminated the politically hazardous problem of choosing sides. The personnel of the CPD refused to describe themselves as consumer advocates.

The CPD's policy reflected a benign view of business practices as unintentionally disadvantageous to consumers. Businessmen were not depicted as sly and predatory schemers who defrauded unwary and innocent victim-consumers. Rather, consumer grievances were the result of a dynamic market beyond any individual's control, the result of breaches of contract, misunderstandings, inevitable failure of communication, and unintentional human error. Admittedly, some losses resulted from illegal activities, but these were few in number. Most businessmen, however, are honest. Moreover, the line between fraudulent practices and acceptable activities is so unclear that punitive law enforcement was not the appropriate response. Where losses and disputes occurred, the CPD would intervene on a case-by-case basis to help promote profitable and equitable relations between consumers and business.

Moreover, case-by-case mediation also seemed to reflect the ultimate goal of consumer protection: controlling deceptive practices and driving incorrigible transgressors out of business. The Consumer Protection Act was specifically directed against patterns of deception and contains increasingly serious penalties for "repeating," "continual," and "habitual" offenders. A complete record of the results of investigation, the determinations of violations, and the resolution of complaints is crucial for implementing the provisions of the law. Therefore, the first problem for any administrator of this statute was how to bring the enforcers of the law and the instances of misrepresentation together. If the staff allowed the deceived consumers to bring their complaints to the attorney general, the CPD would not only help the individual consumer and correct troublesome (but not necessarily illegal) trade practices, but they would also identify and possibly prosecute violators of the law. Any other policy, such as programmatic prosecution, industry-by-industry attack on consumer fraud, or emphasis on proactive consumer education would also require accumulation of some history of consumer practices within the state. The case-by-case approach provided the necessary first step toward any policy of consumer protection.

The policy for consumer protection also took account of CPD's limited resources. The CPD began with essentially no administrative or legal precedent, an inexperienced staff, and few organizational resources. "The heavy investment of resources required to use formal institutions to resolve disputes created pressure to resolve them by more informal means," such as case by case negotiation [Steele, 1975a:1116; Serber, 1980; Macaulay, 1963; 1966; Cranston, 1979].

Indeed, the CPD was characterized by a lack of coordination and leadership. There was little differentiation of roles; channels of communication were haphazard and irregular. Investigation of consumer complaints was, from 1968

through 1975, the responsibility of both attorneys and "investigator" staff members who were usually not members of the bar. There was no formal division of labor, such that investigation of complaints was reserved for those members of the staff who were designated as "investigators". Attorneys had, in addition to their responsibility for the office's formal legal work (e.g. the preparation of subpoenas, bills of complaint, briefs on a variety of subjects), obligations to investigate and mediate consumer complaints. Because formal action by the division was limited, investigation of complaints was a primary responsibility of attorneys and "investigators."

Although the entire staff reported directly to the chief of the division, the assistant attorney general for consumer protection, their discretion was unchecked by any regular process of review. Very soon after its creation, the workload of the office grew beyond the ability of any chief to oversee the work of the entire staff. Resources for control such as sanctions, rewards, and incentives were lacking because the agents were either civil servants or political appointees. Moreover, members of the staff acknowledged that they were responsible only to the attorney general who had appointed them and not to the divisional chief who was responsible for their work. Yet because the attorney general was removed from the daily affairs of the division, he was also unable to review individual performance. Therefore, the investigators and attorneys operated as autonomous law enforcement units.

Initially, the case-by-case mediation policy seemed practical given the agency's resources. It provided the division with a sense of reasonable orderliness; officials knew what they had to do and knew why it had to be done.

The institution of a policy of case-by-case mediation forestalled a court test of the authorizing statute. The consumer protection act had dramatically altered the burden of proof between business and consumers, but the CPD attorneys were, nevertheless, reluctant to bring suits under the law before state court judges. They feared that the law's radical shift from earlier statutory precedents and common law traditions would not be understood or well received by a business-oriented judiciary.

