

of legislation against the retailing revolution exemplified by the discount house. Like the family farm, the family automobile dealership may claim a right to be defended through the political process; "inefficiency" is the price of achieving other values and a way of life.

Today the manufacturers do not attempt to run a pure pressure system. Their revised franchises and practices set standards for judgment of the adequacy of performance which take some account of particularistic factors, and they have eased the burdens of cancellation by offering termination benefits. Their published position is not far from the particularistic approach taken by Mr. Milan of the Wisconsin Automobile Trades Association—a dealer must perform, but one must be sure his nonperformance is not due to factors beyond his control. Both take positions that exclude the interests of the profitable low-volume dealer who does not want to cut prices and set volume records. Yet one can never be sure that a commission's or jury's decision does not contain some reflection of this protectionism or bias for the small businessman although there is no evidence that this factor has predominated.

This then is the fifth stage under the state and federal legislation. The impact of the federal act is subtle at best and the impact of the state statutes has been far greater than has generally been assumed. In the federal litigation the manufacturers held most of the cards because of their resources and their successes in the third stage when the legislation was being debated and passed. In the states with legislation the dealers fared better, and their strength before formal agencies has spawned informal systems that are most important in the total picture. However, the manufacturers still can fight in the states with constitutional weapons; the war may be resumed.

pete against existing dealers. *Automotive News*, July 3, 1961, p. 3, cols. 3-5.

Local dealer organizations often attempt to stabilize prices. This is usually justified on some moral grounds of a "fair" price. It is hard to imagine a dealer meeting during which some mention of profits, margins, and prices is not made. It is clear that city dealers, as a group, have more of an incentive to arrive at some form of price agreement It is also evident that dealers in the larger markets are less able to fix and maintain prices. Not that they do not try, they do. In many instances, the large volume dealers do not become members of the local dealer associations. They wish to operate their dealerships on low margins in order to obtain volume. Hence, they have less interest in maintaining margins. Apparently, there are important differences in cost structure among dealerships. Hence, price agreements are that much more difficult to execute.

PASHIGIAN, *THE DISTRIBUTION OF AUTOMOBILES, AN ECONOMIC ANALYSIS OF THE FRANCHISE SYSTEM* 65 (1961).

IV. THE CONSEQUENCES OF THE DEALERS' APPEAL TO THE LEGAL SYSTEM

Hearings have been held, statutes have been passed, construed, and administered, and the manufacturers have created their own internal "due process" systems. What difference has it made? The answer involves assessing gains and costs, and the balance may look different from the position of dealers, manufacturers, and consumers of motor vehicles. Even these categories may be too crude; the balance of gains to costs may differ for metropolitan and rural dealers, for General Motors and American Motors, and for law professors who trade in cars every five to ten years and the Hertz car rental system.

A. *The Dealers' Costs and Gains*

This article has listed an array of changes flowing from the use of the legal system which were supposed to benefit dealers. To what extent did the dealers actually benefit and at what cost? Have the problems that existed up to the 1950's and which prompted the hearings, statutes, and cases been solved, and are there means for solving newer problems?

The old problems were coercion to take unwanted items, unreasonable and offensive pressure for sales, "bootlegging," and cross selling into the "territory" of other dealers. The evidence indicates that these problems have been solved, changed, or are no longer viewed as real problems.⁷⁶² However, there are new difficulties. Trade association representatives in forty-eight states⁷⁶³ were interviewed. They were asked to compare the present relationship between manufacturer and dealer with that existing in the early 1950's before the federal hearings. Their replies were:

| Relationship | States With Statutes Affecting Relationship | States Without Such Statutes in Effect | Total |
|---|--|--|-------|
| (1) Better | 12 | 22 | 34 |
| (2) Little change | 0 | 3 | 3 |
| (3) Worse | 0 | 0 | 0 |
| (4) Better after hearings and passage of Good Faith Act but almost the same now as before | 2 | 3 | 5 |

⁷⁶² One qualification should be made. These problems still are significant in the relationship between foreign car dealers and American distributors of these cars. Interviews.

⁷⁶³ The directory Mr. Milan, Executive Vice-President of the Wisconsin Automotive Trade Association, gave me lists no associations in Alaska and Hawaii and several in California. California has no state-wide group, but there are associations representing northern and southern California as well as Long Beach and San Diego dealers.

| | | | |
|--|----------------------------|----------------------------|----------------------------|
| (5) No answer or unclear answer ⁷⁶⁴ | 4 | 3 | 7 |
| | <hr style="width: 100%;"/> | <hr style="width: 100%;"/> | <hr style="width: 100%;"/> |
| | 18 | 31 | 49 ⁷⁶⁵ |

Many dealer association managers volunteered comments about what has happened. A number talked about coercion to take unwanted items and said:

| | States With Statutes Affecting Relationship | States Without Such Statutes in Effect | Total |
|---|--|--|----------------------------|
| (1) No real coercion today as in early 1950's | 8 | 11 | 19 |
| (2) Some coercion | 2 | 1 | 3 |
| | <hr style="width: 100%;"/> | <hr style="width: 100%;"/> | <hr style="width: 100%;"/> |
| | 10 | 12 | 22 |

Others talked about pressure to sell cars, a frequent complaint before the Senate hearings. They said:

| | States With Statutes Affecting Relationship | States Without Such Statutes in Effect | Total |
|---|--|--|----------------------------|
| (1) Sales pressure exists today but is less obnoxious | 1 | 9 | 10 |
| (2) Unreasonable sales pressure exists today | 0 | 1 | 1 |
| | <hr style="width: 100%;"/> | <hr style="width: 100%;"/> | <hr style="width: 100%;"/> |
| | 1 | 10 | 11 |

While these replies give the impression that most dealer trade association managers see real advances, the managers' comments are more accurately reflected in words than in numbers. The position of the majority who were satisfied is reflected by the following two comments:

The relationship between the manufacturer and the dealers is greatly improved, and this is due to the efforts of the NADA. There still is a great deal of pressure to sell cars, but it is

⁷⁶⁴ In a few instances I was not able to ask all of my questions because the trade association manager did not want to talk to me. One thought I was working for one of the automobile manufacturers despite my assurances to the contrary. One tape recorded our conversation. Several had an assistant telephone Mr. Milan of WATA while I talked with the association manager. In a few instances an answer was unclear despite my efforts to reframe my question. In this kind of interview situation, one can go only so far in pressing for an answer.

⁷⁶⁵ See note 763 *supra*.

applied much differently. Today you don't get the hard beating over the head you used to get. Of course, all factories want volume and that's a good thing.⁷⁶⁶

The relationship between manufacturers and dealers is better than it was in the early 1950's. The attitude of the factory has changed. They are not as dominating and the dealer has more say about what kinds of cars and accessories he'll take. The relationship is much more of a partnership than it was at that time. There is not as much pressure to sell quotas, but the field men will do their best to push the dealer. The dealers, however, now feel they are in a position to talk back because they are more sure of themselves. There are not as many threats or cancellations as there were in the earlier time either, and [the association official] . . . thinks that the number of cancellations has leveled off and will stay at its present low level. The only threats come in the most obvious cases of dealers who are not doing their job. The dealers do not complain about cancellations and this problem. In the 1950's the dealers were told that they must do certain things and they were given orders. Now the attitude is much more that of a discussion with a partner. The five-year term in the new franchises has helped a great deal.⁷⁶⁷

Five managers thought that after an initial improvement, the relationship was again deteriorating. One expressed his concern as follows:

It is clear that the federal Good Faith Act helps the dealers. At the time it was enacted and for several years afterwards, the manufacturer's representatives were much more reasonable. However, today we are coming back to the same position as we were in at the time the statute was enacted. The manufacturers fear government regulation. When there is a threat of increased government regulation, they will change things. But the pressures are starting back now. It looks like something must be done again. We are getting the demands to do particular things and statements that if you don't do these things, something will have to be done about it. Impliedly, of course, the manufacturer is saying he will cancel a franchise. [The association official] . . . does not believe that this is top management thinking, but top management puts sales quotas on the regional managers, and they have to produce and they are not too concerned about the means.⁷⁶⁸

One problem in [our state] . . . is sales promotions. For example, [the association official] . . . today talked with a Chevrolet dealer who was pushed into a . . . promotion on parts even

⁷⁶⁶ Interview. The material paraphrased in the text is from my notes of the interview. Immediately after each conversation with a trade association manager I dictated the responses to my questions, trying to use the manager's own words as far as possible. I think the notes accurately reflect both what was said and how it was said.

⁷⁶⁷ *Ibid.*

⁷⁶⁸ *Ibid.*

though a strike has been on and he can't get any parts to sell. He brought about 100 charm bracelets [to give to customers] hoping to get away with that small order. He was called and told that he'd have to buy 150 more, and he'd better get his check in fast. He knew that if he didn't co-operate, this would go in his file and he would have a rougher time getting new cars when distribution came back again. The manufacturer's representatives today are a little more careful. You don't get things in writing; all is done by telephone. The association tells its dealers to try to take things down and record the statement made by the representative, and he starts talking about trust and good faith.⁷⁶⁹

Those few who thought there was little change were expressing a judgment that while there had been a change in form there was little gain in substance. Many other representatives would agree with the following comments of one who thought there was little change, but they conclude that these indirect sanctions are preferable to the very direct ones used in the 1950's:

Terminations are not as much of a problem as people being forced to do things because they are afraid. The factory has many, many ways of getting back at a dealer who doesn't co-operate. For example, Ford has its Mustang and LTD models. Both are hot: If you co-operate and are known as a factory dealer, you can get more of these models. If not, you get the minimum. When the new cars come out, do you get a good bunch to take care of the people that come in at that time, or do you just get one or two and the ability to promise people you'll order one for them? The factory can just make it rough on you, and you must go along.

[The association official] . . . hasn't heard of many involuntary terminations recently. There's not much of this going on in his opinion. The factory gets its way by making a nuisance of itself; the dealer gets mad and is ready to quit, and the factory gets him a buyer and gets rid of the man. They don't write formal termination notices; they just get rid of the dealer. They can come in and badger him on his sales volume, criticize his service facilities, set goals that are just a little bit unreasonable on the high side. If they're just a little bit unreasonable and the criticism sounds all right under one interpretation, they won't get in trouble with the Good Faith Act. Moreover, they can mess around with the distribution when they don't get what they call co-operation. The dealer will get two Mustangs when he's entitled to six.⁷⁷⁰

The *Automotive News* reflects this mixed view of what has happened in the past and the present situation. In 1957⁷⁷¹ and 1958 it reported that the manufacturers' field men "walked on

⁷⁶⁹ *Ibid.*

⁷⁷⁰ *Ibid.*

⁷⁷¹ *Automotive News*, Feb. 11, 1957, p. 3, col. 1, at 8, col. 1.

eggs."⁷⁷² In 1963, the Iowa dealers asked their legislature to make it unlawful for manufacturers to coerce dealers to stock more cars than they want; and in 1965, Utah dealers had an administrative-licensing act passed⁷⁷³ to the surprise of factory executives.⁷⁷⁴ On one hand, the Utah legislation reflects the re-emergence of the old problems. *Automotive News*, commenting on that act, said "Many dealers complain that factory men again are using arrogant, rough-shod tactics."⁷⁷⁵ On the other hand, the passage of this

⁷⁷² Finlay, *Dealer Forum*, *id.*, Aug. 11, 1958, p. 3, cols. 1-2.

⁷⁷³ Laws of Utah 1965, ch. 81, at 228.

⁷⁷⁴ *Automotive News*, March 22, 1965, p. 12, cols. 1-2.

⁷⁷⁵ Finlay, *Dealer Forum*, *id.*, July 19, 1965, p. 3, cols. 1-2. See also the following comments by Finlay, the editorial director of *Automotive News*:

Out in Utah, the push behind the new law, which takes effect in July, started with stories like these:

Two Ford dealers, both in fast-growing communities, were called in and told not to spend too much on modernizing facilities because "we're going to have to eliminate one of these deals." The dealers felt they were far enough apart so that this prospective action was not necessary.

Another Ford dealer was told not to spend much because he was going to be moved to another area.

In neither case was there any indication that part of the burden of these moves would be borne by the factory.

At Chrysler, most of the fears started among Dodge dealers. Some were told that in the near future they would no longer handle trucks beyond pickups. These would go through a new truck center.

While many city dealers might be happy to be relieved of responsibility for sales of heavy trucks, country dealers often find their bread and butter in these units.

One Dodge dealer is said to feel that he is now a target for reprisal. He has two deals and he feels that pressure is on him to give up one. He had been promised the truck center and has been told to forget it.

Such activity has caused Utah dealers to rally behind the maker-licensing bill now, under the theory that if they don't they are going to be exposed to further reprisal.

A Chevrolet dealer in a fine installation has been told to prepare to move to a more open area where he will have several acres of land available.

Buick, Pontiac and Chevrolet dealers say they have been subjected to pressure for more volume. A Buick dealer said that while he has tried unsuccessfully to get more cars from the factory, he received an undiplomatic letter scolding him for not holding up Buick's position on registrations.

Fear in man is a mighty lever for action.

