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MARKET IMPERFECTIONS: ENFORCEMENT OF THE ANTI-TRUST LAWS IN A FRICTION-AFFLICTED ECONOMY

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INTRODUCTION

In analyzing the nature of monopoly economists distinguish between market "impurities" and "imperfections." "Pure" competition is a simple concept: there must be many buyers and many sellers, no one of whom can affect prices. Since the sales or purchases of each trader are small, each seller is faced with a perfectly elastic demand curve for his product.¹ A second requirement of market "purity" is that the commodity must be homogeneous.² When the two foregoing

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1. CHAMBERLIN, THE THEORY OF MONOPOLISTIC COMPETITION 7 (5th ed. 1946); Chamberlin, *Monopolistic or Imperfect Competition?*, 51 Q.J. ECON. 557, 566 (1937); ROBINSON, THE ECONOMICS OF IMPERFECT COMPETITION 88-9 (1936); Robinson, *What Is Perfect Competition?*, 49 Q.J. ECON. 104, 105 (1934); Machlup, *Monopoly and Competition: A Classification of Market Positions*, 27 AM. ECON. REV. 445, 451 (1937); TRIFFIN, MONOPOLISTIC COMPETITION AND GENERAL EQUILIBRIUM THEORY 138 (1940). Cf. Kaldor, *Professor Chamberlin on Monopolistic and Imperfect Competition*, 52 Q.J. ECON. 513, 516 (1938).

2. CHAMBERLIN, THE THEORY OF MONOPOLISTIC COMPETITION c. 1 (5th ed. 1946); Machlup, *Monopoly and Competition: A Classification of Market Positions*, 27 AM. ECON. REV. 445, 448 (1937). Difficulty in defining commodities has been, of course, a major problem in the attempt to achieve "pure" competition. Hale, *Size and Shape*, 1950 U. OF ILL. L. FORUM 515, 525.

conditions for "purity" have been achieved, all monopoly elements have been removed from the market.

"Perfect" competition is a residual concept. All obstacles to an economic allocation of resources other than monopoly are referred to as "imperfections."³ Time lags, immobility of capital and labor, ignorance on the part of producer or consumer, and irrational decisions by buyers and sellers are prominent examples of "imperfections."⁴ As we shall see, commodities must also be homogeneous in order to avoid market "imperfections;" thus there is an overlap between the concepts of "purity" and "perfection."⁵

This study examines the nature of imperfections and suggests their application in the enforcement of the anti-trust laws.⁶ In a free

3. HANEY, *HISTORY OF ECONOMIC THOUGHT*, 695 (4th ed. 1949); CHAMBERLIN, *THE THEORY OF MONOPOLISTIC COMPETITION* 6, 206 (5th ed. 1946); Machlup, *Monopoly and Competition: A Classification of Market Positions*, 27 *AM. ECON. REV.* 445 (1937); KNIGHT, *RISK, UNCERTAINTY AND PROFITS* 76-9 (1921).

4. As stated by Professor Knight, the condition of perfect competition: ". . . assumes complete absence of physical obstacles to the making, execution and changing of plans at will; that is there must be 'perfect mobility' in all economic adjustments, no costs involved in movements or changes. To realize this ideal all the elements entering into economic calculations—effort, commodities, etc.—must be continuously variable, divisible without limit. Productive operations must not form habits, preferences, or aversions, or develop or reduce the capacity to perform them. In addition the production process must be constantly and continuously complete; there is no time cycle of operations to be broken into or left incomplete by sudden readjustments. Each person continuously produces a complete commodity which is consumed as fast as produced. The exchange of commodities must be virtually instantaneous and costless." *Id.* at 128. Cf. HANEY, *VALUE AND DISTRIBUTION* 149 (1939). Imperfections prevent application of the "profits" test to determine the existence of monopoly. High profits, in other words, may reflect merely frictions in the market place and not monopoly power. KNIGHT, *RISK, UNCERTAINTY AND PROFITS* 19 (1921); Machlup, *Monopoly and Competition: A Classification of Market Positions*, 27 *AM. ECON. REV.* 445, 448 (1937); Robinson, *What Is Perfect Competition?*, 49 *Q.J. ECON.* 104, 107 (1934).

5. Differentiation of products is a way of avoiding pure competition. Hence the existence of homogeneous commodities is a necessary condition of purity. CHAMBERLIN, *THE THEORY OF MONOPOLISTIC COMPETITION* 7 (5th ed. 1946); ROBINSON, *THE ECONOMICS OF IMPERFECT COMPETITION* 90 (1936); TRIFFIN, *MONOPOLISTIC COMPETITION AND GENERAL EQUILIBRIUM THEORY* 133 (1940); SAMUELSON, *ECONOMICS AN INTRODUCTORY ANALYSIS* 492 (1st ed. 1948); HANEY, *VALUE AND DISTRIBUTION* 146 n. (1939). Cf. Kaldor, *Professor Chamberlin on Monopolistic and Imperfect Competition*, 52 *Q.J. ECON.* 513, 517 (1938). Many subtle forms of product differentiation impair commodity homogeneity. Delivery service, extension of credit and the privilege of returning merchandise are three prominent examples. ROBINSON, *THE ECONOMICS OF IMPERFECT COMPETITION* 89, 90 (1936); Copeland, *Competing Products and Monopolistic Competition*, 55 *Q.J. ECON.* 1, 30 (1940). Standardization of commodities is also important in the concept of "perfect" competition. Without such standards it is impossible for buyers to identify what they are paying for. *Id.* at 32. Cf. LYON, *THE A.B.C. OF THE N.R.A.* 173, 174, 177, 178 (1934) (Code provisions under the N.R.A.). Such standardization, however, can be carried so far as to deny consumers any real choice. At that point there may be conflict between the requirements of "purity" and "perfection" and of consumer sovereignty. Chamberlin, *Monopolistic or Imperfect Competition?*, 51 *Q.J. ECON.* 557, 577 (1937); STOCKING AND WATKINS, *MONOPOLY AND FREE ENTERPRISE* 508 (1951).