Furthermore, they feared that the law would not be able to stand up against charges of vagueness. The statute summarily prohibited all deceptive and misrepresentative practices and all practices that had a tendency to deceive. The statute contained no additional language defining the proscribed activities. Since the law has remained virtually untested, it is difficult to resist the suspicion that this was a belief of convenience. It is true that most cases that come to the CPD do not involve easily identifiable and recognizable illegal practices. In many cases there are no clear or unquestionable rights or illegal practices involved on either side. Most issues fall into a grey zone of still unspecified deceptions, probable deceptions, or disagreements that have not yet been sufficiently generalized to be categorized as

misrepresentation 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; Caplowitz, 1963; Andreasen, 1975; Best and Andreasen, 1975; Nader, 1980]. The specific strengths of the Massachusetts statute reflected a belief that some unpatterned and undefinable consumer business disagreements were inevitable. The statute was purposely written to be as broad and encompassing as possible.

Nevertheless, there is little reason to believe that the law is vague under judicial interpretation. The terms correspond to the language of the Federal Trade Commission Act. The records of the legislation's author and of supporters of the original bill are clear about the intended meaning of this language [Greenberg, 1967, 1968; Meade, 1968; Shea, 1967; Dixon, 1966]. The process of explication has been continuing for 40 years at the FTC. But the staff of the CPD, especially a legal staff that was inexperienced for a long time, felt unsure of their own skills and often attributed their reluctance to proceed formally to the language of the law.

The policy of the CPD also seemed to respond to the fact that buying is far less methodically organized than selling. Because the character of many consumer transactions is haphazard and their terms, conditions, and circumstances unrecorded [see Macaulay, 1963], in any dispute settlement procedure, purveyors are better equipped than consumers 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, for most consumers, complaining is an unusual endeavor; for businesses, however, the handling of complaints is routine. Therefore, an informal mechanism that relied upon persuasion and negotiation rather than documentary proof and evidence was more likely to win tangible benefits for consumers.

In general, then, the staff of the CPD believed that the objectives of consumer protection were best served by responding to consumer complaints individually. For example, staff members argued that litigation could force tottering businesses, from whom the agency was able to wring compromise settlements, into bankruptcy. It could cost more to prepare a case for court than to convince offending businesses to settle. Litigation costs automatically reduce agency resources for mediating complaints, and the aggregate savings to the state's consumers would be reduced. Therefore, although the CPD was established to banish illicit practices from the marketplace, its routine work consisted of helping complaining consumers recoup losses. It was believed that with time, intercession by the attorney general on behalf of consumers would succeed in changing the marketplace. And in the meantime, the office was able to produce tangible results for the individual consumer where alternative enforcement strategies could produce less.

Indeed, in the period between May, 1968 and December, 1974, the CPD managed to function quite effectively without using any of its legal weapons. The office's effectiveness consisted of receiving, investigating, and disposing of between 250 and 400 complaints per week, more than half of which it resolved to the satisfaction of the complaining consumer⁴. These resolutions resulted in about 4 million dollars of restitutions and savings to consumers.

Though disposition of consumer protection cases may necessitate the use of subpoenas or other forms of legal coercion, routine cases are negotiated and concluded without employing formal legal process or punitive or restitutive authority⁵. The accomplishments of the CPD are products of laborious and frequently repetitious bargaining with businesses. This bargaining consists primarily of badgering businessmen, or convincing and often coercing them into making some sort of refund to complaining consumers [Silbey and Bittner, 1982]. Nearly 80 percent of consumers' complaints are silenced by securing a refund or restitution of some sort. The business practice that gave rise to the complaint is rarely addressed as a matter of interest in and of itself, or as a matter of possible interest to other consumers or the commonwealth. When a complaint is silenced, the case is completed [Silbey, 1981].