Id., March 29, 1965, p. 3, cols. 1-2. Another editor of *Automotive News* said:

Why weren't auto makers successful in thwarting passage of the Utah bill licensing and regulating motor-vehicle manufacturers? Here's how Elias Strong, executive vice-president of Utah association, views it: "Manufacturers burned up the telephone wires in an effort to defeat this bill. Their efforts were in vain because pressures from (factory) sales departments during the previous few days had riled up dealers to the point where they literally swamped members of the Legislature with requests to do something about curtailing manufacturer demands. Dealers brought so much pressure on House members that the bill was passed on a unanimous vote" . . . Must be a lesson here somewhere. . . .

Wernhoff, *On The House*, *id.*, March 22, 1965, p. 3, cols. 4-5.

statute and the renewed attempts to pass administrative-licensing legislation in other states also reflect newer problems.

What are the newer problems?⁷⁷⁶ The first is a variation of an older one. All manufacturers want a larger share of the market, and they want their dealers to sell as many units as possible. Ford has set market potentials for its dealers which are ambitious and has pushed for a high percentage of achievement. It has urged dealers to "beat Chevrolet." Dealers are constantly reminded of these goals, and Ford's field men seek to persuade dealers to hold inventories sufficient to meet them and to operate on a high-volume, low-profit-per-unit basis. Some of its dealers object to placing this emphasis on volume and say there is insufficient concern for the dealer's profit.⁷⁷⁷ Chrysler has expanded the number of its dealerships, both to get representation in communities where it had no dealer and also to increase the number of its dealerships in metropolitan areas.⁷⁷⁸ Often it has supplied

⁷⁷⁶ The managers of state dealer trade associations were asked to name current problems between manufacturer and dealer in addition to unfair terminations and forcing unwanted cars. Their answers were as follows:

| | States With Statutes Affecting the Relationship | States Without Such Statutes in Effect | Total Mentioning Problem |
|---|---|--|--------------------------|
| 1. Different discounts (or mark-ups) on compact and regular sized cars hurt dealers. | 9 | 15 | 24 |
| 2. Compensation for warranty work inadequate. | 9 | 13 | 22 |
| 3. Factory sales to leasing companies hurt dealers. | 5 | 7 | 12 |
| 4. Factories injured dealers by setting up factory-controlled dealerships to compete with them. | 4 | 6 | 10 |
| 5. Dealers' profits too low as compared with manufacturers. | 2 | 7 | 9 |
| 6. Distribution favors particular dealers who get unfair share of best models. | 5 | 3 | 8 |

⁷⁷⁷ Interviews.

⁷⁷⁸ Townsend's [Chrysler's president, who was appointed in 1961] toughest problem was with dealers. Before he could help them, he had to have them. In the 1960-61 period, Chrysler had lost around 900 dealers, dropping its total to a low of some 5,800. "We found we didn't even have national distribution any more," recalls Townsend.

Wherever Chrysler still had dealers, they were often in old locations where car buyers rarely went any more. In some areas, for example, competitors had moved to the suburbs along with their customers, but Chrysler dealers were still scraping along downtown. In other cases Chrysler had too many dealers for one line in one market. Right at home in Detroit, for example, 60 Plymouth dealers fought tooth and nail for sales, while 25 Chevrolet dealers blanketed

most of the money for the new dealership and hired a manager or made larger loans to the new dealer. The existing dealers are displeased by the added, and what they deem unfair, competition. The added dealers have newer facilities in good locations. It is charged that they are more willing to adopt a high-volume, low-profit strategy since they are doing business on the factory's money and can take a lower rate of return on investment.⁷⁷⁹ Both Chrysler and General Motors also have split many franchises that formerly were for two makes—Dodge-Plymouth or Chevrolet-Buick, for example. To some extent, this creates competition. The former Dodge-Plymouth dealer who keeps Dodge now must sell against a Plymouth dealer. Moreover, it creates an incentive for a high-volume strategy since it is more difficult to sell for higher prices and remain profitable at lower volume.⁷⁸⁰

the city perfectly. Altogether, sub-standard dealers and lack of dealers were costing Chrysler, according to Townsend, some 300,000 units a year.

Forbes, Sept. 15, 1965, p. 22, col. 3.

One of the problems Boyd's [the official in charge of changing Chrysler's dealer force] group ran into right away was the difficulty of luring dealers away from competitors. Both GM and Ford will do almost anything to keep good dealers whom they have nourished and who have nourished them over the years.

To get dealers, Chrysler has invested heavily in its Dealer Enterprise Program, which provides capital for financing new dealers, expanding existing dealer facilities and relocating others. Basically it is similar to a plan Alfred P. Sloan put to work for GM more than 30 years ago and which Ford later copied.

"What we generally do through the program," says Boyd, "is put up about 75% of the \$200,000 or so to set up an average dealership. If he's a good man who knows the business, he has the option of buying our share out and eventually can average at least a 25% return on his investment. If he is going into it strictly as an investment, he had better have a good general manager on hand who knows the business. Otherwise he will probably lose his shirt."

Id. at 23, col. 1.

Pashigian has asserted that "the tendency for the profit rates of automobile dealers to surpass the profit rates of the retail trade sector persistently indicates that automobile manufacturers have not been able to impose an 'all or nothing' bargain on their dealers successfully. Thus, dealer economic profits have persisted." PASHIGIAN, *op. cit. supra* note 761, at 34. He then asks why the manufacturers have not granted franchises to others to cut dealer profits and increase volume. He concludes that there are a number of answers but that "the automobile companies have not been too successful in overcoming the bargaining position of their established dealers. There is no reason to believe they would be more successful with newly placed dealers." *Id.* at 35.

⁷⁷⁹ Interviews. Trade association representatives conceded that under some circumstances Chrysler had a legitimate interest in financing new dealers and adding to the number in a particular area. See also *Automotive News*, March 26, 1962, p. 6, cols. 1-2. Chrysler has taken steps to make its dealers happier by increasing the amount of money a dealer must put into a "Dealer Enterprise" franchise. See *N.Y. Times*, Feb. 3, 1965, p. 43, col. 6, at 50, cols. 7-8.

⁷⁸⁰ The Dodge-Plymouth dealership could rely on sales of both Dodges and Plymouths to those who would buy these makes because of product

Of course, it is difficult to measure the significance of the high-volume strategy problem. While some dealers complain loudly, automobile sales are generally very good and the pressure for this strategy does not rub against as many dealers as it might in poorer years.

The second problem concerning the relationship between manufacturer and dealers involves the manufacturers' desire that there be changes in the places where cars are sold. Most manufacturers, and especially General Motors, have plans which call for many small-town and rural dealerships to be closed.⁷⁸¹ As the owners retire or die, they are not replaced. Many small towns and their surrounding rural areas are losing population. These dealerships have a potential of relatively few sales a year. The complexity of modern cars makes it important to have trained mechanics, but they are hard to find in these areas. Nonetheless, some small-town dealerships are old, established family businesses, and none of these arguments is persuasive to a son who wants to continue the dealership his grandfather started.

Dealers in larger cities also are expected to change their place of business or improve it.⁷⁸² Most simply, as the population grows and more families buy two cars, the manufacturers expect business to increase. This calls for dealerships with more capital and larger

loyalty. After the Plymouth franchise was taken away, the dealer would have a smaller base of old loyal customers. He would have to sell more Dodges to new people and engage in price competition.

⁷⁸¹ Another related problem is the distribution of automobiles to smaller dealers. These dealers claim that they get few cars when the new models are introduced and few of the best-selling models at any time. See *Automotive News*, Nov. 7, 1960, p. 3, cols. 1-2, at 49, cols. 4-5. One dealer tried to get relief under the Good Faith Act but failed. See Zarbock v. Chrysler Corp., *TRADE REG. REP.* (1965 Trade Cas.) ¶ 71361, at 80538-39 (D. Colo. 1964):

[T]he record fails to establish that plaintiff's treatment . . . was any worse than other small dealers throughout the country. The ways and wiles of big business may indeed seem harsh, but this Act does not purport to provide a remedy against uniformly distasteful national policies by automobile manufacturers to their dealers.

The record does not show . . . that defendant consistently refused to fill plaintiff's orders. The history of events reflects great hardships placed upon plaintiff, but it does not show "lack of good faith" as to constitute an action under the Automobile Dealer's Day in Court Act.

Others have induced their trade associations to push for sections of administrative-licensing acts to offer some protection against poor distribution and discrimination of the large-city, high-volume dealers. See, e.g., *OKLA. STAT. ANN.* tit. 47, § 565(j)(1) (1962), which gives as a ground for revoking or suspending a license, "Being a Manufacturer . . . who: (1) Has refused to deliver to any Motor Vehicle Dealer having a franchise . . . any motor vehicle, publicly advertised for immediate delivery, within sixty (60) days after such dealer's order shall have been received . . ."

⁷⁸² See, e.g., *Automotive News*, Oct. 8, 1956, p. 1, cols. 4-5, at 51, col. 1; *id.*, Feb. 17, 1958, p. 3, cols. 4-5.

facilities for sales and service or for more dealers in an area. Moreover, as the population of a city moves to the suburbs and its downtown decays, some older dealerships lose their customers and find themselves in undesirable locations. The solution is obvious and expensive: move the location of the dealership and build new facilities. There is little dispute between manufacturers and dealers about the need for expansion or relocation in appropriate cases. The disagreement comes as to when this is to be done and how much must be spent. The manufacturers want changes at a faster pace than some dealers. This is especially true when the dealer is older and nearing retirement; such a dealer may wish to leave this problem to his successor.⁷⁸³

The changes in factory policies which were produced by the hearings and the federal and state legislation have affected the conduct of the manufacturers which the dealers dislike and the dealers' response to these problems. The manufacturers want volume and new facilities, but they must seek them differently today. Termination is no longer as effective a sanction since it is not as credible or as disastrous. If pressure to sell to avoid termination is to be a successful strategy, a dealer must have a sufficiently bad record so that a road man's recommendation might be followed by his superiors.⁷⁸⁴ The evaluation of the dealer's

⁷⁸³ Interviews. See the following letter from Herman Schaefer, Executive Vice-President, Automobile Dealers Association of Indiana:

The sudden surge of factory terminations is rapidly becoming the focal point of concern of many dealers. If age of physical facilities or length of time a firm has held a selling agreement or the age of the dealership's principals are to be, or are to become, the important factors for factory terminations, many more dealers will soon be in trouble.

Under such circumstances can a dealer approaching or slightly over his 50s seriously consider going into long-term indebtedness for new or expanded facilities that have little or no utility for any other business? And even if they would have, is there any assurance that there would be tenants readily available at the time of termination?

This is not to denounce or impugn the desirability of new facilities. Sure, they are nice and they may be a bit more efficient, but is it fair to a dealer with older but well kept and adequate housing facilities to have someone rake through his operations with a fine-tooth comb, seeking only to create reasons to justify termination?

If dealers' equities are not protected under the federal good-faith law then perhaps we should amend the good-faith law to make it read as it was originally written and introduced, which protected dealers' basic equities. Dealers' 1955 and 1956 experience indicates that Congress will listen to small business when its cause is just!

Automotive News, Sept. 7, 1964, p. 10, cols. 4-5.

⁷⁸⁴ Although dealers have not been successful in collecting under the [Good Faith] act . . . some felt it has helped to equalize their bargaining position.

The fact that factory coercion or intimidation of a dealer can result in a lawsuit tends to prevent such action by over-zealous factory representatives, they feel.

One dealer explained: "If a factory guy calls me and starts telling

record will be based on criteria that are more particularized and favorable to the dealer than in the early 1950's: local conditions affecting sales, availability of product, and comparisons with comparable dealers. In states with effective administrative-licensing legislation, and perhaps in all states under one view of the federal statute,⁷⁸⁵ the factory cannot cancel without a real effort at rehabilitation over time. Finally, as termination benefits have improved, the impact of termination has been eased somewhat. I do not want to go too far and argue that fear of termination has no force as a sanction, but more dealers are free to argue and bargain about quotas and inventories. The manufacturers' field men now attempt to gain power by using rewards—allocations of hot models, quick delivery of specially ordered cars, and co-operation in dealing with the factory bureaucracy. This too helps create a give-and-take relationship. Nonetheless freedom to bargain does not necessarily lead to success in bargaining. A dealer who does not want to run a high-volume operation, expand or move his facilities, or face competition fostered by his factory will have a difficult time since he has little to bargain with in negotiations about these subjects with manufacturer representatives.

Dealers also can communicate with the top management of the manufacturers. If any of the factory policies offends enough of the dealers, either the manufacturers' dealer councils or the NADA Industry Relations Committee presents a means of bringing a challenge to the attention of those in authority. One NADA official thinks that this ability to communicate is the most important gain from the whole process of hearings, legislation, and cases—"Now they will talk with us and listen to what we say."⁷⁸⁶ Finally, by seeking legislation the dealers can force top management to review how policies are carried out in the field. Passage of the Utah statute shocked and annoyed those in command of the manufacturers, and probably will prompt some examination of the daily practices of field men and district offices.⁷⁸⁷ There is now a pattern set by the Wisconsin and Oklahoma acts and dealers know about it. However, in order to use either the communications system or the lobbying approach effectively, a dealer who is unhappy must convince enough other dealers that action is called for. Individuals who cannot prompt collective action must take their chances within the manufacturer's internal system. In summary, the dealers have made real gains and the climate is far better, but that does not mean that all, or even most, dealers are satisfied completely.

me how to run my business, I ask him to hold on while I switch on a recorder so that I can get all his 'suggestions.' This changes the tone of the conversation considerably."