6. The basic federal statute is the Sherman Act. 26 *STAT.* 209 (1890), 15 *U.S.C.* § 1 (1946). Supplementary legislation is collected in the first part of title 15 of the United States Code. Similar legislation exists in most of the states and was collected in *W.P.A., STATE ANTI-TRUST LAWS* (Martin ed. 1940). The common law of the several states should also be considered.

market economy allocation of resources is guided by consumer demand. Frictions and imperfections which reduce mobility of capital and labor or cloud the reign of consumer sovereignty may be just as injurious to the economy as monopoly itself.⁷ In addition, such frictions and imperfections may themselves give rise to a degree of monopoly power: if Ivory is the only brand of soap known to a housewife, its maker can monopolize her trade.⁸ This paper suggests that in some instances monopoly elements in effect merely eliminate imperfections which may be more disruptive to the economy than the impurities which they create. In any anti-trust case, therefore, not only the monopolistic tendencies, but also the imperfections which they tend to remove must be examined and weighed in order to obtain an economically sound result.

THE NATURE OF MARKET IMPERFECTIONS

Indivisibility and immobility are obvious imperfections. A town may not be large enough to support a second theater. Workers may hesitate to leave family and friends in order to secure higher wages in a distant area.⁹ Space itself is an imperfection¹⁰ and likewise gives rise to part of the problem of mobility.¹¹ Similarly, time lags prevent

7. Lindhahl, *The Federal Trade Commission Act as Amended in 1938*, 47 J. POL. ECON. 497, 504 (1939); GARVER AND HANSEN, *PRINCIPLES OF ECONOMICS* 58 (3d ed. 1947). Imperfections may seriously distort the economy. Machlup, *Monopoly and Competition: A Classification of Market Positions*, 27 AM. ECON. REV. 445, 451 (1937). Consumer sovereignty is, of course, also thwarted by monopoly. Hildebrand, *Consumer Sovereignty In Modern Times*, 41 AM. ECON. REV. 19, 21 (Supp. 1951) (Proceedings American Economic Association).

8. Robinson, *What Is Perfect Competition?*, 49 Q.J. ECON. 104, 106 (1934); LYON AND ABRAMSON, *THE ECONOMICS OF OPEN PRICE SYSTEMS* 64 (1936); BORDEN, *THE ECONOMIC EFFECTS OF ADVERTISING* 182 (1942); Wright, *Toward Coherent Anti-Trust*, 35 VA. L. REV. 665, 678 (1949).

9. Cf. KNIGHT, *RISK, UNCERTAINTY AND PROFITS* 177 (1921); Chamberlin, *Monopolistic or Imperfect Competition?*, 51 Q.J. ECON. 557, 564-5 (1937); HANEY, *VALUE AND DISTRIBUTION* 151 (1939); WILCOX, *COMPETITION AND MONOPOLY IN AMERICAN INDUSTRY* 2 (TNEC Monograph 21, 1940); Gregory, *Fashion and Monopolistic Competition*, 56 J. POL. ECON. 69, 73 (1948). Such imperfections are often equivalent to those economies of scale which stand in the way of "pure" competition. Kaldor, *Professor Chamberlin on Monopolistic and Imperfect Competition*, 52 Q.J. ECON. 513, 521 (1938). Query whether differences in managerial ability should be considered imperfections. In *United States v. Aluminum Co. of America*, 148 F.2d 416, 431 (2d Cir. 1945), one of the elements of monopolization mentioned was that the defendant had kept the elite of personnel in its industry available for production of its goods. Note also, the following statement: "Small business by its very nature—the low financial requirements, easy entry, attractiveness to the individual—invites entrants without management experience while it is usually unable to contain within itself the elements of good management in the way of accountants, financial experts, fact finding, and so on." Wexman, *Financial Advice and Guidance for Small Business*, 11 LAW & CONTEMP. PROB. 334, 336 (1945).

10. Stated differently: The fact that all economic activity does not occur at one place is in itself an imperfection.

11. MARSHALL, *PRINCIPLES OF ECONOMICS* 324-5 (8th ed. 1922); KNIGHT, *RISK, UNCERTAINTY AND PROFITS* 79 (1921); ROBINSON, *THE ECONOMICS OF IMPERFECT COMPETITION* 89 (1936); GARVER AND HANSEN, *PRINCIPLES OF ECONOMICS* 61 (3d

a perfect allocation of resources: even though a new product is not protected by patent some delay normally ensues before the innovator is challenged by competition.¹²

Inertia is an important imperfection.¹³ Many economic decisions are the result of habit and custom rather than rational choice. We do not and we could not pause to re-examine every day the quality of the commodities which we buy.¹⁴ The man who has always driven a Buick may purchase another car of that make to save an afternoon of shopping around for his game of golf. Closely akin to inertia are the emotional barriers to a free flow of resources.¹⁵ Sectional,

ed. 1947); Hotelling, *Stability in Competition*, 39 *ECON. J.* 41, 44 (1929); Lerner and Singer, *Some Notes on Duopoly and Spatial Competition*, 45 *J. POL. ECON.* 145, 186 (1937); WEINTRAUB, *PRICE THEORY* 277, 278, 285 (1949); Smithies, *Optimum Location in Spatial Competition*, 49 *J. POL. ECON.* 423, 434 (1941); Copeland, *Competing Products and Monopolistic Competition*, 55 *Q.J. ECON.* 1, 29 (1940). From another point of view, the factor of space simply differentiates products and hence constitutes an impurity rather than an imperfection. Hale, *Size and Shape*, 1950 *U. OF ILL. L. FORUM* 515, 518, 527; Enke, *Space and Value*, 56 *Q.J. ECON.* 627, 637 (1942); Sraffa, *The Laws of Returns Under Competitive Conditions*, 36 *ECON. J.* 535, 544 (1926); Chamberlin, *Monopolistic or Imperfect Competition?*, 51 *Q.J. ECON.* 557, 562 (1937); Lerner and Singer, *Some Notes on Duopoly and Spatial Competition*, 45 *J. POL. ECON.* 145 (1937); WEINTRAUB, *PRICE THEORY* 272, 284 n. (1949). For a discussion of how competitors behave in relation to the impurity or imperfection of space see Copeland, *Competing Products and Monopolistic Competition*, 55 *Q.J. ECON.* 1, 29 (1940); Lerner and Singer, *Some Notes on Duopoly and Spatial Competition*, 45 *J. POL. ECON.* 145, 151, 154 (1937); Smithies, *Optimum Location in Spatial Competition*, 49 *J. POL. ECON.* 423, 430, 432, 436 (1941). Retail market areas, of course, vary in size and economic importance. WAITE AND CASSADY, *THE CONSUMER AND THE ECONOMIC ORDER* 234 (1939).