For example, consider the case of the Pontiac radiators. A consumer complained that the radiator in his six-month-old Pontiac cracked and that General Motors was unwilling to honor the warranty on the car. The manufacturer claimed that the device had been damaged by the consumer's negligence and misuse. The consumer had not used General Motors antifreeze or the equivalent as the owner's manual specified. But the manual did not describe an equivalent antifreeze and the consumer had used a nationally known brand. The investigator made numerous phone calls to Detroit to discuss the case with Pontiac's divisional counsel. He learned that General Motors had complaints from other consumers in Massachusetts, as well as from consumers in other states. He also learned that attorneys general in other states were initiating action against Pontiac on several grounds including deceptive practices. The investigator finally obtained an agreement from Pontiac to honor this consumer's warranty and to pay for any associated damages to the car. The investigator explained his success by saying that "Pontiac was on thin ice" and did not want to deal with yet another attorney general. The investigator was aware that General Motors had additional complaints from consumers in Massachusetts exactly like the one just settled. Yet he did not attempt to negotiate a settlement for them by having their radiators repaired, getting their money refunded, or securing a commitment to have the warranties honored now or in the future. The investigator commented: "It is not my affair. I do not have the complaints, and I am not going to dig them out and resurrect the dead."

This case is illustrative of the hundreds that are processed by the CPD each week. All cases begin with a complaint brought by an aggrieved consumer. When

an agent receives a complaint, he or she immediately contacts the respondent business to report that a consumer has lodged a complaint and that an investigation has begun. The investigator does little more than ask the parties what happened. After speaking to both the consumer and the business, the agent makes a decision about what the complaint actually involves.

The staff's freedom of action is literally unchecked with respect to the investigation of complaints because the assessment of whether a complaint contains grounds for negotiation or resolution is entirely the investigator's — in practice it is never reviewed. All future questions about how to handle this complaint, possible routes of negotiation, the prospects of litigation, and the probable and likely dispositions depend upon this initial evaluation.

The agent assesses the veracity and integrity of the parties; ordinarily, he or she will not pursue a case if the parties do not substantially agree about the facts [Silbey, 1981:863]. The investigator also assesses the legal issues presented by the stipulated facts. Often the law provides no clear remedy; most cases that come to the CPD do not involve obvious illegal practices or assertions of unquestionable rights. Nevertheless, even if the complaint alleges a clear violation of law, the investigator must determine whether and how to attack it within the variety of legal means available, and may decide not to proceed with this investigation [Wilcox, 1972; Black 1974:38; Davis, 1972:88; Bittner, 1974; Lobenthal, 1970; Macaulay, 1979]. In the process of making these evaluations, the investigator forms an attitude about the "justice" of a complaint, and the likelihood of resolving it successfully. The investigator's best efforts are reserved for those "good" cases which have the best chance of a satisfactory disposition.

After a preliminary inquiry an investigator has two options: to drop the case because it seems without merit, or to continue with the case seeking a satisfactory disposition. If the agent decides to continue the case, he or she begins to negotiate with the parties; investigation gives way to mediation. The negotiations may be simple and the complaint resolved with one or two phone calls, or they may involve many calls such as in the Pontiac radiator case. More often than not, cases remain open in the investigator's file for months. Letters and telephone calls have not succeeded in securing any refund for the consumer. The case has reached what agents call a "state of limbo". It is open, nothing is happening, and the parties seem unable to reach any resolution. Most cases are neither open or closed — they are indeterminate.

Consumer protection is an endless process. It is endless because most cases have no clear boundaries or inherent conclusions. If a case cannot be resolved immediately to the satisfaction of the complaining consumer, it is the agent's tolerance and the agent's threshold of satisfaction that is critical for resolution. Despite the reactive stance of the agency, it is not the interested party's threshold of action that determines case disposition. Cases can be closed and resolved without

grievances falling below the level of the consumer's or the businessman's interest because recourse to an alternative forum are costly and largely unavailable. Because consumer protection generally ends when the attorney general's agent closes a case, agents are reluctant to close cases unsatisfactorily. Thus, case mediation is frequently a series of impasses. The consumer wants his restitution, the business wants to be left alone, and the investigator wants a number to add to the office's record of success, i.e., satisfactorily closed cases. These interests govern case processing and militate against encouraging more consumers to complain, such as other Pontiac owners.