Automotive News, Feb. 25, 1963, p. 3, col. 5.

⁷⁸⁵ See text accompanying notes 660-64 *supra*.

⁷⁸⁶ Interview.

⁷⁸⁷ See Automotive News, March 22, 1965, p. 12, cols. 1-2.

These gains have cost most dealers very little. Occasionally, manufacturers say that the use of the legal system made the relationship more legalistic and formal and less personal and based on trust. "Our business requires close cooperation, and too often legislation . . . tends to make us work at arm's length."⁷⁸⁸ Yet few dealers see advantages to them in a personal relationship in which they must scramble for favors from all-powerful field men. Undoubtedly, manufacturers keep more careful records on each dealer's performance than before the legal system intruded, but this may actually encourage trust. If personal whim cannot operate, if relatively equal treatment is given equals, and if it is necessary for manufacturers to explain their goals and persuade (rather than order) dealers to share them, this should tend to promote co-operative relationships.

Where administrative-licensing statutes have been passed, control of the manufacturers may come at the price of control of some dealers. Typically, these statutes also license dealers and serve to limit some types of competition and trade practices.⁷⁸⁹ Yet, since dealer lobbies write these laws, only the deviants from accepted practices are likely to be hit. Some dealer representatives have said that the federal Good Faith Act has been used by manufacturers as a justification for not forcing some dealers to cease misleading trade practices.⁷⁹⁰ Perhaps passage of this statute cost some dealers a legislative solution to other problems. Since Congress had given the dealers something, the pressure the dealers could exert for different statutes was diluted. Some dealers wanted protected territories to end competition from other dealers selling the same make;⁷⁹¹ passage of the Good Faith Act may have cost them such legislation.⁷⁹² Finally, it is possible that such problems as Chrysler's company-financed dealerships occurred as a result of ending the older techniques for pushing dealers. After the "reform management" took power in 1961, Chrysler wanted to regain what it thought was its share of the market quickly and felt it must do more than politely ask existing dealers if they would please try a little harder.⁷⁹³

⁷⁸⁸ The statement was made by Virgil E. Boyd, group vice-president in charge of domestic automotive divisions of the Chrysler Corporation. See Finlay, *Dealer Forum*, Automotive News, July 19, 1965, p. 3, cols. 1-2, at col. 2.

⁷⁸⁹ See, e.g., Wis. STAT. § 218.01(3) (a) (1963).

⁷⁹⁰ Interviews.

⁷⁹¹ See, e.g., Automotive News, Feb. 7, 1955, p. 1, cols. 3-5.

⁷⁹² However, territorial security measures faced a presidential veto. See, e.g., *id.* at 48, col. 3. This alone may have been enough to block such legislation.

⁷⁹³ See note 778 *supra*.

B. *The Manufacturers' Costs and Gains*

Many of the costs to the manufacturers of the dealers' campaign to alter the balance of power in their relationship are fairly obvious. First, the manufacturers incurred costs in attempting to defend their position before the various legislative, judicial, and administrative agencies. Lawyers and executives devoted time to meeting the dealers' attacks. The manufacturers created internal review systems that had to be staffed, and they channeled practices within their organizations so that they would be prepared to defend their actions. Secondly, the imprecise nature of the formal legal control and informal sanctions which were created also had costs. These pressures did not provide clear guidelines, and the possibility of a mistake could have serious consequences under some circumstances. As a result, the manufacturers could not be sure what they could demand from their dealers. They either had to bend over backwards or take calculated risks. Conversely, that which the law made certain added to the manufacturers' burdens. They were forced to justify terminations, and they could not demand that a dealer order certain cars which he did not want. Thus, a burden of keeping careful records about each dealer was added. Also manufacturers had to create better systems to minimize production of unwanted models of their products since they could not push the costs of errors on the dealers.

While these all are costs, the key disadvantage predicted as the consequence of the legislative efforts of the dealers was that the manufacturers would have to tolerate something less than maximum performance from their dealers and thus would not sell as many cars as possible.⁷⁹⁴ In other words, if one were to give dealers grades on their performance as one gives students grades, the manufacturers would have to tolerate the C-minus dealer and could only cancel the D and F dealers. Moreover, they would have lost one means of changing a C-minus dealer into a B or A performer since the kinds of pressure possible would have been curtailed. To what extent was this prediction accurate? Unfortunately, this question cannot be answered very well with the information that is available. Apparently, manufacturers retain a great deal of power to induce dealers to maximize sales. A dealer's sales quota can be increased as market surveys show an increase in his opportunities to make sales. Dealers whose sales fall significantly below their potential can be cancelled.⁷⁹⁵ While

this power may not be used often, its existence probably still supplies some spur to hard work. Some dealers may be induced to work harder by the chance of getting extra allocations of the best-selling models. Also some manufacturers have added dealers in metropolitan areas. The existing dealers selling the car in question must share the market with the newcomer. He is likely to sell to some people who would have bought a car from the existing dealers had he not obtained a franchise. Thus the existing dealers must increase their efforts significantly just to stay where they were. Of course, the manufacturer hopes that the existing dealers and the newcomer will increase the total number of sales of its car in the area by selling to people who formerly bought competing makes or who have never owned cars.⁷⁹⁶

Not only have the manufacturers retained these powers, but they also have sold record numbers of cars in the last few years.⁷⁹⁷ There are a number of possible explanations: the manufacturers may have used all of their rewards and punishments skillfully; there may be few or no C-minus or worse dealers who need such attention; or the demand for cars may be so overwhelming that even a C-minus dealer can do a good job. Of course, American Motors Corporation's sales have been declining despite the general trend of the industry.⁷⁹⁸ One of its officials said that a factor in this decline was the poor performance of some Rambler dealers.⁷⁹⁹ However, there is no indication that American Motors has been significantly hampered in its attempts to deal with the problem by either the Good Faith Act or the state legislation.

It is possible that if the manufacturers still had all of their powers of the early 1950's, they would have just as many or more

⁷⁹⁶ See the following comment:

A second dealer cannot be placed in the market area until the total sales in the market area are large enough so that both dealerships can operate in the market area without their per unit costs differing significantly. Suppose two dealerships were placed in the market area, even though total sales were only large enough to support one dealership. Over time, both could not persist. One would tend to grow and, in the process of growth, realize further cost economies. The other dealership would be subjected to continuous price competition and would, therefore, be more likely to fail. Hence, it is in the interest of the manufacturer to allow the existing dealer to grow and realize the economies from increasing size.

PASHIGIAN, *op. cit. supra* note 761, at 151-52. "The automobile companies appear to act with considerable restraint. There may be some excess of dealerships in the East, relative to the number placed in the West in markets with comparable sales. However, on the whole, the companies do not saturate a market area with an excess of dealerships." *Id.* at 160. Pashigian notes that some dealers would disagree with his conclusion. *Id.* at 160 n.23.

⁷⁹⁷ *Automotive News* 1965 Almanac, April 26, 1965, § 2, p. 44.

⁷⁹⁸ *Ibid.*

⁷⁹⁹ Finlay, *Dealer Forum*, *Automotive News*, Sept. 6, 1965, p. 3, cols. 1-2, at 4, cols. 3-4.

⁷⁹⁴ See, e.g., note 367 *supra*.

⁷⁹⁵ On January 1, 1955, before the Senate hearings on the passage of the Good Faith Act, there were approximately 40,000 new-car dealers in the United States. On January 1, 1965, there were only approximately 31,000. *Automotive News* 1965 Almanac, April 26, 1965, § 2, p. 93. See PASHIGIAN, *op. cit. supra* note 761, at 78-79, for a discussion of the reasons for the decline in the number of dealers.

C-minus performers as they have now. One psychologist, Rensis Likert,⁸⁰⁰ would say that the net effect of the hearings, legislation, and cases of the past ten to twenty years has been an unanticipated benefit to the manufacturers. He would predict that the manufacturers have fewer C-minus performers now than they would have had if they had retained the practices of the early 1950's. To explain this, we must recall that many dealers viewed the pre-1956 management methods as a system involving obnoxious orders from superiors and punishment for noncompliance. For example, at that time the national average system was widely used to measure sales performance. If eight per cent of all cars sold nationally were Buicks, a Buick dealer had to sell eight per cent in his area. Little consideration was given to a dealer's own circumstances. Items arrived unordered and unwanted, and a dealer had to accept them. Field men harassed dealers to cut prices and move a large volume of cars. Assuming such a punitive-pressure system exists, what are the dealer's options? First, he can comply with the demands as best he can and suffer in silence. This is easier to do if the dealer thinks the demands may make him profitable. The dealer may, on the other hand, suffer in silence when his poor record makes his standing with the factory precarious. Secondly, a dealer can comply in form but not in substance. He can sell his quota by "bootlegging" cars to used-car dealers in other states—a practice not in the interest of the manufacturer since it may cost sales in the other states where the "bootlegged" cars are sent. Also, he can sell his quota by adopting practices on the borders of fraud, by slighting the preparation of new cars, and by skimping on warranty work. Thirdly, a dealer subject to high pressure can surrender and give up his franchise. Fourthly, a dealer in this system can defy it and counterattack. He can push his trade association for militant action to ease the pressure, and, for example, a state administrative-licensing statute may result. The first two responses to a punitive-pressure system are likely to produce fast but short-run gains in sales. In the long run this system will not work. On one hand, the pressure must be applied constantly or effort will fall off. On the other hand, pressure will either prompt tactics which cost customer good will or prompt a counterattack to end the pressure.

Professor Likert says that there is substantial evidence that a "modified theory" of management which stresses motivation will yield better long-run results than a punitive-pressure system. His "modified theory" starts from the idea that people must be moti-

⁸⁰⁰ See, e.g., LIKERT, *NEW PATTERNS OF MANAGEMENT* (1961); Likert, *A Motivational Approach to a Modified Theory of Organization and Management*, in HAIRE, *MODERN ORGANIZATION THEORY* 184 (1959); Likert, *Measuring Organizational Performance*, *Harv. Bus. Rev.*, March-April 1953, p. 41. See also Guest's study of managerial succession reported in BLAU & SCOTT, *FORMAL ORGANIZATION* 239-40 (1962).

vated to carry out an organization's goals. Initially, the organization must avoid motivating conduct which undercuts these goals by prompting people to do as little as possible just to get by. Not surprisingly, he argues, subordinates react favorably to experiences they see as supportive and negatively to those they see as threatening their sense of importance and personal worth. Economic rewards can only partially overcome the negative impact of threats and pressure. Suppose a dealer long has run a relatively low-volume, high-profit-per-unit operation. A manufacturer's field man harasses the dealer to sell more cars in order to benefit the manufacturer, and threatens termination for poor performance if the demands are not met. Probably, the dealer will make some changes in his sales strategy if he views the threat as credible. In all likelihood, however, the field man has only succeeded in giving the dealer every incentive to do as little as possible to move toward a higher-volume operation. One could predict that the dealer will do what he must, but no more.

According to Professor Likert, not only must an organization avoid creating negative incentives but it must create positive ones. It must create effective work groups with a common goal of high performance—in this case, a relationship between field man and dealer conducive to maximum sales over the long run. The manufacturer's goal of high sales volume must be compatible with the dealer's goals of profit and (in many cases) running a respectable business. The manufacturer's decisions concerning goals must not only influence the dealer, but they must be influenced by him as well. And, Likert adds, effective organizations are characterized by an extraordinary capacity to deal constructively with conflict and to resolve it. They have the organizational machinery and personnel to deal with it, and there is high confidence and trust among the members of the organization in each other.

The hearings and legislation of the mid-1950's prompted the manufacturers to move more toward Likert's model of management. Field representatives were limited in the degree to which they could issue orders and punish noncompliance. While often they still cannot be called "supportive" to a dealer who is not selling enough cars,⁸⁰¹ there is indication that they are much less threatening and harassing than during the early 1950's. The factories have taken steps to hear the views of dealers and to resolve conflicts in a manner which appears fair to dealers. Such groups as the Ford Dealer Policy Board in its consultant role provide one channel of upward communication; elected dealer councils provide

⁸⁰¹ Of course, there are limits on how supportive an organization's representative can be while acting to achieve the organization's goals. Perhaps the most supportive approach would be to tell a failing dealer that the manufacturer will not penalize his failures. Likert does not suggest that an organization can never use penalties or must abandon its goals to keep its subordinates happy.

another; and the manufacturers' co-operation with the NADA Industry Relations Committee provides still another. In some companies there has been an attempt to give dealers a voice in setting market strategies, and in all there are organizational structures designed to resolve conflict. Top management of the manufacturers talks about the importance of trust and close co-operation; at least this is accepted ideology. While the systems of the automobile manufacturers in practice often are far from what Likert has in mind, still there has been great movement toward his model and away from pure pressure and punishment as the managing devices for controlling dealers. If Likert is right that a positive motivational system produces greater long-term results, some of the recent automotive sales success may have been caused in part by the changes which were prompted by the dealers' legal strategy. Clearly, whenever the manufacturers seriously head back toward a punitive-pressure system or seek to impose their goals on dealers when the goals are incompatible with the dealers' interests, the factories pay a price since the dealers seek relief and now have means to get it. In some areas in the past few years, the factories damaged the sense of trust and mutual sharing of goals by pushing more expansion and more volume faster than many dealers were ready for it, by financing competitive dealers in metropolitan areas, and by programs to retire older dealers. As a result, the manufacturers "chased the dealers to the legislature."⁸⁰² In summary, it is likely that the Senate hearings and federal and state statutes produced as an unexpected by-product a more efficient and productive system of managing relations with dealers. Of course, the gains may flow primarily from the skills of the managers of these large business organizations, but they have been prompted to devote their energies to dealer affairs by the threat of drastic governmental regulation.