12. MARSHALL, *PRINCIPLES OF ECONOMICS* 330 (8th ed. 1922); HANEY, *HISTORY OF ECONOMIC THOUGHT* 707 (4th ed. 1949); WILCOX, *COMPETITION AND MONOPOLY IN AMERICAN INDUSTRY* 2 (TNEC Monograph 21, 1940); WAITE AND CASSADY, *THE CONSUMER AND THE ECONOMIC ORDER* 254 n. (1939); CHAMBERLIN, *THE THEORY OF MONOPOLISTIC COMPETITION* 6 (5th ed. 1946); BURNS, *THE DECLINE OF COMPETITION* 29 (1936). Some variations in price on a seasonal or other basis reflect changes in demand rather than imperfections. The August fur sale, the higher price of hair cuts on Saturday and the lower telephone rates available in the evenings are examples of such changes in demand corresponding to time periods. OXENFELDT, *INDUSTRIAL PRICING AND MARKET PRACTICES* 240 (1951). The passage of time is important, however, to a study of monopoly proper even though most observers to date have contented themselves with "static" analyses. HANEY, *HISTORY OF ECONOMIC THOUGHT* 709, 713 (4th ed. 1949); Chamberlin, *An Experimental Imperfect Market*, 56 *J. POL. ECON.* 95, 108 (1948).

13. ROBINSON, *THE ECONOMICS OF IMPERFECT COMPETITION* 89 (1936); HANEY, *HISTORY OF ECONOMIC THOUGHT* 702 (4th ed. 1949).

14. KNIGHT, *RISK, UNCERTAINTY AND PROFITS* 210 (1921); GORDON, *ECONOMICS FOR CONSUMERS* 7, 66 (2d ed. 1944); Mack, *Economics of Consumption in A SURVEY OF CONTEMPORARY ECONOMICS* 42 (Haley ed. 1952). A vivid illustration of the force of habit is found in consumers' attachment to particular brands of goods. OXENFELDT, *INDUSTRIAL PRICING AND MARKET PRACTICES* 140 n. 64, 146 (1951). *But cf.* Nichol, *Edgeworth's Theory of Duopoly Price*, 45 *ECON. J.* 51, 62-3 (1935); Roper, *The Fortune Consumer Outlook*, 40 *FORTUNE* 57, 60 (Sept. 1950). The very notion that consumers may exercise freedom of choice is a modern one. In earlier ages consumer sovereignty was unknown and even the amount of food to be eaten by the citizenry was prescribed closely by governmental decree. GORDON, *ECONOMICS FOR CONSUMERS* 599 (2d ed. 1944).

15. Differences in tastes vary greatly among consumers. Mack, *Economics of Consumption in A SURVEY OF CONTEMPORARY ECONOMICS* 62, 63 (Haley ed. 1952); ROBINSON, *THE ECONOMICS OF IMPERFECT COMPETITION* 89 (1936). Unequal distribu-

social, family and religious considerations make markets rigid. Racial prejudice warps employment and other transactions. Hopes and habits, customs and conventions often prevent consumers from acting in a manner which others might consider rational.¹⁶

Government action in the nature of intervention—control over prices and the rationing of commodities—should be considered as an impurity.¹⁷ Other types of governmental action may, however, well result in imperfections. Thus taxes levied on particular products such as gasoline and cigarettes tend to distort consumer demand for those commodities.¹⁸ In the short run, police power regulation

tion of income is, of course, responsible for a large part of (but not all) taste variations. Mack, *Economics of Consumption* in A SURVEY OF CONTEMPORARY ECONOMICS 40, 45, 53, 55, 63-4, 67, 68, 71 (Haley ed. 1952). Consumers are often motivated by a desire for display and to acquire the latest fashions. GORDON, *ECONOMICS FOR CONSUMERS* 64, 98, 291 (2d ed. 1944); BORDEN, *THE ECONOMIC EFFECTS OF ADVERTISING* 655 (1942); HOYT, *CONSUMPTION IN OUR SOCIETY* 78 (1938); Gregory, *Fashion and Monopolistic Competition*, 56 J. POL. ECON. 69, 70 (1948) (pointing out the relationship between fashion and that product differentiation which characterizes monopolistic competition). Cf. *FTC v. Algoma Lumber Co.*, 291 U.S. 67, 78 (1934); *Eastern Wine Corp. v. Winslow-Warren Ltd.*, 137 F.2d 955, 958 (2d Cir. 1943) (quoting *FTC v. Algoma Lumber Co.*, *supra*). Some commodities are sold in conventionalized price "lines" which are maintained even when competition takes the form of changes in quality. NELSON AND KEIM, *PRICE BEHAVIOR AND BUSINESS POLICY* 75 (TNEC Monograph 1, 1941).