Consumer protection is also endless because complaints seemingly flow forever. There will always be more cases; there is no need to go looking for them. The endlessness of the case flow not only militated against looking for other like cases, it also worked against adopting other enforcement strategies. Once the attorney general began to accept consumer complaints, a reasonable decision in and of itself, the volume became overwhelming and the division became a victim of its own efforts: the more successful it was at resolving consumer complaints, the more complaints arrived and inundated the office. Coping with the flow of complaints required so much work that managing the cases fully occupied the office's resources. Consumer protection did not have to consist solely of case-by-case mediation; but once case-by-case mediation began, consumer protection ground to a halt. Coping with this first stage of consumer protection required so much work that, in effect, it co-opted any decision about what the job of consumer protection was to be.

Consequences of Responsive Implementation: Cooperation between Regulators and the Regulated

Both liberals and conservatives alike live comfortably with a public policy process in which power is delegated to those most immediately interested in it. It is a matter of incorporating parties having recognizably legitimate interests and effectively shutting out opposing positions and the public [See McConnell, 1963, 1966; Miller, 1959; Kolko, 1965, 1967; Weinstein, 1968; Weinstein and Eakins, 1970]. Participation replaces standards of implementation as contingency replaces law [Lowi, 1967:18]. This research suggests that the consequences of including private interests in the public policy process, in terms of problem definition and "self administration," is exacerbated by the effective incorporation of those same interests into the law enforcement process as well.

Mediation is generally regarded as a voluntary noncoercive process in which the third party has no power to impose a binding decision and relies upon the willingness of the parties to compromise. It allows an *equal* juxtaposition of the

interests of each party, unconstrained by normative or legal priorities such as those contained in the consumer protection act. Mediation, in contrast to adjudication, arbitration, or some form of structured aggregation of interests, *incorporates* perspectives, values, and interests of *each* party *into* the outcome, thus legitimizing and enfranchising conflicting perspectives without choosing between them. It transforms the mechanism, the consumer protection law and its enforcement agency, that was created to provide some balance between these unequal interests from a mechanism for representing consumer claims to an agency for mediating them. When informal conciliatory mechanisms such as mediation and negotiation are adopted as law enforcement strategies, they become the behavioral means of cooperation between regulators and the regulated. Mediation of grievances and consumer disputes becomes a means through which the demands and perspectives of business can be incorporated into the definition of consumer protection itself. It is just this, for example, that Kagan suggests is the virtue of cooperative rather than legalistic enforcement strategies [Kagan, 1980].

Of course, mediation by an attorney general's office is not an example of classic mediation. Here, third-party intervention is inherently coercive. The CPD has the ability, if not to impose a binding solution, at least to ask a court to impose a compulsory solution. But the attorney general is not omnipotent and people succeed in not being coerced. In a six-year period from 1968 to 1974, the attorney general pursued only four consumer complaints through formal litigation. Case processing in the CPD can be characterized as mediation because in the negotiation of consumer complaints, there is a real gain for both sides. The CPD tended to accept whatever the defendant offered that, at the same time, satisfied the complainant. The consumer received something that mollified his interest in complaining further; the business continued operating as in the past and at the same time silenced the complaining consumer.

The satisfactory resolution of consumer complaints has been defined by consumer protection officials as meeting the demands of the complaining consumer without recourse to formal litigation. It is the most consistent and time-consuming work of consumer protection offices [Cranston, 1979; Steele, 1975a, 1975b; Nader, 1981; Daynard, 1979; Ramsey, 1981]. Satisfaction or success means negotiating a settlement between an aggrieved party and an offender. Success, according to this policy, requires the cooperation of business; it necessitates securing for the consumer what he or she did not receive from the original transaction — the product or service or money refunded.

What consequences follow from this policy? Responsive regulation fails to make law general. To Fuller [1969], this is a critical variable for determining legality. To Lowi [1969], this is characteristic of the replacement of the commonweal by private interest groups. Indeed, this policy is a failure to enforce and apply the law. It reduces law enforcement to a circumstantial and private relation-

ship between the negotiating parties [Gulliver, 1973; Aubert, 1963] in which the public and third parties have no roles in this exclusive relationship. The elimination of public representation and the exclusivity of the negotiating situation are the most distinctive and telling aspects of cooperation. They are the key to understanding the practical meaning of public regulation.