C. The Consumers' Costs and Gains

The dealers have obtained some protection from manufacturer pressure tactics and the manufacturers may have both lost and gained as a result. But in many ways the test of the desirability of increasing the dealers' "countervailing power" is its impact on those who buy automobiles. Automobile consumers are not an organized interest group, and they could be the ones to pay the price of some types of accommodation between dealers and manufacturers in the form of higher prices, poorer products, and less reliable service.

Have the manufacturer-dealer laws and the changes made in response to the Senate hearings increased automobile prices? Perhaps. The effect of the laws and practices is to curb the power of a manufacturer's field personnel to demand that a dealer

achieve high volume and take hard-to-sell products and dispose of them. A dealer's high volume as compared to other dealers is the result of many factors but primarily of price cutting.⁸⁰³ Almost all dealers offer some discount from the manufacturer's list price,⁸⁰⁴ but the discounts vary greatly from dealer to dealer and city to city.⁸⁰⁵ For example, one study showed that in 1959 in Chicago, Ford dealers discounted a 3,000 dollar car from 150 dollars to 539 dollars, with an average discount of 444 dollars.⁸⁰⁶ Other studies indicated that in San Francisco, Pittsburgh, and Boston, dealers offer much smaller discounts than those in Chicago.⁸⁰⁷ The average price paid in Pittsburgh, for example, was 105 dollars more than that in Chicago.⁸⁰⁸ One might assume that if the factories could force dealers to make all possible efforts to maximize sales, they would use their power to induce dealers to sell for as low a price as possible.⁸⁰⁹ If the federal Good Faith Act had not

⁸⁰³ "In general, prices were reduced least for those cars that were selling well in 1960 and most for those whose sales needed stimulation. Despite so-called administered list prices, at the retail level there was substantial adaptation of prices to market demand in order to sell cars in desired volume." Jung, *Impact of the Compact Cars on New-Car Prices*, 34 J. OF BUS. 167 (1961).

⁸⁰⁴ Dealers "complain that even though consumers are spending big sums for fancy cars, the haggling over price is fierce." Wall Street Journal, May 14, 1965, p. 1, col. 6, at 12, col. 2.

⁸⁰⁵ "Some big volume dealers constantly play up low prices to win customers. Most dealers, however, say they only discount to meet competition." *Id.*, Jan. 29, 1965, p. 4, cols. 3-4, at col. 4.

⁸⁰⁶ Jung, *Price Variations Among Automobile Dealers in Chicago, Illinois*, 32 J. OF BUS. 315, 318 (1959).

⁸⁰⁷ Jung, *Prices of Falcon and Corvair Cars in Chicago and Selected Cities*, 33 J. OF BUS. 121 (1960); Jung, *Compact-Car Prices in Major Cities*, *id.* at 252, 253.

⁸⁰⁸ *Ibid.*

⁸⁰⁹ Dealers, of course, have overhead which limits the discount that can be offered if they are to stay in business. Pashigian argues:

To what extent have the manufacturers used their potentially dominant position to "force" autos on dealers? Suppose the manufacturers do in fact have a dominant bargaining position and exploit this position to the fullest. One would expect the dealers' profit rates to be no more than the competitive rate. However dealer profit rates have not been that low. . . . To insure comparability, the total return rate (profits plus officers' compensation) of automobile dealers was compared with the total return rate in retail trade. In general, the total return rate of automobile dealers has exceeded the total return rate in retail trade. Also, it appears that the profit rates of General Motors and Ford dealers have exceeded the profit rates of retail firms. Granting the inadequacies of the data, the best estimate seems to be that dealer earnings have tended to be higher than the earnings of other businesses in retail trade.

The existence and persistence of the earnings differential is not consistent with the full use of "forcing" by the manufacturers. Hence, there is some support for the contention that the companies, if they have a dominant bargaining position, have not used it as effectively as they might. This does not mean there has been no "forcing." It just means that the manufacturer could have engaged in this practice to an even greater extent.

⁸⁰² Finlay, *Dealer Forum*, *Automotive News*, July 19, 1965, p. 3, cols. 1-2.

been passed, one might expect the discounts offered to car buyers in Chicago to come closer to the 539 dollar maximum reduction from the 3,000 dollar list price than they did at the time of the study. Also one might expect that dealers in cities such as Pittsburgh would be pushed to offer prices comparable to those available in Chicago. However, these studies of car prices do not establish that higher car prices are caused by the limitation of the manufacturers' powers imposed by the Good Faith Act. It seems likely that factors other than the statute also influence the prices quoted to customers. For example, the statute's curb on the manufacturers has not caused Chicago prices to increase to the levels found in Pittsburgh.

Secondly, if factories can no longer force dealers to take unwanted cars, there may be fewer bargains available. If one were willing to drive a pink Buick Wildcat which did not have an automatic transmission or power steering, he might be able to buy such a rolling manufacturing error at dealer cost or even less. Moreover, not only could the absence of pressure take away a dealer's incentive to discount greatly and the absence of coercion reduce the number of bargains, but such a loss of power could raise the "list" prices of cars as well. Automobile manufacturing is a high-volume business with costs and profits spread over many vehicles. If the loss of power caused volume to fall significantly, the price of each vehicle must be increased ultimately to maintain desired profit margins. Again, all that can be said is that there is no evidence that this has happened. Rather, since 1960 prices have been fairly stable.

While we are speculating about the possible effects of the dealers' and manufacturers' accommodation of the last ten years, we must also consider some important factors that work to minimize the price buyers pay for cars. Most importantly, each dealer faces some competition. His potential customers can buy a used car, or buy from another dealer selling his make or a competitive one. The potential customers usually can delay purchase if they think prices are too high. Even if a dealer were willing to settle for an "acceptable profit" on fewer sales rather than attempt to maximize volume, he must make real efforts to remain competitive so that his pricing policy does not yield an unacceptable loss. While dealers in some areas manage to avoid real price wars, few could survive if they tried to sell too close to list price, except under conditions where demand greatly exceeded supply. Also the manufacturers' power to push dealers has only been curbed and not destroyed. The dealer must at least perform adequately, if

PASHIGIAN, *op. cit. supra* note 761, at 58-59. Since Pashigian's findings cover many years before the passage of the federal Good Faith Act, they tend to refute the argument that the manufacturers would use their power to force dealers to lower prices if they still had that power.

not outstandingly, or he can be terminated. Moreover, the manufacturer in most states⁸¹⁰ is probably free to create more competition in an area by establishing new dealerships.

To what degree has the dealers' use of the legal system increased the price a consumer must pay for a new car? The data is delightfully inconclusive since, although car prices have increased from 1950 to 1965, the causes are impossible to determine. Ideally, one might compare car prices in similar cities in Illinois, Minnesota, and Wisconsin to get some information about the impact of the state laws since Illinois has no law affecting manufacturer-dealer relationships, Minnesota has a penal statute, and Wisconsin has an administrative-licensing act. Unfortunately, this information is not available⁸¹¹ and cannot be obtained except at a very high cost.⁸¹²

One can do a little more with the impact of the federal hearings, the Good Faith Act of 1956, and the price sticker law of 1958. New-car sales dropped and prices increased in the three years following the hearings and the Good Faith Act. It is impossible to determine if the hearings and laws caused this, but it seems unlikely. In 1955, new-car sales reached a record 7,100,000 units,⁸¹³ and the Consumer Price Index for new-car prices reached the lowest point which had been or would be reached from 1953 to 1965.⁸¹⁴ This was the year, dealers complained, that marked the high point of pressure for sales and forcing of unwanted cars. The O'Mahoney hearings took place at the end of the year, and the Good Faith Act was passed in mid-1956. Dealers reported a marked decrease in pressure for sales from field men beginning some time in 1956. Sales of

⁸¹⁰ See note 760 *supra*.

⁸¹¹ The Bureau of Labor Statistics of the United States Department of Labor collects new-car prices as quoted by dealers in forty-six cities for its Consumer Price Index. For a comment on the method by which these prices are gathered, see Jung, *Indexes of Retail Prices of New Cars—Consumer Price Index*, 34 J. OF BUS. 490 (1961). Prices have been collected in Minneapolis and St. Paul, Minnesota, Madison, Wisconsin, and Chicago, Illinois. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. NO. 1351, PRICES: A CHARTBOOK—1953-62, at 33 (1962).

I telephoned an official of the Bureau in charge of collecting prices for new cars. She said that the prices cannot be given out since secrecy must be preserved so that the dealers will continue to give accurate reports of actual selling prices. She said it was her impression that prices did not differ significantly between Wisconsin and Illinois. She thought that it was very unlikely that the presence of an administrative-licensing or penal statute concerning manufacturer-dealer relationships had any impact on car prices. Prices are traditionally higher on the west coast and in the mountain states. They are higher in remote cities and smaller communities. Volume of sales and competition are the major variables.

⁸¹² See Jung, *Indexes of Retail Prices of New Cars—Consumer Price Index*, 34 J. OF BUS. 490 (1961).

⁸¹³ Automotive News 1965 Almanac, April 26, 1965, § 2, p. 44.

⁸¹⁴ U.S. BUREAU OF LABOR STATISTICS, *op. cit. supra* note 811, at 132.

new cars dropped to 5,900,000 units both in 1956⁸¹⁵ and 1957⁸¹⁶ and to only 4,600,000 in 1958.⁸¹⁷ Prices increased: manufacturers' list prices jumped significantly during these three years. For example, a comparable Ford with the same extra equipment had the following list prices:⁸¹⁸

| Year | List Price | Amount of Increase |
|------|------------------------|--------------------|
| 1955 | \$2,418 ⁸¹⁹ | — |
| 1956 | 2,535 ⁸²⁰ | \$117 |
| 1957 | 2,721 ⁸²¹ | 186 |
| 1958 | 2,897 ⁸²² | 176 |

The Consumer Price Index predictably reflected these increases too. From 1959 to 1965, sales have climbed to new record levels⁸²³ and prices have at least leveled off if not declined.⁸²⁴

⁸¹⁵ Automotive News 1965 Almanac, April 26, 1965, § 2, p. 44.

⁸¹⁶ *Ibid.*

⁸¹⁷ *Ibid.*

⁸¹⁸ The car priced was a V-8 with a 292 cubic inch engine displacement, except for the 1955 model which was offered with a 272 cubic inch displacement. The car was equipped with automatic transmission and power steering. Of course, whether or not any 1955 Ford is properly compared with any 1958 Ford is a difficult question. *Consumer Reports* for these years mentioned no drastic mechanical improvement. See 23 CONSUMER REPORTS 205-06 (1958); 22 CONSUMER REPORTS 184 (1957); 21 CONSUMER REPORTS 171, 179 (1956); 20 CONSUMER REPORTS 221, 235 (1955). I see no significant difference in the appearance of the cars. However, others may think that Ford offered far more car for the money in some of these years than others.

⁸¹⁹ 20 CONSUMER REPORTS 221 (1955).

⁸²⁰ 21 CONSUMER REPORTS 171 (1956).

⁸²¹ 22 CONSUMER REPORTS 181 (1957).

⁸²² 23 CONSUMER REPORTS 197 (1958).

⁸²³ Automotive News 1965 Almanac, April 26, 1965, § 2, p. 44.

⁸²⁴ Our same Ford V-8 with automatic transmission and power steering had the following list prices from 1959 to 1965:

| Year | Price | Amount of Increase or Decrease |
|------|---------|--------------------------------|
| 1959 | \$2,988 | \$+ 91 |
| 1960 | 2,843 | — 145 |
| 1961 | 2,893 | + 50 |
| 1962 | 2,888 | — 5 |
| 1963 | 2,888 | 0 |
| 1964 | 2,800 | — 88 |
| 1965 | 2,811 | + 11 |

See 30 CONSUMER REPORTS 205 (1965); 29 CONSUMER REPORTS 193 (1964); 28 CONSUMER REPORTS 184 (1963); 27 CONSUMER REPORTS 200 (1962); 26 CONSUMER REPORTS 197-98 (1961); 25 CONSUMER REPORTS 198 (1960); 24 CONSUMER REPORTS 177, 190 (1959).