16. KNIGHT, *RISK, UNCERTAINTY AND PROFITS* 78 (1921); Boulding, *Welfare Economics* in A SURVEY OF CONTEMPORARY ECONOMICS 31 (Haley ed. 1952); Mitchell, *The Backward Art of Spending Money* in AMERICAN STANDARDS AND PLANES OF LIVING 377, 388 (Eliot ed. 1931); Mack, *Economics of Consumption* in A SURVEY OF CONTEMPORARY ECONOMICS (Haley ed. 1952); Galbraith, *Rational and Irrational Consumer Preference*, 48 ECON. J. 336 (1938); GORDON, *ECONOMICS FOR CONSUMERS* 43, 70, 72, 291, 507 (2d ed. 1944). Even on the assumption that consumers act purely "rationally" many imperfections must be recognized. Thus it has been said: ". . . Consumers tend to choose wisely, but because they have so many alternatives before them they need help in discriminating on the actual market. We have only 24 hours a day, and we cannot spend the whole 24 weighing potatoes, burning silk, experimenting with coffee grinders and feeding guinea pigs." HOYT, *CONSUMPTION IN OUR SOCIETY* 79 (1938). Another observer said: ". . . To learn really to select wisely among the many items in order to build a program of consumption would be a life's work. To learn, in addition, to choose the best value among the many qualities in which each item is offered at different prices would take the proverbial nine lives of a cat. . . ." Vaile, *Consumption, The End Result of Marketing*, 209 ANNALS 14, 21 (1940).

17. Statutes illustrating this type of government action are: 49 STAT. 543 *et seq.* (1946), as amended, 54 STAT. 919 (1940), 49 U.S.C. § 301 *et seq.* (1946) (Part II of the Interstate Commerce Act); 52 STAT. 977 *et seq.* (1938), as amended, 49 U.S.C. § 401 *et seq.* (Supp. 1951) (Civil Aeronautics Act); 49 STAT. 2036-9 (1936), as amended, 41 U.S.C. §§ 35-41 (Supp. 1951) (Walsh-Healey Act). See Fisher, *Anti-Trust During National Emergencies*, 40 MICH. L. REV. 969, 1167 (1942); Hale, *Principles of Free Enterprise*, 1 BILL OF RIGHTS REV. 186, 193 (1941); Hale, *Monopoly and Mobilization: The Conflict Between Direct Control and the Anti-trust Laws*, 47 NORTHWESTERN U.L. REV. 606 (1952). Cf. Sargent, *Economic Hazards in the Fair Labor Standards Act*, 6 LAW & CONTEMP. PROB. 422, 429 (1939). But cf. CHAMBERLIN, *THE THEORY OF MONOPOLISTIC COMPETITION* 47 (5th ed. 1946).

18. See INT. REV. CODE §§ 2000, 2800, 3250. Steeply progressive income taxes may impair incentives and hence constitute imperfections. Stigler, *The Economics of Minimum Wage Legislation*, 36 AM. ECON. REV. 358, 364 (1946); Boughner, *Methods of Reducing Excess Profits Taxes*, 32 CHI. BAR RECORD 453, 456 (1951). Restraints have sometimes been imposed upon the extension of credit. Federal Reserve System Regulation No. 10, 16 FED. REG. 1586 (1951) (Regulation 10, Real Estate Credit). It is not clear whether such restrictions should be regarded as market imperfections.

designed to protect public health and safety¹⁹ may have some similar effect. A statute requiring theatres to be constructed with a minimum number of fire exits may make it more expensive to erect such structures and hence discourage entry. In the long run, however, statutes designed in good faith²⁰ to protect public health and safety should not be considered imperfections because the barriers which they create will be counter-balanced by subsequent savings to society. In such instances the burden of regulation can be justified if the counter-vailing savings actually exist. Contrariwise, even statutes designed to protect investors from fraud²¹ may be administered in such a manner as to handicap small and growing business²² to the point where resources are allocated imperfectly.

IGNORANCE, THE GRAND IMPERFECTION

Lack of knowledge is surely the most important imperfection and perhaps the underlying cause of the others listed above. Upon the part of producers, ignorance of demand and costs is the most damaging.²³ A taxi driver sinks the savings of a lifetime in a chicken

19. Examples of this type of regulation are: 49 STAT. 546, 557 *et seq.* (1935), as amended, 49 U.S.C. §§ 304(a)(2), 315 *et seq.* (1946); ILL. REV. STAT. c. 95½, § 240 *et seq.* (1949) (Truck Act); 52 STAT. 977 *et seq.* (1938), as amended, 49 U.S.C. § 401 *et seq.* (Supp. 1951); ILL. REV. STAT. c. 127½, § 6 *et seq.* (1949) (Fires—Investigation and Prevention). See Brownfield, *Compulsory Liability Insurance for Commercial Motor Vehicles*, 3 LAW & CONTEMP. PROB. 571, 574 (1936); I SHARFMAN, *THE INTERSTATE COMMERCE COMMISSION* 245, 248 (1931).

20. It is a common-place, of course, that police power regulation may be diverted to interventionist ends. EDWARDS, *MAINTAINING COMPETITION* 313 (1949); cf. American Trucking Ass'n, Inc. v. United States, 344 U.S. 298 (1953). Many statutes fall near the border line. *E.g.*, ILL. ANN. STAT. c. 48, § 36 (Supp. 1952) (semi-monthly payment of wages); ILL. REV. STAT. c. 74, § 1 *et seq.* (1949) (regulation of rate of interest). For the history of statutes regulating hours of work and the like, see REISENFELD AND MAXWELL, *MODERN SOCIAL LEGISLATION* 598 *et seq.* (1950).

21. *E.g.*, 17 CODE FED. REGS. § 240.14a (1949) (SEC, Regulations X-14).