Responsive regulation, by failing to make law general, incorporates business interests into law enforcement. Cooperative regulation protects trade because the market remains in the control of business. We have increasingly numerous accounts of the ways in which sellers accommodate customers through the complaint process [Ross and Littlefield, 1978]. This accommodation of business to the complaining consumer, encouraged, supported and facilitated by the CPD, also determines what relief will be granted. Thus, the level and extent of consumer protection depend in part on the goodwill of those against whom the protection is supposed to function. Through accommodation, the seller retains control over the outcome, thereby reducing additional costs of regulation [Ramsey, 1981].

By failing to make law general, consumer protection takes place in a sphere where one party is more powerful and where major advantages rest with business. First, the reliance upon case by case resolution of consumer complaints, that constitutes the major form of consumer protection in the United States, leaves the initiative with the complainant. Like the classical model of the market that consumer protection was intended to alter, case-by-case resolution of consumer problems relies upon the knowledge and aggressiveness of the consumer to obtain redress for unsatisfactory transactions. The consumer must bear the opportunity costs of satisfactory consumption, costs that are extraordinarily high in modern technological societies. Regulation is costly; it forces business to accept costs that have been heretofore "externalized".

The disaggregation of consumer complaints allows the business complained against to respond to consumer complaints individually. Although this may suggest that consumer complaints would therefore become more burdensome to business, because of their number, than if they were joined in their demands, it also allows a juxtaposition of the business's skills and resources to the consumer's already heavily taxed and diminished capabilities in the marketplace.

The accommodation inherent in cooperative and responsive regulation disguises political content by obscuring the inequality between consumers and business [see Abel, 1981]. For instance, an angry consumer confronting a mass seller or a recalcitrant merchant cannot help but see the confrontation as one of power. The mediation of the CPD transforms the dispute, making it appear to the consumer that the sides are now more evenly balanced. In other words, the seller, an adversary, is replaced by the mediator, apparently neutral (or even predisposed to the consumer) hiding the imbalance of the struggle. Of course, the individuation of grievances inherent in law disguises their political content. And yet, the

neutrality and passivity of negotiation and mediation in the attorney general's office allowed inequalities and power differentials to affect the outcome. Therefore, the disaggregation of issues, typical of the legal process, is exacerbated when mediation is used as a regulatory process.

Moreover, from the businessman's point of view, this policy makes consumer protection a new kind of tax on business activities. Traditional wisdom assumes that law functions either as a deterrent, in the sense that behavior will be changed to accommodate or at least take account of legal proscriptions, or in more contemporary analyses, as a factor to be considered in a cost analysis of doing business. For example, Malcolm Feeley suggests that law should be looked at as a means of altering the costs of engaging in certain activities; law should be viewed as a pricing system that is more elaborate than a simple calculus of compliance. "Law creates categories through which people must filter their thinking and organize their lives." It creates "a complex pricing system which not only puts a value on the wants people may be inclined to pursue, but also affects them indirectly in that people also must adjust their wants to the behavior of others whose preferences in turn are shaped by law" [1976:515; see Holmes, 1897].

When an investigator notifies a businessman that a complaint has been lodged against him, he usually responds to the attorney general's representative by saying, "I'll see what I can do." A few weeks or months later, the businessman may get another call, or perhaps he will never be called again. The consumer has given up; the attorney general's agent has other cases to pursue [Silbey, 1981]. But, if the businessman does receive a subsequent call, and he is induced to make a refund or perform some service, there is no assurance that he will have adopted practices that conform to law. The merchant will have acceded to this consumer's demand in this particular case.

The consumer protection agency, in this sense, acts not as a regulatory agency establishing rules and regulations for business practice, but more like a police officer giving out parking tickets to those parties who get caught violating the law [see Packer, 1968]. In nine out of ten unsatisfactory transactions, businesses will not be approached about a complaint by the consumer or by the attorney general's office [Best and Andreasen, 1976; 1977]. But if on that tenth time, the business is required by the CPD to make a refund, the satisfaction of this consumer's complaints acts as a fine that symbolically covers the other unsatisfactory transactions that were not complained about. The CPD will have functioned as a tax collection agency, and like all taxes that permit a business to continue its normal operation, the costs will be passed on to the consumer. Law enforcement can never get at all violators; in this case, regulation does not even control calculating violators.