Clearly, there is a substantial difference in size and appearance between a 1955 and 1965 Ford. Perhaps one is getting a great deal more car for his \$2,811 in 1965 than he received for his \$2,418 in 1955. One can name a number of mechanical improvements ranging from a newer design in the engine to a design that requires less lubrication. Arguably, the 1955 full sized Ford should be compared with Ford's 1963, 1964 and 1965 "Fairlane" or intermediate size car. A similarly equipped Fairlane has

What caused the jump in prices and the decrease in sales almost immediately after the federal hearings and legislation? If one could offer no explanation other than the dealers' successes in lobbying, he might conclude that the correlation reflected cause. Unfortunately for purposes of answering this question, one can offer many other explanations. One writer attributes the increase in list prices to drastically increased costs of the annual model change.⁸²⁵ Moreover, the wages of automobile workers were increasing during these years,⁸²⁶ and the price of steel also increased.⁸²⁷ Comparisons with 1955 sales figures may be misleading. Another writer asserts that the high sales of 1955 were prompted by

a unique influence at that time that may hardly ever be repeated: installment credit maturities were lengthened substantially. While in 1953 it was difficult to finance a new car for more than twenty-four months, by 1955 financing over thirty-six months became quite common. Lengthening of the financing period results in a reduction of the amount of monthly payments. Since the ability to make monthly payments out of income represents a crucial consideration in car buying, many people were in a position to buy cars in 1955 who could not have done so earlier.⁸²⁸

Also sales in 1955, to some extent, may have cost sales in the three following years. Many of the 7,100,000, 1955 car buyers⁸²⁹ were still paying for the 1955 models in 1957 and 1958. Many people in 1955 traded in cars for new ones after having used them for a much shorter time than usual; in a sense, some who normally would have bought in 1956 and 1957 accelerated their purchase to 1955.⁸³⁰

been priced \$2,600, \$2,610, and \$2,650 in those years. See 30 CONSUMER REPORTS 200 (1965); 29 CONSUMER REPORTS 178, 188 (1964); 28 CONSUMER REPORTS 163, 179 (1963). If this is a proper comparison, the increase of less than \$200 over ten years is remarkable. Of course, to complete the picture one should consider the purchasing power of a dollar over this period.

See Wall Street Journal, Oct. 5, 1965, p. 16, cols. 4-5, on the government reaction to the increase in prices of the 1966 models.

⁸²⁵ According to the Ford Motor Company, the dollar cost of major model change-overs increased more than six and a half times between 1948 and 1957, and at an increasing rate: in 1957 these costs were more than three times as high as in 1953. Since sales increased at a much slower rate, the ratio of styling costs to sales (and production costs) increased significantly—doubling between 1948 and 1957. The effect of these cost increases on auto prices were substantial; a standard two-door, six-cylinder Ford which sold to the customer for \$1,522 in 1950 increased in price to \$1,991 by 1957.

Adams, *Consumer Needs and Consumer Sovereignty in the American Economy*, 35 J. of Bus. 264, 272 (1962).

⁸²⁶ See Automotive News 1965 Almanac, April 26, 1965, § 2, p. 98.

⁸²⁷ U.S. BUREAU OF LABOR STATISTICS, *op. cit. supra* note 811, at 132.

⁸²⁸ KATONA, THE MASS CONSUMPTION SOCIETY 251-52 (1964).

⁸²⁹ See note 824 *supra*.

⁸³⁰ KATONA, *op. cit. supra* note 828, at 252.

My own guess is that the hearings and legislation probably affected car prices slightly in some areas where competitive forces did not push dealers to a complete "discount house" approach. Yet we have no idea what happened to the total cost of purchasing a new automobile as we have no comparative data on the cost of financing cars from 1955 to 1965.⁸³¹ Dealers find this part of their business highly profitable, and decreases in the price of the car can be made up in part by increases in rates charged in the time-price differential.⁸³²

⁸³¹ See Jung, *Charges for Appliance and Automobile Instalment Credit in Major Cities*, 35 J. OF BUS. 386 (1962). Professor Jung reported the finance charges quoted by new-car dealers in nine major American cities. They ranged from a low rate of 8.8% simple annual interest to a high of 15.8%. The dealer usually resells his commercial paper to various financial agencies, but he ultimately will get a large percentage of the interest paid by the buyer.

⁸³² In hearings held at both Federal and state levels, and in a number of court cases, evidence revealing the degree to which auto retailing has become a kind of con game has been accumulating. One of the most recent records was compiled by the dealers themselves, together with their commercial allies, the banks and other lending institutions, at a hearing before California's Corporations Commissioner. The matter under consideration was Sears, Roebuck & Co.'s request for a license to go into the business of making automobile loans.

It was quite a hearing. Banks, small loan companies, industrial loan companies, sales finance companies, independent insurance companies, and auto dealers were all there, as well as Sears, of course. A big pot was at stake. More than 10% of all cars sold—new and used, for cash or credit—are bought in California, where auto sales this year could total as much as \$4 billion. An estimated 70% of that amount will be financed at rates ranging upward of 36% true annual interest to a low of around 8%. These latter terms are the \$4-a-\$100 bank loans made directly to consumers with good credit ratings. Such low-cost loans account for only a fraction of car debt, however, because banks and other lenders make most of their loans through dealers, whose rates are considerably higher. Allstate terms, said Sears, would be competitive with low bank rates. Competition on rates, however, was not the only dealer worry, nor was it the worst. What upset auto dealers most was that the Allstate loans, like the low-rate bank loans, would be made directly to car buyers; hence these borrowers would become, so far as dealers were concerned, cash buyers in their salerooms. And more cash buyers are decidedly *not* what dealers are looking for.

Time and again the cash buyer was discussed at the hearing and always in such terms as in the following testimony from Gil Ashcom, a *Rambler* dealer, who is president of the Northern California Motor Car Dealers Association:

QUESTION: May I ask you one question, Mr. Ashcom? Do you want to sell cars for cash?

ANSWER: I do not want to sell them for cash if I can avoid it.

QUESTION: You would not want to sell the cars you do for a cash price then?

ANSWER: No, sir.

QUESTION: Does this mean that you are not really in the business of selling automobiles?

ANSWER: It does not mean that at all.

QUESTION: But you don't want to sell automobiles for cash?

ANSWER: It means that I want to sell cars for the most profit that

The state statutes and the federal hearings and legislation also may have produced some gains for consumers. To some degree these efforts at dealer protection may have helped consumers to avoid practices bordering on fraud. Price-packing has been ended by the price sticker law, for today it is difficult to increase both the trade-in appraisal and the asserted list price by the same amount. Each new car has an accurate price tag prominently displayed. Some of the incentive to deceive buyers may have been removed when unlimited factory pressure was curbed. Selling a quota no longer is such a life or death matter "justifying" the use of any means. Moreover, the price of some of the state legislation to protect dealers from manufacturers was more legislation to protect consumers from dealers. For example, the Wisconsin administrative-licensing statute allows the Motor Vehicle Department to revoke or suspend a dealer's license for many deceptive practices, including "having advertised, printed, displayed, published, distributed, broadcast or televised . . . any statement or representation with regard to the sale or financing of motor vehicles which is

I can per car. Finance reserve [dealer's share of the carrying charges] and insurance commissions are part of the profit derived from selling a car on time. . . .

The amount of the profit to be made from selling cars on time depends, in large part, on the opportunities offered for manipulating charges—or "making a package," as they say in the trade. A package consists of trade-in, insurance, and finance rates. "Three ways to skin a cat" is the way one banker at the hearing put it. "We have different rates depending on the risk," said a *Ford* dealer. And in answer to the question "So you adjust the basic price of the car to fit the deal you can make?" another dealer said: "Every automobile dealer in the United States has to adjust the deal to the customer's ability to pay. . . ."

The dealer, however, does not adjust his price as the old-fashioned family doctor did. In auto salesrooms, the charge is an inverse of the ability to pay—the lower the ability, the higher the price. This, too, was freely admitted by the dealers. There was, in fact, a good deal of testimony from both dealers and lenders about the amount of poor-risk credit they extended. Nevertheless, the dealers, in particular, made it plain that they preferred the gamble of extending poor credit to the assurance of selling cars for cash. The gamble, of course, is not great. The car can always be repossessed to serve as a lure to another, and still higher-cost, credit deal. (Loans on used cars earn higher rates than do those on new cars.) Thus the profit possibilities offered by even the poorest credit risks are such that dealers discourage cash buying:

QUESTION: If I went into a dealership and wanted to buy a *Ford* car and I say I want to pay cash for it, am I likely to have to pay a higher price than I would if I wanted to buy it on credit?

ANSWER: Well, I would say in effect you probably are right.

The trouble with the cash buyer, as the dealer sees him, is his interest in price. Furthermore, a cash transaction is usually too straightforward to allow for stratagems to deflect attention away from price. Opportunities to befuddle the credit buyer, on the other hand, are multiple beyond any layman's imagination.

30 CONSUMER REPORTS 258-59 (1965). One industry paper referred to the *Consumer Reports* article as a "smear" but conceded that there was some truth in CU's contentions. *Motor News Analysis* 2 (May 1965).

false, deceptive or misleading."⁸³³

The curbing of factory pressure for sales may also have allowed dealers to act in ways that are in the car buyer's long-term interest. These are the benefits usually asserted for "fair trade" and related legislation. If a dealer must discount heavily to maximize sales volume, he must rigorously minimize all of his costs to stay in business. He could cut back on preparing cars for delivery and on free repairs not covered by warranty but which are needed because of defects in the car. He could cut both his inventory of different models of cars and of parts so that he stocks only the faster-moving items. Such a dealer could also profit through his service business by selling unnecessary repairs—minor defects can be turned into major ones when the service department adopts this strategy since few consumers are qualified to challenge the service department's diagnosis.

One can conclude that dealers have made some significant gains at little cost to themselves, that manufacturers have lost some of their power although internal due process may produce some long-run advantages, and that consumers *may* pay slightly more for cars and may receive some benefits in exchange. One can wonder if the gains-to-costs ratios would have produced more startling conclusions had the dealers been able to pass statutes or have them administered to protect the low-volume, high-price-per-unit, profitable dealer and to minimize competition by "territorial security" programs.⁸³⁴

V. SOME CONCLUSIONS AND OBSERVATIONS

A. *The Standards for Decision Making: Efficiency, Due Process, and Performance*

The organized dealers are a "special interest group" which has achieved some success in solving its problems by using the legal system. One usually thinks of special interest legislation as fenc-

ing in a group to protect it from competition. For example, this is the effect of many fair trade laws and much occupational licensing. The dealers' efforts may have had some anti-competitive effects; but, as we have seen in the discussion of the construction of the Good Faith Act, the administration of the state statutes, and in the operation of private systems, the impacts of other values such as efficiency, performance of commitments, and due process have been far more important. To what extent can this be explained?

1. EXPLANATIONS AND CONJECTURE

There are a number of possible explanations for the efficiency, performance of commitments, and due process approach. Some involve the history of the statutes, others involve the tactics used to get them passed, and still others involve the likely reaction of administrators faced with imprecise directions from legislatures. Part of the answer can be found in the legislative history of the state and federal statutes. The first state statute was passed in Wisconsin in 1937 and most of the other state legislation follows the pattern set by this act.⁸³⁵ However, the story of the Wisconsin statute does not begin with its introduction on March 19, 1937.⁸³⁶ Rather this was legislation colored by the depression. Nevins and Hill, it will be recalled, reported the great pressure to sell cars exerted by the Ford Motor Company in the early 1930's.⁸³⁷ There were threats to cancel franchises if sales quotas were not met, and new dealers were franchised to compete with the old ones under the "cross-roads" policy. Given a depression that contracted the market and the demands for increased sales, many dealers adopted marketing strategies based on price competition and consumer deception. They had to sell, and short-run considerations controlled their conduct. Dealers sold below manufacturers' list prices or they increased the trade-in allowances far above the market value of customers' used cars.

Congress passed the National Industrial Recovery Act of 1933,⁸³⁸ and the automobile dealers were the first group of retailers to establish a Code of Fair Competition.⁸³⁹ The Wisconsin Legislature passed the Wisconsin Recovery Act⁸⁴⁰ in the same year, and Wisconsin dealers established a code modeled closely on the national one.⁸⁴¹ Both codes required dealers to sell for no less than

⁸³³ WIS. STAT. § 218.01(3) (a) (19) (1963).

⁸³⁴ David Riesman asserts:

The effect of limited room for maneuver is most evident on the dealers, who clearly feel caught between the customer who sells himself if he smells prosperity around the corner and the manufacturer who has done his best, three years ahead of time, to prefigure the hundreds of technicolor-and-box-top configurations the customer will want. In their lachrymose outburst to Congressional investigators, these normally Republican free-enterprisers begged for governmental controls and even price support, their love of *laissez-faire*, like that of most businessmen, being quite platonic. If and when the dealers catch up with the unions and secure the equivalent of a guaranteed annual wage, yet another bureaucratizing pressure will have made the reliable anticipation of consumer preference more exigent than ever.

RIESMAN, *Autos in America*, in *ABUNDANCE FOR WHAT?* 279 (1964). See Friedman, *Freedom of Contract and Occupational Licensing 1890-1910: A Legal and Social Study*, 53 CALIF. L. REV. 487 (1965).

⁸³⁵ See text accompanying notes 99-162 *supra*.

⁸³⁶ See Wis. Senate Bill 206 (1937).

⁸³⁷ See text accompanying notes 39-40 *supra*.

⁸³⁸ National Industrial Recovery Act, § 3, 48 Stat. 195, 196 (1933).