22. *Hearings before Committee on the Judiciary, Subcommittee on Study of Monopoly Power*, Part 2-A, 81st Cong., 1st Sess. 468 (1950). Friends of the Securities and Exchange Commission have attempted to minimize the impact of its regulation upon small business. *Id.* at 686-8; LOSS, *SECURITIES REGULATION* 246-7 (1951). Practitioners familiar with the field have not been impressed by the commission's defense. Cf. Margraf, *Does Securities Regulation Hinder Financing Small Business?*, 11 LAW & CONTEMP. PROB. 301, 302, 308 (1945); BURNS, *THE DECLINE OF COMPETITION* 419 (1936). Other examples of police power regulation which may handicap small business are found in the fields of sanitation, small loan regulation, control of insurance company investments and the like. MATTHEWS, *GUINEA PIGS NO MORE* 138 (1936); ROBINSON AND NUGENT, *REGULATION OF THE SMALL LOAN BUSINESS* 120, 135, 174 (1935); ILL. REV. STAT. c. 73, § 737(1)(h), (3), (4)(a) (Insurance Code). Complicated tax legislation may have a similar effect, *e.g.*, INT. REV. CODE § 165; KAPLAN, *SMALL BUSINESS: ITS PLACE AND PROBLEM* 68, 106, 174 (1948). As Professor Kaplan suggests, legislation of a manifestly interventionist type places a particularly heavy burden upon small and growing business. Hale, *Monopoly and Mobilization: The Conflict Between Direct Controls and the Anti-trust Laws*, 47 NORTHWESTERN U.L. REV. 608, 614 (1952).

23. For a detailed analysis of the problem mentioned in the text see KNIGHT, *RISK, UNCERTAINTY AND PROFITS* 86, 198, 213, 225, 226, 230, 252, 253, 254, 260, 263 (1921). Many observers have recognized the problem, *e.g.*, PIGOU, *THE ECONOMICS*

farm; but his location is too distant from urban markets to permit profitable operation.²⁴ At great effort an inventor develops a method of fixing nitrogen only to find that the cost of manufacture by his process is prohibitive.

Consumer ignorance is a far more important cause of market imperfections.²⁵ Faced with a vast selection of goods and imprisoned by prejudice, habit and emotion, it is next to impossible for the average consumer to buy intelligently.²⁶ Family units are not sufficiently large and their requirements are too varied to allow a detailed investigation of all the goods purchased.²⁷ Exhaustive laboratory tests are necessary to determine the relative merits of goods offered in the market place.²⁸ Even governmental and industrial buyers are not always able to determine precisely which product is the most satisfactory.²⁹ As a result, correlation between price and quality is often loose.³⁰ Rain boots selling for eighty-eight cents a pair were found

OF WELFARE 356 (4th ed. 1932); SAMUELSON, *ECONOMICS: AN INTRODUCTORY ANALYSIS* 38-9 (1st ed. 1948); OXENFELDT, *INDUSTRIAL PRICING AND MARKET PRACTICES* 123 (1951); LYON AND ABRAMSON, *THE ECONOMICS OF OPEN PRICE SYSTEMS* 7 (1936). For an example of ignorance even upon the part of large business men see *The Scrap Men*, 39 FORTUNE 80, 88 (Jan. 1949).

24. Marketing research has now been refined to a point where it is able to give producers considerable help in determining the nature of consumer demand. Testing devices indicate the preferences of consumers for various types of products and the marketing methods which will be most effective. See BROWN, *MARKETING AND DISTRIBUTION RESEARCH* 16 (1949); Cowan, *The Function of Management in Marketing*, 209 ANNALS 71, 74 (1940). It appears likely, however, that marketing research is employed only by large and perhaps medium size firms. Small producers appear not to have utilized such techniques. Smith, *Increasing Distribution Efficiency by Better Organized Research*, 17 J. MARKETING 233, 234 (1953); OXENFELDT, *INDUSTRIAL PRICING AND MARKET PRACTICES* 130 (1951); Mulvihill, *Marketing Research for the Small Company*, 16 J. MARKETING 179 (1951). Cf. KNIGHT, *RISK, UNCERTAINTY AND PROFITS* 254 (1921).

25. SORENSON, *THE CONSUMER MOVEMENT* 8-9 (1941).

26. Mitchell, *The Backward Art of Spending Money in AMERICAN STANDARDS AND PLANES OF LIVING* 377, 380 (Eliot ed. 1931); HOYT, *CONSUMPTION IN OUR SOCIETY* 78, 109 (1938); Haley, *Value and Distribution in A SURVEY OF CONTEMPORARY ECONOMICS* 1, 6 (Ellis ed. 1948); Alderson, *The Consumer Market—Income, Expenditure and Saving*, 209 ANNALS 1 (1940).

27. Mitchell, *The Backward Art of Spending Money in AMERICAN STANDARDS AND PLANES OF LIVING* 377, 379 (Eliot ed. 1931); Edwards, *Competition in Selling Consumer Goods in SOCIAL MEANING OF LEGAL CONCEPTS* #4, 353, 359 (Cahn ed. 1952); ROBINSON AND NUGENT, *REGULATION OF THE SMALL LOAN BUSINESS* 89 (1935) (old-time loan "sharks" operated in secrecy).

28. NELSON AND KEIM, *PRICE BEHAVIOR AND BUSINESS POLICY* 60 (TNEC Monograph 1, 1941); cf. GORDON, *ECONOMICS FOR CONSUMERS* 8, 12, 221 (2d ed. 1944). Just as names are convenient to identify persons, uniform labels for commodities are important to the exercise of rational choice by consumers. See K Aidanovsky, *CONSUMER STANDARDS* 141, 339 (TNEC Monograph 24, 1941).

29. *Id.* at 167. Cf. NELSON AND KEIM, *PRICE BEHAVIOR AND BUSINESS POLICY* 68 (TNEC Monograph 1, 1941).