There is a sense in which cooperation means not only achieving less compliance than what was hoped for or possible, but in also achieving something different than compliance. It means that cooperative regulation will be accommodating. It will

acclimate consumers to the ways of business; it will educate business to the demands of consumers. For example, a roofing contractor does more or less the same job at all times. If sometimes a roof leaks after it is installed, and if every once in a while he receives a complaint about poor workmanship from the attorney general's office, he will most likely regard these complaints as a nuisance. Will the roofer change the way he regularly does his job? A search of the literature suggests that the problems of the market are pervasive, small injuries, errors, miscalculations, and insufficiencies that are often unpredictable and irreparable [see Rice, 1968; University of Pennsylvania Law Review, 1966; Silbey, 1978; Best and Andreasen, 1976; 1977; Nader, 1980]. Is the effort to resolve these individual consumer complaints merely acclimating consumers to the realities of the market at the expense of providing structural remedies to correct the source of the problem? If the most pervasive problems of the market are really roofs that sometimes leak, automobile repairs that are only sometimes effective, and toasters that last only six months, can one realistically legislate corrections for consumer complaints in general? Are the efforts of the CPD to satisfy the complaining consumer providing Band-Aids and thereby creating a mechanism for accommodating the consumer to the prevailing organization of production and business? Is this not what cooperation really means?

Summary and Conclusion

The CPD adopted a policy of case-by-case 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 history under the legislation, and cross pressures of consumer and business lobbying. The CPD could help individual consumers with immediate needs hoping that eventually these would accumulate to change the market and improve generally the situation of all consumers. At the same time, the agency could begin to educate the business community about their responsibilities under the law, allow them opportunity to adjust their practices, and develop the voluntary compliance that would be necessary to actually change market conditions.

Often all parties were satisfied. The consumer received some moderation of his loss; the businessman met a particular consumer's demand without necessarily having to change ordinary practices, or respond to consumers who had not complained. And the attorney general's agent could claim one more consumer case satisfactorily resolved by the good efforts of this public office, thus testifying to the effectiveness of legal regulation. An issue, complaint, dispute, however one wishes to label the event, was resolved within the limited domain of these parties. The activities of the CPD reflected what the agency understood its mandate to be.

Nevertheless, the apparently mundane routine of mediating consumer complaints has cumulative and systematic effects, the clearest of which is the incorporation of business interests and perspectives into law enforcement processes. Dynamic responsiveness seems to protect the ongoing organization of business, its relationship to the consuming public and the distribution of power, rights, obligations and resources between them. Cooperative regulation protects trade because it continually uses up all available resources, and, in the case of consumer protection, does not address itself to the elimination of deceptive practices. It helps compensate complaining victims and the silencing of complaints protects the organization of trade.

In this chapter I have not meant to be ironic, nor to begrudge sympathy to those who claim that they are doing as well as could be expected. I have not argued that subversion of the law is intended; but neither is it unusual. Indeed, I have not suggested that consumer protection ought to be or can be "fixed up" at the point where individual case resolution is adopted as a policy. A reactive, complaint-based system does not necessarily preclude the possibility that an agency could take on bad business practices. The agency itself is a repeat player, after all, and can adjust its policies to reflect the consequences of its past strategies; policy implementation is cyclical and responsive in this way. Although changing case-by-case mediation to something else will change what consumer protection is, that too will entail its own consequences. Any form of regulation of trade will have its own consequences, and weaknesses.