⁸³⁹ Record, p. 79, Gibson Auto Co. v. Finnegan, 217 Wis. 401, 259 N.W. 420 (1935).

⁸⁴⁰ Wis. Laws 1933, ch. 476, at 1015.

⁸⁴¹ Record, p. 112, Gibson Auto Co. v. Finnegan, 217 Wis. 401, 259 N.W. 420 (1935). The code is reproduced in Record, p. 58, Henneman v. Finnegan, 217 Wis. 414, 259 N.W. 425 (1935).

list price and to allow no more than an established average price for trade-ins. The effect was to fix the price of new cars. The National Automobile Dealers Association and the Wisconsin Automotive Trades Association both gathered information about the average prices charged for various models of used cars, and their reports controlled all trade-in allowances. The code approach was defended by the deputy administrator of the Wisconsin code, a Milwaukee dealer who had been the moving force behind its creation. In 1934 he explained:

We had two, as I remember it, cycles. From the beginning of the automobile business up to and including a few years ago dealers seemed to be making some progress and making some profit and building up a business. Then it appeared that trading came into the picture and certain factories were trying to increase their production. They were asking for elaborate places of business and, putting it all together, their sales force, as I could see it, were asking the automobile trade to do more business than the public really wanted to do. The result being that they had to go out and allow the public considerable more than a piece of merchandise was worth—whether it was an automobile or a tractor or what, in order to then and there sell them a new motor car.

During that period there was injected into the business, finance companies, some of them company owned and some independent. As the dealers' capital became depleted the factories came along with these finance companies to help the dealer put more merchandise in his place on these finance companies. Then the final due date would come around on these cars and it was a necessity to get rid of them and again they would go out and make deals that I do not believe under ordinary business conditions they should have done. The interest rates, insurance rates, all the expenses that I mentioned before had to be met and I believe that in the last four years there has been a greater collapse of dealers' profits than at any other time I have noted in the automobile business. Profits and dealers' capital all collapsed. On the whole before the code went into effect the state of the industry was such that from every indication we could get in covering the territory it seems as though the dealers were at a very low ebb from a capital, profit and willingness-to-go-on stand-point. Their banking standing had grown steadily worse in the last five years. I have a great many banker friends over the state and they tell me that the dealer has got into what they term a very bad condition.⁸⁴²

When the Wisconsin code was proposed in February of 1934, 650 of the state's 850 new-car dealers favored it.⁸⁴³ However, about six months later there were stories that many dealers were giving

trade-in allowances which were greater than permitted. Some of the largest dealers refused to comply. One said he could not meet the sales quota imposed by Chevrolet if he did not give higher trade-in allowances than were authorized.⁸⁴⁴ WATA, the moving force behind the code, decided to press the matter and test the effectiveness of the price-fixing provisions.

Proceedings for violation of the code were brought against six large dealers.⁸⁴⁵ On March 5, 1935, the Wisconsin Supreme Court ruled the Wisconsin Recovery Act unconstitutional because it involved an undue delegation of legislative power to a private group.⁸⁴⁶ Almost three months later, the United States Supreme Court reached the same conclusion about the National Industrial Recovery Act.⁸⁴⁷ Private control over price competition through codes of fair competition was dealt a crippling if not fatal blow.⁸⁴⁸

The Wisconsin Automotive Trades Association reacted by seeking a constitutional method of solving the problems of dealers who were faced with a depression, factory pressure, and fraudulent competitive practices. WATA requested legislation on May 21, 1935, to control the competitive practices of dealers and coercion by manufacturers to use particular finance companies.⁸⁴⁹ New-car dealers were to be licensed. Licenses could be denied or revoked for "unfitness" or "any unconscionable practice relating to said business" as well as fraudulent practices.⁸⁵⁰ Coercion to sell installment contracts to particular finance companies was made criminal.⁸⁵¹ Thus, if prices could not be controlled under a code of fair competition, some of the dealers' problems might be solved by a different approach. Entry into the business was limited to those who were "fit," which would inhibit a cross-roads policy. Some methods of competition were controlled so that ethical dealers would not have to meet the practices of the unethical, and the intrusion of the manufacturer-backed finance company was barred. This approach also had the merit of getting WATA out of the position of trying to run a program against the wishes of a number of large dealers. A further step was taken in 1937 to end the incentives for cutthroat price competition. The first administrative-licensing law governing manufacturers was passed.⁸⁵² They had to obtain a license and could lose it for coercion or unjust

⁸⁴⁴ *Id.* at 5.

⁸⁴⁵ See *Gibson Auto Co. v. Finnegan*, 217 Wis. 401, 259 N.W. 420 (1935); *Henneman v. Finnegan*, 217 Wis. 414, 259 N.W. 425 (1935) (this case involved five large dealers).

⁸⁴⁶ *Gibson Auto. Co. v. Finnegan*, *supra* note 845.

⁸⁴⁷ *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

⁸⁴⁸ See Wylie, *The Regulation of Trade Practices by Codes*, 12 Wis. L. Rev. 261 (1937).

⁸⁴⁹ See Wis. Senate J. 964 (1935).

⁸⁵⁰ Wis. Laws 1935, ch. 474, §§ 1(3) (a) (i), (11), at 752.

⁸⁵¹ Wis. Laws 1935, ch. 474, § 1(7), at 755.

⁸⁵² See text accompanying notes 99-162 *supra*.

⁸⁴² *Id.* at 86-87.

⁸⁴³ Record, p. 50-51, *Gibson Auto Co. v. Finnegan*, 217 Wis. 401, 259 N.W. 420 (1935).

cancellations. Given the constitutional atmosphere of the mid-1930's, dealing with the pressure for excessive price competition must have seemed a more fruitful approach than another attempt at fixing prices.

Another factor may have influenced the form of the 1937 administrative-licensing statute. WATA's draftsmen faced a difficult, and not uncommon, problem. They could not define precisely the problem they were attempting to solve. The dealers did not want to be pushed around by manufacturers' representatives because they wanted to be free to engage in civilized rather than savage competition. But the draftsmen could hardly write a statute prohibiting manufacturers, their representatives, or both from "pushing around" dealers. They could point to many practices which annoyed dealers, but these were little more than symptoms of the disease that the dealers wanted to cure. The draftsmen might have avoided this difficulty by prohibiting manufacturers from attempting to persuade dealers to increase sales by any means or from ever cancelling dealers. Yet such a statute would look outrageous and be so hard to sell to a legislature that it might test the organized dealers' political power to its limit. The alternative selected was to specify those practices which the draftsmen were sure they wanted to prohibit (for example, coercion to force a dealer to order unwanted merchandise)⁸⁵³ and to cover all other practices by an imprecise standard which would be given content in its application (for example, "unfairly, without due regard to the equities of the said dealer, and without just provocation" cancelling a franchise).⁸⁵⁴ The general standard selected has some connotation of efficiency, contract, and due process: "just provocation" points to reasonable standards based on business success and "fairness" points to notice of those standards and the absence of capricious decisions. The "equities of the dealer" phrase directs attention to the particular case and discourages the formulation of rules which would sacrifice the interests of an individual for the greater good of the manufacturer. "Equities" also may point to termination benefits to protect the reliance interest of the dealer. Of course, other less contractual and more anticompetitive ideas could be found in this language too, but that does not blunt the efficiency, performance of commitments, and due process meanings that are there as well.

Other general and imprecise terms could have been used which would have been more open to an anticompetitive interpretation. The statute could have prohibited cancellation "without due regard to the equities of the said dealer" and said nothing about

the manufacturer's right to cancel where there was "just provocation." However, such a position might have raised constitutional questions in an era when economic relief legislation was being frequently overturned by the courts. Also those who ran WATA believed that the manufacturer ought to be able to terminate some kinds of dealers. They had no desire to protect the dealers who were unethical or the small operators with inadequate service facilities who had been put in business under the cross-roads policy. Moreover, those in control of WATA accepted the idea of success and failure as valid reasons for rewarding some dealers and penalizing others. The dealers and the manufacturers might have different definitions of these concepts, but they shared the same basic ideas.

As a result of all of these factors, the Wisconsin dealer legislation was not openly anticompetitive. The Wisconsin statute later became the model for the others.⁸⁵⁵ Dealer lobbyists elsewhere typically offered their legislatures a variation of the Wisconsin act along with several dealer witnesses who told stories about factory pressure and voiced their conclusion that the bill was needed. The manufacturers usually responded in kind by decrying the statutes as un-American and a threat to the franchise system. What did not happen is important. Legislators did not carefully define an alleged problem, investigate to see whether or not the problem existed and warranted legislative solution, define possible solutions to the problem they found, and consider the likely consequences of those solutions.⁸⁵⁶ These steps were taken, if at all, outside of the legislatures by the dealer trade associations whose conclusions reflected the interests of their dominant members. The state legislative committees generally acted as rubber stamps approving the Wisconsin pattern offered by the lobbyists or as veto agencies rejecting it. As other states followed the Wisconsin model, its efficiency, performance of commitments, and due process emphasis automatically followed. Of course, the process might not have been so automatic if the Wisconsin model had not appealed to the free enterprise ideology of many state legislators and dealer trade association members or had not promised solutions for what were viewed as real problems in the 1950's.

The federal Good Faith Act is even more Delphian than the state statutes, although it is the product of an extensive data-gathering effort on the part of Congress. Its ambiguity and its legislative history have influenced its construction by the courts. At least two factors prompted the ambiguity. First, all of the effort leading up to the bill was not directed at any clearly defined

⁸⁵³ WIS. STAT. § 218.01(3)(15) (1963).

⁸⁵⁴ WIS. STAT. § 218.01(3)(17) (1963). See also WIS. STAT. § 218.01(3)(16) (1963): "induced . . . any automobile dealer to . . . do any other act unfair to said dealer, by threatening to cancel any franchise . . ." This section has never been used.

⁸⁵⁵ See text accompanying notes 99-162 *supra*.

⁸⁵⁶ See Mayo & Jones, *Legal-Policy Decision Process: Alternative Thinking and the Predictive Function*, 33 GEO. WASH. L. REV. 318, 349-50, 367-68 (1965).

problem. The NADA faced division within its own ranks over which problems legislation ought to solve.⁸⁵⁷ Those who profit by selling in the territory of others and by offering low prices do not want territorial security and a fair trade approach; other dealers think of these things as essential. The hearings dealt with dealers' complaints about "bootlegging," territorial security, forcing unwanted cars and accessories, arbitrary cancellations, vagueness of franchise provisions, difficulties in communicating dealer problems to top management, price packing, and sales techniques bordering on fraud (which the factories were alleged to have encouraged), as well as the unfairness of the dealers' position at the bottom of the manufacturers' administrative pyramids. The statute as originally drafted was supposed to cover some of these problems by requiring manufacturers to act in "a fair, equitable, and nonarbitrary manner so as to guarantee the dealer freedom from coercion . . . and in order to preserve all the equities of the automobile dealer which are inherent in the nature of the relationship."⁸⁵⁸ The amendments in the House reduced this language to requiring manufacturers to act in "a fair and equitable manner . . . so as to guarantee . . . freedom from coercion."⁸⁵⁹ The House report on the bill said that some of the problems were not covered but failed to tell an interested reader just which ones were supposed to be solved.⁸⁶⁰ This puzzle may have been necessary to satisfy as many NADA members as possible that their interests were protected.

Secondly, the uncertainty undoubtedly is also the product of the compromises required to get a statute on this subject passed in 1956. The act is a resolution of the clash of several interests—dealers, manufacturers, Democratic senators and representatives, and the Eisenhower Administration. The proponents may have thought that the symbolic victory of passing any statute over the opposition of the manufacturers and the chance of future victories in the courts were worth the indefiniteness. It is striking that in all of the lengthy hearings, debates, and committee reports there is little attempt to define a problem, think of alternative solutions, predict the consequences of each, and make a choice. Chairman Celler was worried about the possibility that the Senate bill might prevent manufacturers from cancelling the franchise of an inefficient dealer, and he created a great deal of legislative history which made clear that inefficient dealers could be dropped.⁸⁶¹ But this was action designed to block only one possible undesirable consequence. There was little other effort to predict just what the Good Faith Act would do.

⁸⁵⁷ See text accompanying notes 216-21 *supra*.

⁸⁵⁸ See text accompanying notes 323-25 *supra*.

⁸⁵⁹ See text accompanying notes 372-74 *supra*.

⁸⁶⁰ See H.R. REP. No. 2850, 84th Cong., 2d Sess. (1956).

⁸⁶¹ See pp. 552-53 & notes 367, 379 *supra*.

In light of all this background, it is not surprising that courts and administrators asked whether or not a dealer's duties were fair and whether or not he had performed them. First, the text of the statutes and the legislative history lean slightly in this direction for reasons that have been indicated. Secondly, due process, efficiency, and performance of commitments are all values with high acceptance in this society. Any standard calling for the protection of a group from the impact of the market, toleration of inefficiency, and excuse of personal failures to perform because of inability would be hard to defend. One would have to find other highly valued concepts to advertise such a norm. While one can speak of the family farm or the small-town merchant as social institutions with romantic claims to being part of the very fabric of our society, the "family automobile dealership" does not evoke similarly strong and positive images. Thirdly, the manufacturers rewrote their franchises in terms of commitments to be judged by relatively objective standards and to be reviewed by elaborate processes within their organizations. They were able to come to court or before an agency asserting that due process, efficiency, and performance *were* the appropriate standards to be applied and that they *had* been applied in the particular case. They were able to counter the dealer's appeal for sympathy by showing that he had been given a fair hearing, that he was not efficient, and that he had not done what he had agreed to do. Faced with this kind of case, many decision makers would find that a position which would protect a dealer from the requirement that he compete effectively would be difficult to rationalize.