30. KNIGHT, *THE ECONOMIC ORGANIZATION* 69 (1951); Chase and Schlink, *Consumers in Wonderland in AMERICAN STANDARDS AND PLANES OF LIVING* 804, 806 (Eliot ed. 1931); NELSON AND KEIM, *PRICE BEHAVIOR AND BUSINESS POLICY* 78 (TNEC Monograph 1, 1941); Oxenfeldt, *Consumer Knowledge: Its Measurement and Extent*, 32 REV. ECON. & STATISTICS 300 (1950); STEWART AND DEWHURST, *DOES DISTRIBUTION COST TOO MUCH?* 310 (1939); *Hearings before Temporary National Economic Committee*, Part 8, 76th Cong., 2d Sess. 3322 (1939).

better than another brand of the same commodity retailing for \$1.85.³¹ Product differentiation and the difficulty of evaluating credit, delivery and installation services render it almost impossible for the domestic consumer to achieve rational results in buying.³²

Advertising is frequently seen as an important cause of consumer ignorance and hence of imperfections in the market place.³³ Advertising assists in the differentiation of otherwise identical commodities and thus permits sellers to discriminate among groups of buyers. Identical goods are sold to different groups at widely varying prices when advertised under different trade-marks.³⁴ So heavy have been the expenditures for advertising of cigarettes and tooth paste and so great is the attachment of consumers to the established brands³⁵ that it has become more difficult and expensive for new producers to

31. *Rainboots for Women*, 30 CONSUMERS' RESEARCH BULL. 17, 18 (Aug. 1952). See also *The New Carpets*, 30 CONSUMERS' RESEARCH BULL. 13, 16, 17 (Sept. 1952); *Vacuum Cleaners*, 30 CONSUMERS' RESEARCH BULL. 5, 8-9 (Nov. 1952); *1952 Automobiles*, 29 CONSUMERS' RESEARCH BULL. 5, 6 (June 1952); *Hearings before Temporary National Economic Committee*, Part 8, 76th Cong., 2d Sess. 3331 (1939); BORDEN, *THE ECONOMIC EFFECTS OF ADVERTISING* 305 (1942). Indeed, observers have often noted that consumers frequently take price as an index of quality: the higher the price the better the quality. Corey, *Fair Trade Pricing: A Reappraisal*, 30 HARV. BUS. REV. No. 5, 47, 52 (Sept.-Oct. 1952); cf. GORDON, *ECONOMICS FOR CONSUMERS* 13 (2d ed. 1944); cf. ROBINSON, *THE ECONOMICS OF IMPERFECT COMPETITION* 89 (1936). Price reductions are sometimes avoided for fear that buyers, ignorant of quality, will assume a deterioration has taken place in manufacture. Edwards, *Competition in Selling Consumer Goods* in *SOCIAL MEANING OF LEGAL CONCEPTS* #4, 353, 361 (Cahn ed. 1952).

32. Cf. Mack, *Economics of Consumption* in *A SURVEY OF CONTEMPORARY ECONOMICS* 61 (Haley ed. 1952); Oxenfeldt, *Consumer Knowledge: Its Measurement and Extent*, 32 REV. ECON. & STATISTICS 300, 313 (1950). However, it has proven difficult or impossible to determine the quantitative importance of the problem. *Ibid.* Consumer ignorance can have broad effects upon the economy generally. It raises questions as to the whole doctrine of consumer sovereignty. See *id.* at 312, 313; Hildebrand, *Consumer Sovereignty in Modern Times*, 41 AM. ECON. REV. 19, 21 (Supp. 1951) (Proceedings American Economic Association); Clark, *An Appraisal of Certain Criticisms of Advertising*, 15 AM. ECON. REV. 5, 13 (Supp. 1925) (Proceedings American Economic Association); GORDON, *ECONOMICS FOR CONSUMERS* 7, 13 (2d ed. 1944). As to the relationship between consumer ignorance and standardization suggested in the text see WILCOX, *COMPETITION AND MONOPOLY IN AMERICAN INDUSTRY* 2 (TNEC Monograph 21, 1940); Montgomery, *Consumer Standards and Marketing*, 209 ANNALS 141, 143 (1940); EDWARDS, *MAINTAINING COMPETITION* 33 (1949); *Hearings before Temporary National Economic Committee*, Part 8, 76th Cong., 2d Sess. 3346 (1939).

33. KNIGHT, *RISK, UNCERTAINTY AND PROFITS* 185 (1921); NELSON AND KEIM, *PRICE BEHAVIOR AND BUSINESS POLICY* 55 (TNEC Monograph 1, 1941); Brown, *Advertising and the Public Interest*, 57 YALE L.J. 1165, 1171, 1173 (1948); BORDEN, *THE ECONOMIC EFFECTS OF ADVERTISING* 21, 322 (1942).

34. See NELSON AND KEIM, *PRICE BEHAVIOR AND BUSINESS POLICY* 80 (TNEC Monograph 1, 1941); Timberg, *Trade-Marks, Monopoly and the Restraint of Competition*, 14 LAW & CONTEMP. PROB. 323, 341 (1949); *Hearings before Committee on the Judiciary, Subcommittee on Study of Monopoly Power*, Serial 12, 82d Cong., 1st Sess. 462 (1952). *But cf.*, KNIGHT, *RISK, UNCERTAINTY AND PROFITS* 262 (1921). From time to time the courts have had to determine whether a brand designation distinguished otherwise identical commodities. Hale, *Size and Shape*, 1950 U. OF ILL. L. FORUM 515, 525.

35. PIGOU, *THE ECONOMICS OF WELFARE* 356 (4th ed. 1932); OXENFELDT, *INDUSTRIAL PRICING AND MARKET PRACTICES* 140 (1951); GORDON, *ECONOMICS FOR CONSUMERS* 253 (2d ed. 1944).

enter those fields.³⁶ Finally, it is urged that advertising, when not downright dishonest and misleading,³⁷ appeals to the emotions³⁸ more than the intellect and hence contributes to the irrationality of consumer behavior.³⁹ If the seller of a face cream does not promise to rejuvenate beauties faded with the passage of years, he may nevertheless murmur sweet nothings in their ears until his product is on their faces.⁴⁰