Finally, it is important to ask if there is any value in responsive and cooperative regulation? Obviously there is.⁶ If there are situations where pro forma compliance does not achieve the intent of the law, for example, communication and protection of rights inherent in Miranda warnings or informed consent, then incremental and cooperative modes of regulation may be necessary. But where there are genuine abuses, questions of scale, repetitiveness and a desire for economy of effort, direct enforcement may be more effective [see Gifford, 1980]. The appropriateness of a particular enforcement strategy cannot be defined in advance; it will evolve in response to particular situations and mandates. However, the integration of mandates with environments requires a dynamic vision of social responsibility lest it degenerate into co-optation or unreasonableness. This tension is not easily resolved, because responsibility is not consonant with accountability and the requirements of law are not necessarily the requirements of justice.

Notes

1. *Caveat emptor* is latin and derived from *caveo*, to be on one's guard, to beware, or to avoid, and *emptor* is defined as a buyer or purchaser; thus, it can be translated as an injunction, to the buyer, to beware. The words are of Roman origin but were inconsistent with classical mores and law. If they were actual in Roman or later use, they must have had specific intent, limited usage and could never have been meant as a general rule, principle or philosophy (Hamilton, 1931: 1133, 1157).
2. *Caveat emptor* first appears in written works in 1534 in the course of a legal discussion by Fitzherbert on horse trading, "if he be tame and have been ryden upon, then caveat emptor". Fitzherbert further cautioned the "buyr to make make sure of the goodness of his bargain in horse flesh while yet there is time, if the horse be sold without a warranty it is 'at the other's peril', for his eyes and his taste ought to be his judge" (Hamilton, 1931: 1164). By the beginning of the seventeenth century the maxim is well known, and at least twice set down by Coke in his treatises. The commonly cited passage from Coke runs, "by the civil law every man is bound to warrant the things he selleth or conveyeth, albeit there is not express warranty, either in deed or in law; but the common law bindeth him not, for caveat emptor". The phrase is first discovered in the law reports in 1601 as an aside in a case concerning the ravishment of a wealthy ward (*Moore v. Hussey Hobart*, 93 *Eng. Rep.* 243) but it is in 1603 in *Chandelo v. Lopus*, 79 *Eng. Rep.* 3, that the principle of the vendor's nonresponsibility for his wares is formulated in such authoritative manner that it has been cited as the foundation for succeeding decisions over the centuries.
3. Since the *caveat emptor* was not compatible with the principles of civil law, not a product of the law merchant, and inconsistent with the values and organization of traditional society, Walton Hamilton hypothesizes that it must have been a product of the folk thought of the masses. Perhaps it was a response to the growing presence of vagabond traders, wayfaring palmers, "peripetetic peddlers with gew-gaws and ornaments, strangers here today and there tomorrow, wayfaring men of no place and without law." These men plied their trade outside the market towns and regulated commerce. "In such wares, and among such men, one had to trade at his peril." *Caveat emptor* came to be the thing we know today from increasingly common situations of unremedial grievance. "The wisdom seems to be the afterthought of the good man who has bargained . . . once too often" [Hamilton, 1931: 1163].
4. Fewer than 1 percent of all consumer complaints resulted in litigation. During the period between March 1968 and December 1974, the CPD received, investigated, and disposed of anywhere between 200 and 700 complaints per week, depending upon how they were counted. It attained some sort of satisfactory resolution in approximately half of them. Satisfaction was determined by the consumer's acceptance of what a business offered in negotiation with the attorney general's agent. These resolutions created about four million dollars of restitutions and savings to consumers. But the records of formal legal proceedings entered into by the CPD is infinitesimally small in relation to the number of cases handled. There were altogether fewer than 30 petitions for orders of discontinuance and no more than four suits seeking injunctions. Steele [1975a] states

that approximately 4.5 percent of the cases received in the Illinois attorney general's office were litigated. While the difference in the two states is significant if contrasted to each other, in neither state did litigation represent a sizable portion of the office's work.

5. It has been suggested that mediation rarely approximates the ideal of noncoercive dispute resolution [Silbey and Merry, 1980].
6. Bardach and Kagan [1982] present an articulate and thorough argument against unreasonableness (the imposition of uniform regulatory requirements in situations where they do not make sense) and unresponsiveness (the failure to consider arguments by regulated enterprises that exceptions should be made).

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