Fourthly, the legislatures and Congress had made almost no investigation of the consequences of a protectionist standard. Shortly after the Good Faith Act was passed, Kessler and Stern seemed to argue that a construction of that act which looked to general undefined fairness concepts would injure competition and raise automobile prices.⁸⁶² This possibility probably bothered some judges and administrators: enforcement agencies do not have the facilities to make good predictions about the consequences of economic regulation; they could not be certain where such a construction might take them.⁸⁶³

Finally, concepts of due process and contract are likely to be used to color imprecise statutes which remove an area from generalized contract law. Those concepts are familiar, relevant, far more developed than any others, and most people acknowledge that they are good things. Those concepts also simplify the job of the decision maker. It is far easier to determine whether or not

⁸⁶² Kessler & Stern, *Competition, Contract, and Vertical Integration*, 69 YALE L.J. 1, 103-14 (1959).

⁸⁶³ See the comments of Judge Clark in note 74 *supra*. See also Wellington, *Freedom of Contract and the Collective Bargaining Agreement*, 112 U. PA. L. REV. 467, 495-98 (1964).

a dealer sold enough cars as compared with other dealers than whether or not the manufacturer allowed the dealer a fair return on his investment or recognized all of his other "equities." In short, these norms are accepted and they work.

Not only has the application of the manufacturer-dealer statutes focused on due process and performance of commitments, it has been carried out in a particularistic fashion. The courts and administrators have demanded that manufacturers consider each dealer's own circumstances rather than uniformly apply a general rule which might make running a large organization easier. To some extent, this particularism reflects General Motors' response to the criticisms which were made at the Senate hearings—now the formal standard for adequate sales requires consideration of "local conditions directly affecting such sales performance."⁸⁶⁴ But the criticisms at the hearings reflect a modern concern with treating men as cogs in a large industrial machine. Also particularism has been fostered by the fact that the courts and the administrators have used contract concepts in applying these statutes, and modern contract law is exceedingly particularistic. It has been influenced by the whole movement called legal realism which directs a decision maker to "balance interests" or do almost anything but decide cases deductively from rules.

2. NEW SPECIALIZED AREAS AND GENERALIZED CONTRACT LAW

This article describes the long process by which legislatures removed automobile manufacturer-dealer relations from the domain of general contract law and created a new area of law. The removal is highlighted by contrasting the legal approach in analogous areas, such as the relations of manufacturers and dealers of farm equipment.⁸⁶⁵ This relationship is still treated as the automobile manufacturer-dealer relationship was treated before the hearings and statutes. In one sense of the term, it is still governed by contract because contract law allows people to agree not to have a legally enforceable contract.⁸⁶⁶ This means, in effect, that generalized contract doctrines allow a more powerful organization to give no rights to the less powerful. If this is done, the contract lacks mutuality and is unenforceable. As a result, the powerful organization is free to use its power to govern the relationship, controlled only by the antitrust laws which establish broad outer limits within which there is great freedom to exercise other-than-legal sanctions. In other words, paradoxically, the parties are free

⁸⁶⁴ GENERAL MOTORS CORPORATION, DEALER SELLING AGREEMENT, CHEVROLET MOTOR DIVISION § 9 (1962).

⁸⁶⁵ Senator Morse introduced a bill on February 27, 1964, which would have expanded the remedies of the Good Faith Act and broadened its coverage to include "tractors, farm equipment, or farm implements . . ." S. 2572, 88th Cong., 2d Sess. (1964).

⁸⁶⁶ See 1 CORBIN, CONTRACTS § 34 (1963).

to contract not to have a contract. However, to a great extent, this freedom has been taken away by the automobile manufacturer-dealer legislation. Now there is a kind of compulsory contract; manufacturers must continue relationships with dealers unless a dealer has in some material way violated a duty under the franchise. The questions of what is a failure to perform a contract duty, whether a failure is a material one, and whether there are any excuses bear a striking resemblance to the problems dealt with by traditional contract law. In this sense of the term, the new law has pushed these transactions from the domain of pure economic power into a contractual relationship where both parties have rights and duties.⁸⁶⁷

This process may affect one's view of the thesis developed by Prof. Lawrence Friedman in his challenging book, *Contract Law in America*.⁸⁶⁸ His definition of contract law is crucial to his thesis. He limits the term contract law to the generalized set of rules which purport to apply to all transactions without regard to the type of case involved. He argues that contract law no longer governs any of the significant economic relationships in the society. Rather it has become the law of leftovers, covering only those transactions not important enough for their own area. Once the law makers have created a specialized law of insurance, sales, and labor law and have added occupational licensing, quality regulation, and fair trade laws, there is little left for the old bulwark of the first year of law school—basic contract law. Certainly, my study of the practices of businessmen and lawyers engaged in large scale manufacturing confirms much of what Friedman says.⁸⁶⁹ These people, for the most part, find generalized contract law irrelevant. Nonetheless, it is difficult to create a whole new area of law without drawing on old accepted ideas. Many, but not all, of the ideas which are usually called contract law are likely to be appropriated when a law maker seeks to order a particular kind of exchange relationship, such as automobile manufacturer-dealer transactions. The legal system may remove an area from abstract contract doctrine and insist that employers bargain in good faith; that manufacturers not terminate dealers unfairly, without just provocation and without due regard to the equities of the dealer; and that certain services not be sold by one without a license. But it is likely to interpret agreements, police them for fairness, and tailor appropriate remedies for default along the lines worked out in cases usually classified as involving the law of contracts. However, perhaps these doctrines are not really contract

⁸⁶⁷ See HAVIGHURST, THE NATURE OF PRIVATE CONTRACT 103-28 (1961).

⁸⁶⁸ FRIEDMAN, CONTRACT LAW IN AMERICA (1965).

⁸⁶⁹ See Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AMERICAN SOCIOLOGICAL REV. 55 (1963); Macaulay, *The Use and Nonuse of Contracts in the Manufacturing Industry*, Prac. Law., Nov. 1963, p. 13.

doctrines within Professor Friedman's use of the term; they will, after all, take on the nuances of the areas in which they are applied. For example, one cannot determine whether or not a breach is material without considering the particular kind of transaction involved. Moreover, ideas of fairness are not the exclusive property of the law of contract.

Still, the courts have talked as if there were a law applicable to all kinds of transactions dealing with interpretation, fairness, and appropriateness of remedy, and this body of thinking has been appropriated into the new area of manufacturer-dealer law. This appropriation may have significance. It is possible to apply these "contract" concepts to support the operation of the market or blunt it, and one can attempt to regulate general practices or make adjustments in particular cases.⁸⁷⁰ Yet these ideas do provide a starting place for analysis—one is to ask whether or not a dealer's default is "material" and measure its seriousness by certain factors. This approach has a built-in bias favoring a market-supporting but particularistic approach, since that is the nature of today's general contract law. In this sense, contract law itself may have lost much of its subject matter, but many of its ideas continue to be significant in what may be called the "newly developing nations" of the law.

B. Interest Groups and the Public Interest

When people face a problem which they think they cannot solve through private action, they can form or mobilize an interest group to appeal to the legal system for a change or they can seek a champion among governmental officials with some power. What does this case study of the dealers' struggle suggest about what the legal system offers to those seeking to use its power? What does it suggest about the protection of the public interest against the efforts of such groups?

1. THE LEGAL SYSTEM AND GROUPS SEEKING CHANGE

It is clear that the legal system can give great help to those who seek change, yet lack power in the market. Even the potential exercise of legal power can aid or hinder particular groups. When Congress developed an interest in automobile dealers in the mid-1950's, the manufacturers modified some of their practices. After the dealers' victories in the O'Mahoney hearings, even more sweeping changes were made. Some managers of dealer trade associations assert that the manufacturers' good behavior in their states is caused in part by the knowledge that the association could and would have an administrative-licensing law passed by a friendly legislature if there were any trouble.⁸⁷¹ Undoubtedly, an interest

group which has won some victories in the past will have a more credible deterrent than one which has not.

It is not easy to appropriate the power of the legal system when there is an intelligent and organized opposition. At a minimum, the interest group must be able and willing to pay the cost of the struggle. Lobbying activity is not cheap. Solutions take time and often require patience and a willingness to compromise—two things interest groups that are not old and established often lack. More discouraging is the fact that the American legal system is organized so that it is hard to be sure that a lasting victory has been won over a determined opponent. The dealers struggled long and hard to pass the Good Faith Act, but they had to compromise and allow the manufacturers to write a proviso that undercut much of the impact of their statute. The Arkansas dealers twice passed an administrative-licensing statute only to have it pronounced unconstitutional because of a highly legalistic defect. They passed a third statute only to see it overturned in a referendum which was influenced by an all out advertising campaign.⁸⁷²

Even if a group is willing to pay the price in money, time, and effort needed to seek change in this manner, it will find that legal power often is limited. The other-than-legal sanctions held by the economically powerful are hard to control. For example, the dealers could have statutes passed covering a number of practices they disliked; but many dealers would still feel that co-operation with factory demands would produce more favors (such as extra allocations of best-selling models) than would the assertion of their legal rights. Moreover, enforcement may turn on the interest of a prosecutor or of a commission, or on the wealth of an individual dealer who has been cancelled. In short, passing a law does not always give a group what it wants.

2. WHAT OF THE PUBLIC INTEREST?

Interest groups may ask for legal solutions to their problems which can be said to affect the "public interest" adversely. The public interest is a useful all-purpose term that may mean the interest of the majority, the interest of those who claim to seek what is best for society in the long run,⁸⁷³ the interest of groups not represented adequately in the process leading to change, or even the interest of anyone who does not like a lobby's proposal.

⁸⁷² See text accompanying notes 697-701 *supra*. This continuing opportunity to fight for power is an example of what Crozier has called the bureaucratic dysfunctions of the American system of organization. CROZIER, *THE BUREAUCRATIC PHENOMENON* 231-36 (1964). "They emerge from the innumerable conflicts that develop between the different centers of decision making." *Id.* at 234.

⁸⁷³ For example, professors. See Klein, *The Incidence of the Corporation Income Tax: A Lawyer's View of a Problem in Economics*, 1965 *Wis. L. REV.* 576, 601-05 (1965).

⁸⁷⁰ See note 4 *supra*.

⁸⁷¹ Interviews.

Assuming that the concept is limited to some interest or interests we value, what safeguards are built into the legal system?

We have seen one safeguard already. Viewed one way, cost, delay, and a multiplicity of forums are encumbrances on the law's valuable leverage function; viewed another way, these factors limit capricious and unwise change, particularly where there is an organized and intelligent opposition. For example, if one assumes that laws fixing the prices of cars are not in the public interest, then one can say that the car-buying public was protected from the most clear-cut infringements by decisions of the courts overturning the codes of fair competition. Moreover, the reaction of key legislators who have power is a major control. Representative Celler's views modified the text and the legislative history of the Good Faith Act so that efficiency, performance of commitments, and due process standards were highly likely to be applied by the courts. This was reinforced by the position of the Eisenhower Administration, which was able to exercise another potential source of control.

However, the system is far from perfect. Particularly at the state level bills may slip through almost unnoticed when they are pushed by some interest groups. Neither courts nor legislatures have very extensive facilities for defining problems, discovering alternatives, predicting consequences, and making informed choices. The low visibility of the consequences of their proposals gives some interest groups more power in dealing with a legislature harassed by problems of budget and taxation. Furthermore, there are few means of appraising the impact of a statute after it is passed or a common-law rule after the case is decided. Of course, committee staffs, where they exist, can do some of this work. But frequently judges, administrators, and legislators lack the feedback which might improve their work. Their information often is handed to them by partisan advocates. While we count on the clash of adversaries to produce truth in the judicial process, its procedures generally are not geared to produce data on the consequences of the present legal solution or the alternatives being pushed by the opposing parties. For example, none of the briefs in the Good Faith Act cases has more than the most general statement about the very significant consequences of the possible definitions of coercion. The records contain but few facts relevant to this question.⁸⁷⁴ To a great extent, the courts have played it by ear and relied on common sense; perhaps that is the best we can expect. In the legislative sphere there is always the danger that important interests will not be represented. Apparently in many states the automobile dealers' lobby can write its own ticket as long as the impact on car buyers is not too blatant.⁸⁷⁵ The

dealers' lobby may use its power with restraint and with a view toward the public interest as it sees it, but still we must rely on the good faith and judgment of those who control the trade associations.

C. Law and Private Systems: Formality and Informality

Operating in relatively formal and informal ways, the legal system prompted the creation of the other-than-legal, or private, systems which I have described in this article and which have both ordered present-day manufacturer-dealer relationships and dealt with disputes. These private systems continue to be supported by the legal system, and they are largely responsible for whatever impact the lawmaking described in this article has had.