36. *Hearings before Temporary National Economic Committee*, Part 8, 76th Cong., 1st Sess. 3399 (1939). As to the existence of monopolistic profits in such situations compare NELSON AND KEIM, PRICE BEHAVIOR AND BUSINESS POLICY 81 (TNEC Monograph 1, 1941) with BORDEN, THE ECONOMIC EFFECTS OF ADVERTISING 175, 176 (1942). As stated in the text, heavy advertising expenditures can raise barriers to entry into competition. STEWART AND DEWHURST, DOES DISTRIBUTION COST TOO MUCH? 227 (1939); OXENFELDT, INDUSTRIAL PRICING AND MARKET PRACTICES 283 (1951); STOCKING AND WATKINS, MONOPOLY AND FREE ENTERPRISE 75, 164 (1951); SIMONS, ECONOMIC POLICY FOR A FREE SOCIETY 71, 72 (1948); BORDEN, THE ECONOMIC EFFECTS OF ADVERTISING 859 (1942). Such advertising may also force competitors into defensive and retaliatory measures of the same type. OXENFELDT, INDUSTRIAL PRICING AND MARKET PRACTICES 224 (1951). Note, for example, the following comment appearing in an annual report: ". . . Quality of product, although all important, is only a starting point. Unless the consumer is repeatedly convinced through advertising and merchandising, as well as by experience, that the Company's products offer the best value, sales volume will drop." THE BEST FOODS, INC., ANNUAL REPORT 5 (August 15, 1951). It is probably true, however, that the foregoing effects of advertising operate only in the short run. BORDEN, THE ECONOMIC EFFECTS OF ADVERTISING 860 (1942).

37. Compare BORDEN, THE ECONOMIC EFFECTS OF ADVERTISING 808 (1942).

38. BORDEN, THE ECONOMIC EFFECTS OF ADVERTISING 604 (1942); OXENFELDT, INDUSTRIAL PRICING AND MARKET PRACTICES 205 (1951); GORDON, ECONOMICS FOR CONSUMERS 182-3 (2d ed. 1944).

39. It is argued that advertising is merely persuasive and not informative and that trade-marks are not a scientific mechanism to identify product quality. Clark, *An Appraisal of Certain Criticisms of Advertising*, 15 AM. ECON. REV. 5 (Supp. 1925) (Proceedings American Economic Association); ROBINSON, THE ECONOMICS OF IMPERFECT COMPETITION 90 (1936); NOURSE, PRICE MAKING IN A DEMOCRACY 248 (1944); WILCOX, *Brand Names, Quality and Price*, 173 ANNALS 80, 82 (1934). Advertising is often designed merely to catch the attention of consumers so that they may receive a message of persuasion. Thus a cigarette manufacturer may employ well-known theatrical performers for its radio broadcasts simply to assure a large audience for its "commercial." See, e.g., P. LORILLARD COMPANY, 1950 ANNUAL REPORT 13 *et seq.*

40. See *Charles of the Ritz Distributors Corporation v. FTC*, 143 F.2d 676 (2d Cir. 1944). It is sometimes argued that advertising can actually create demand. E.g., Shove, *The Imperfection of the Market*, 43 ECON. J. 113, 124 (1933). Such a view would compel sweeping revision of the whole theory of consumer sovereignty. Stocking, *Modern Advertising and Economic Theory*, 21 AM. ECON. REV. 43, 44, 50, 53 (1931). But see Hotchkiss, *An Economic Defense of Advertising*, 15 AM. ECON. REV. 14-6 (Supp. 1925) (Proceedings American Economic Association). Similarly, it is sometimes urged that advertising can shift consumer demand from one brand or product to another. E.g., Mack, *Economics of Consumption in A SURVEY OF CONTEMPORARY ECONOMICS* 59 (Haley ed. 1952). It is often urged that such advertising is merely persuasive and hence wasteful in character. Brown, *Advertising and the Public Interest*, 57 YALE L.J. 1165, 1169 (1948); SIMONS, ECONOMIC POLICY FOR A FREE SOCIETY 71 (1948). But see BORDEN, THE ECONOMIC EFFECTS OF ADVERTISING 165, 168, 313 (1942). It was reported, for example, that parent teachers associations had induced school boards to remove candy vending machines from school houses. So successful had the campaign been that only 5% of the schools had such machines as against 80% before the campaign started. Candy distributors proposed a campaign to remedy the situation by advertising candy as a food contributing to health and good spirits. *Opportunities and Dangers Ahead*, 10 SOUTHERN CANDY JOBBER 10, 13 (Dec. 1951). Whether advertising can "create" demand or not, it is often credited with an ability to influence demand and much money is spent in reliance on such beliefs. BORDEN, THE ECONOMIC EFFECTS OF ADVERTISING 337, 380 (1942); THE LAMBERT COMPANY, 1950 ANNUAL REPORT 2; *Gulf Presents a New TV Show*, 10 ORANGE DISC 21, 22 (Sept.-Oct. 1952).

On the other hand, advertising and trade-marks serve as devices to remove imperfections in that they inform buyers of the existence of products and their prices.⁴¹ Classified advertising in newspapers surely constitutes an important element looking to the reduction of consumer ignorance. Mail order catalogs supply a host of information concerning products, their quality and prices.⁴² Trade-marks identify goods by reference to standards of quality which have been tested and approved by consumers.⁴³ Newly developed products are quickly brought to the attention of consumers through advertising⁴⁴ and thus achieve a volume of sales which permits mass production and hence low prices far more rapidly than would otherwise be possible.⁴⁵

41. KNIGHT, RISK, UNCERTAINTY AND PROFITS 261 (1921); GORDON, ECONOMICS FOR CONSUMERS 69, 155, 156, 165 (2d ed. 1944); Hotchkiss, *An Economic Defense of Advertising*, 15 AM. ECON. REV. 15, 17 (Supp. 1925) (Proceedings American Economic Association); BORDEN, THE ECONOMIC EFFECTS OF ADVERTISING 27, 169, 415 (1942); STOCKING AND WATKINS, MONOPOLY AND FREE ENTERPRISE 72, 73 (1951); Brown, *Advertising and the Public Interest*, 57 YALE L.J. 1165, 1168 (1948). How salesmen overcome inertia, as well as ignorance, is described in \$1,000,000 *A Year Insurance Men*, 40 FORTUNE 79, 81 (July 1949); *Sales People Aren't Selling*, 40 FORTUNE 78 (Sept. 1949).