1. THE RELATIONSHIP BETWEEN THE LEGAL AND THE PRIVATE SYSTEMS

a. The Nature of the Systems

The legal system can operate in a more or less formal fashion. At one extreme, law can attempt to change or support social situations or relationships by its formal processes. Legislation can be passed. Statutes can be interpreted, and common-law doctrines can be created by courts. Disputes can be resolved in litigation or administrative proceedings. The manufacturer-dealer story involves all of this legal output; there has even been a referendum to overturn the Arkansas administrative-licensing statute. But the legal system also can operate less formally in ways not so easy to observe in a law library. For example, Senate committees can harass the president of General Motors in an effort to induce him to change corporate policies; if the information media co-operate, this can be most effective.⁸⁷⁶ Lawyers counselling their clients can

⁸⁷⁶ The publicity hearing appears to be exceedingly effective when applied to the automobile industry. This technique has most recently been applied to the problem of automobile safety. The General Services Administration in July 1965 demanded that vehicles it purchased for the government be equipped with seventeen safety devices. *Wall Street Journal*, July 2, 1965, p. 2, col. 5. Shortly before the top executives of General Motors were to testify before a Senate committee, General Motors announced that six safety devices would be included in all of its 1966 model cars. *Id.*, July 9, 1965, p. 10, col. 2. At the hearing the number was increased to thirteen of the devices demanded by the General Services Administration, and General Motors stated that it would finance a \$1,000,000 study of highway safety statistics. *Id.*, July 14, 1965, p. 3, cols. 2-3. The executives were subjected to great criticism for inadequate efforts in the past. *Ibid.* Chrysler executives faced the same criticism when they appeared before the committee. *Id.*, July 15, 1965, p. 7, cols. 2-3. The *Wall Street Journal* commented that "Clearly GM and Chrysler underestimated the opposition and failed to prepare adequately. Moreover, their executives antagonized both subcommittee chairman Ribicoff (D. Conn.) and the even more formidable Sen. Robert Kennedy of New York. Yet the

⁸⁷⁴ See note 544 *supra*.

⁸⁷⁵ Interviews.

channel conduct. In this way they can give actual or even potential formal legal action widespread effect.⁸⁷⁷ If, as is suspected, the manufacturers pursued a test case strategy in approaching the interpretation of the Good Faith Act, their lawyers were giving meaning to the act in many areas by telling the sales staff to abandon many traditional practices—at least temporarily. Also administrators can advise manufacturers and dealers about their rights under state statutes and influence conduct. They can mediate disputes in prehearing conferences without the costs of formal proceedings. For better or worse, all of this less formal legal action affects people and organizations significantly.

Private orderers, too, can operate in a more or less formal fashion. The structure of a relationship can be planned or left to evolve in response to circumstance. The manufacturer-dealer relationship has been codified in selling agreements, and procedures have been created within the manufacturers' organizations for an upward flow of communications and for review of actions taken at the local level. Other formal channels for meeting problems have been created by the manufacturers' recognition of the legitimacy of the National Automobile Dealers Association as a representative of the dealers. Of course, it is one thing to create relatively formal private procedures, and it is another thing to follow them. Often a formal contract is drafted, signed, filed away, and forgotten as businessmen prefer to work things out their own way without regard to rights and duties.⁸⁷⁸ We have little information about the degree to which field men insist on enforcing the provisions of franchises and when and to what extent dealers are given leeway to deviate from the formal pattern. We can expect that field men and dealers do not always "follow the book," for few superiors find it profitable to enforce all of the rules all of the time.⁸⁷⁹

Disputes also can be handled more or less formally outside of the legal system. At one extreme, General Motors has set up an impartial umpire to consider problems raised by dealers. The retired federal judge who was appointed adopted a procedure similar to that used in court.⁸⁸⁰ At the other extreme, field men and

hostile Congressional reaction evidently came as a shocking surprise to the auto magnates." *Id.*, July 20, 1965, p. 14, col. 3.

A similar use of hearings has taken place on the subject of tire safety. See, e.g., *id.*, Oct. 26, 1965, p. 1, col. 6, at 22, cols. 2-5; *id.*, Aug. 13, 1965, p. 1, col. 6.

⁸⁷⁷ See HURST, *THE GROWTH OF AMERICAN LAW—THE LAW MAKERS* 334-38, 342-52 (1950).

⁸⁷⁸ See note 869 *supra*.

⁸⁷⁹ See BLAU & SCOTT, *FORMAL ORGANIZATIONS* 237-40 (1962). "Formal rules and sanctions and his [a superior's] status prerogatives provide opportunities for obligating subordinates simply by refraining from enforcing or exercising them." *Id.* at 237.

⁸⁸⁰ Interview.

Retired United States Supreme Court Justice Charles Whittaker was

dealers settle disagreements privately and informally through negotiation. This is a bargaining process with a minimum of procedures and structure, although it takes place within a context set by the written franchise, the Good Faith Act, and, in many instances, state legislation.

b. *The Impact of the Legal on the Nonlegal Systems*

Both the more and less formal operations of the legal system have influenced the more and less formal operations of the private systems and produced the major part of whatever impact the total effort by the dealers has had. For example, the 1956 revised General Motors franchise, the elected dealer councils, and the impartial umpire were created in response to the Senate hearings. Private negotiations between field man and dealer will be affected to the extent that a manufacturer's legal department tells its sales staff that they must persuade and not order dealers to act. A field man who cannot demand action must bargain. All of these private systems have far more meaning for most dealers than lawsuits for damages under the Good Faith Act or proceedings under administrative-licensing statutes to revoke licenses of factory representatives. The major significance of these formal legal proceedings is that they support the private other-than-legal ways of dealing with the problems. This is why there is general satisfaction with the results of the dealers' use of the legal system, although one can find few reported cases under either the Good Faith Act or the state statutes which favor the dealer who brought the case. The elaborate screening systems designed to catch problem situations generally work. The law prompted most of them and keeps them safe from erosion.

2. ADVANTAGES AND DISADVANTAGES OF INFORMALITY AND PRIVATE SYSTEMS

To describe the operation of less formal legal systems and private systems for planning and solving problems is not necessarily to applaud them. Of course, each has important values. First, consider the advantages of informal legal action. For example, a publicity hearing performs an educational function, drawing attention to a problem and creating a climate for action. Unless the hearing exposes conduct which many would criticize, it fails because its findings are not news. It is one of the few techniques by which an individual legislator can initiate action rather than simply recording his vote on proposals made by the executive or the controlling group in the legislature.

named as umpire in October 1965. *Automotive News*, Oct. 25, 1965, p. 4, col. 5. It is not known whether he will retain the procedures of his predecessor; given his background, it seems likely that some similarity to the judicial process will remain.

Private other-than-legal dispute settlement systems also have virtues. They frequently operate at less cost and greater speed than the courts, keep problems relatively unpublicized, produce compromises instead of victories, and leave the parties happier than they would be if they had engaged in full scale legal warfare. It seems likely that a dealer would be allowed to continue selling Fords if he won his case before the Dealer Policy Board. One can wonder about his chances of continuing after he won a suit under the Good Faith Act.

Nonetheless, there are costs. First, informal legal systems are classified as informal because they abandon due process and procedural safeguards. It is not news that the publicity hearing can be used to sidestep these inconvenient "legal technicalities" and throw people to the mob. Individuals or organizations may be forced to abandon their rights when the exercise of them is unpopular. Secondly, private dispute settlement has drawbacks. When two strong organizations get together to resolve differences, the resolution can be at the expense of other unrepresented interests. For example, the manufacturers and those who control dealer associations could reach decisions in private negotiations which adversely affected unrepresented dealers or the car-buying public. (This is not to say they have done so.) It is probably a little harder to do this in a public forum because of the chance of publicity and the usual attempts to give all interests a hearing.

3. SIGNIFICANCE FOR LEGAL RESEARCH

These observations should influence legal research which is concerned with the impact of law. For example, most of the articles on manufacturer-dealer problems confidently assert that the state statutes are ineffective⁸⁸¹ and that the Good Faith Act will

⁸⁸¹ See, e.g., Brown & Conwill, *Automobile Manufacturer-Dealer Legislation*, 57 COLUM. L. REV. 219, 226 (1957) (state statutes "may have resulted in benefits which are illusory at best."); Note, 70 HARV. L. REV. 1239, 1243 (1957) ("remedies appear to be impractical."); Note, 63 HARV. L. REV. 1010, 1020 (1950) (state statutes "are not entirely satisfactory."); Note, 31 IND. L.J. 233, 242 (1956) (state statutes "have been largely unrealistic."); Note, 52 NW. U.L. REV. 253, 257 (1957) (state statutes "have afforded little protection for the dealers."); Comment, 74 YALE L.J. 354, 356 (1964) (state statutes "had proved ineffective."). In addition Comment, 62 MICH. L. REV. 310, 312-13 (1963), repeats, with only slight modification and without quotation marks or footnote, the words used by the *Northwestern* note.

To a great degree, these articles assume that the statutes are ineffective because the dealers were not expressly given a private right to sue for damages, because taking away a manufacturer's license would injure all of its other dealers and the car-buying public in the state, and because the statutes could be evaded by granting short-term franchises. Only the last reason has some validity—manufacturers could in some states do this, but by and large they have not. See notes 702-04 *supra*.

The *Yale* comment states, "Surprisingly, there has been little litiga-

tion under the state statutes." Comment, 74 YALE L.J. 354, 356 n.10 (1964). I would be surprised if litigation were often necessary where informal legal systems and all the private systems were operating.

have or has had little significance.⁸⁸² If those articles announced no more than the conclusions of the dealers who have been cancelled and have tried to sue, it would be hard to disagree. But the articles purport to pass judgment on the effectiveness of the statutes in carrying out the interests of all dealers including those who have never been forced to try to use them. They are wrong. Their mistaken appraisal rests on their failure to consider the operation of the less formal parts of the legal system and the private systems of planning and adjustment which were created in response to, and are supported by, the legal system.⁸⁸³

Gathering reliable data about these things is difficult. Most of my information was based on interviews, letters, or trade papers. I would have preferred to observe each process described in action, but one can hardly expect to be invited, say, to participate in and report the discussions held by a manufacturer about how to respond to a dealer's Good Faith Act suit.⁸⁸⁴ As is so often the case, my research touched areas where secrecy is thought to be important. Even had I been allowed to participate and observe, my presence probably would have changed the process. Thus, I was forced to rely on information that may or may not be totally reliable. Moreover, there are many questions left unanswered. For example, exactly how do the internal dispute settlement systems of the manufacturers operate? Do those in command consider past service, the impact of cancellation on a dealer, and his other

⁸⁸² See, e.g., Brown & Conwill, *supra* note 880, at 228; Freed, *A Study of Dealers' Suits Under the Automobile Dealers' Franchise Act*, 41 U. DET. L.J. 245, 256-61 (1964); Comment, 48 CORNELL L.Q. 711, 741-42 (1963).

⁸⁸³ *But see* Note, 70 HARV. L. REV. 1239, 1256-57 (1957), which states with good sense:

The primary function of these statutes . . . should be to encourage the parties concerned to reach agreements without burdening the courts. To the extent that the legislation creates a willingness to develop such facilities for the settlement of disputes as arbitration agreements or impartial review boards, it will be successful. . . . Although it would seem to be in the best interests of both manufacturers and dealers to create some institutional system for resolving their differences without litigation, it is difficult to determine how successful the state and federal statutes will be in promoting this objective.

Little more could have been said in 1957.

⁸⁸⁴ Prof. Melville Dalton used participant observation to its fullest. He was an employee of a company he studied. He talked with his friends, some of whom were unaware of his research interests. He persuaded secretaries to give him access to the files and data on managerial salaries. See Dalton, *Men Who Manage*, in *SOCIOLOGISTS AT WORK* 50 (Hammond ed. 1964).

Some might question the ethics of this covert or undercover research. See BLAU, *THE DYNAMICS OF BUREAUCRACY* 285-86 (2d ed. 1963). See Dalton's reply in Dalton, *supra* at 59-62. In any event, it is a most time-consuming and difficult way to produce rewarding information and insights.

"equities," or do they apply strictly economic criteria? To what extent do those in command rely on the record compiled by local representatives who have been accused of wrongdoing, and to what extent are their investigations independent? To what extent can the small number of Good Faith Act cases brought against General Motors be attributed to its impartial umpire? What are the expectations of the majority of the dealers for which the manufacturers are responsible, and to what extent do the results reached by the courts, administrative agencies, and private arbitrators and mediators carry out those expectations? What has been the actual cost of the state and federal statutes to the manufacturers and to what extent has this been passed on to the consumer? Even if one were given access to the people and records needed to provide answers, they would not be obtained without great difficulty and expense. Certainly this article does not pre-empt the field of manufacturer-dealer relations.

Nonetheless, despite the difficulties in gathering reliable data, relatively informal legal systems and private systems exist and can produce important consequences for people and organizations. They can be prompted, supported, or hindered by legal action. If these matters are ignored, an evaluation of the consequences of a law is simply shooting in the dark. Data is hard to get, but informal legal systems and private systems for planning relationships and settling disputes will not just go away. It may be that legal research can do little more than speculate, use common sense, and rely on whatever facts can be found concerning these matters. Yet this seems preferable to ignoring them.