42. GORDON, ECONOMICS FOR CONSUMERS 154 (2d ed. 1944); BORDEN, THE ECONOMIC EFFECTS OF ADVERTISING 668 (1942). Note the important role played by display advertisements inserted in newspapers by department stores and chain groceries. *Hearings before Temporary National Economic Committee*, Part 8, 76th Cong., 2d Sess. 3290 (1939).

43. Hotchkiss, *An Economic Defense of Advertising*, 15 AM. ECON. REV. 14, 21 (Supp. 1925) (Proceedings American Economic Association); Auerbach, *Quality Standards, Informative Labeling, and Grade Labeling as Guides to Consumer Buying*, 14 LAW & CONTEMP. PROB. 362, 381 (1949); Wilcox, *Brand Names, Quality and Price*, 173 ANNALS 80, 83 (1934); BORDEN, THE ECONOMIC EFFECTS OF ADVERTISING 23, 25 (1942); *Hearings before Temporary National Economic Committee*, Part 8, 76th Cong., 2d Sess. 3442 (1939). But see *id.* 3325; ROBINSON, THE ECONOMICS OF IMPERFECT COMPETITION 89 (1933); BORDEN, THE ECONOMIC EFFECTS OF ADVERTISING 25 (1942). Note the following comment by a well known proponent of protection for consumers: ". . . It isn't possible to draw sweeping conclusions that a well known brand is necessarily the consumer's guarantee of a high-quality product. Sometimes it is an important safeguard to assure at least reasonable quality, but it all depends on the sense of public responsibility of the company's management, and not at all on the volume or character of its advertising." Schlink, *Off the Editor's Chest*, 30 CONSUMERS' RESEARCH BULL. 2, 18 (Oct. 1952).

44. Hotchkiss, *An Economic Defense of Advertising*, 15 AM. ECON. REV. 14, 20 (Supp. 1925) (Proceedings American Economic Association); Brown, *Advertising and the Public Interest*, 57 YALE L.J. 1165, 1177 (1948); STOCKING AND WATKINS, MONOPOLY AND FREE ENTERPRISE 164 (1951); GORDON, ECONOMICS FOR CONSUMERS 155 (2d ed. 1944); OXENFELDT, INDUSTRIAL PRICING AND MARKET PRACTICES 230 (1951). But see the factors of jealousy and greed mentioned in Vaile, *Consumption, The End Result of Marketing*, 209 ANNALS 14, 18 (1940). All that is new does not glitter. See, e.g., *No Cure-All for Wet Basements*, 30 CONSUMERS' RESEARCH BULL. 28 (July 1952).

45. Clark, *An Appraisal of Certain Criticisms of Advertising*, 15 AM. ECON. REV. 5, 7 (Supp. 1925) (Proceedings American Economic Association); BORDEN, THE ECONOMIC EFFECTS OF ADVERTISING 173, 409, 436, 502 (1942); *What's the Matter with American Salesmanship?*, 40 FORTUNE 67, 68 (Sept. 1949); Tosdal, *The Advertising and Selling Process*, 209 ANNALS 62, 66 (1940); GORDON, ECONOMICS FOR CONSUMERS 165 (2d ed. 1944). Query whether advertising has an effect upon the number of producers in an industry. Clark, *An Appraisal of Certain Criticisms of Advertising*, 15 AM. ECON. REV. 5, 9 (Supp. 1925) (Proceedings American Economic Association); *Hearing before Temporary National Economic Committee*, Part 8, 76th Cong., 2d Sess. 3298 (1939); Hale, *Diversification Impact of Monopoly Policy Upon Multi-Product Firms*, 98 U. OF PA. L. REV. 320, 332 (1950).

Without advertising many American women might still be deprived of a Toni permanent.⁴⁶

Many private weapons in addition to advertising are employed in the struggle against ignorance. Producers commonly employ "market research" as a device to ascertain the rough outlines of consumer demand.⁴⁷ Mass merchandisers seek constantly to inform themselves as to product quality and market conditions.⁴⁸ Both sellers and buyers are aided in securing knowledge of market conditions by employment agencies, real estate brokers, trade journals and similar services.⁴⁹ Trade associations and professional societies engage in standardization and testing activities.⁵⁰ Specialized services exist to advise domestic consumers of the relative merits of products offered for consumption in the home.⁵¹ Because, however, the tastes and subjective values of consumers vary widely, the services rendered by organizations such as Consumers' Research fall considerably short of removing all the ignorance and irrationality with which purchasers are afflicted.⁵²

46. It is sometimes suggested that advertising might be able to smooth out hourly, daily, seasonal or longer fluctuations in business volume. Advertising, for example, might induce housewives to buy their groceries earlier in the week when stores are not operating at capacity levels. *Shifts in Advertising Sought for Weekly "Second Food Day,"* 20 THE AMERICAN BAKER 50 (Jan. 1952). See *What's the Matter with American Salesmanship?*, 40 FORTUNE 67, 69 (Sept. 1949). Query whether such an effect should be deemed the removal of an imperfection or an effort to alter demand.

47. Jeuck, *Marketing Research—Milestone or Millstone?*, 17 J. MARKETING 381 (1953); BORDEN, THE ECONOMIC EFFECTS OF ADVERTISING 127 (1942).

48. STOCKING AND WATKINS, MONOPOLY AND FREE ENTERPRISE 316 (1951); White, *Marketing Research*, 209 ANNALS 183, 185 (1940); K Aidanovsky, CONSUMER STANDARDS 306, 311 (TNEC Monograph 24, 1941). But see *id.* at 323. Even relatively small retailers sometimes approach market studies. A highly amusing account of the efforts of a dealer in infants' wear to secure the names of potential customers before its competitors will be found in Watson, "*Crib of the Month*" Club Plan Rocks Miami, 6 JUVENILE MERCHANDISING 60 (Jan. 1952).

49. LYON, *et al.*, GOVERNMENT AND ECONOMIC LIFE 216 n. (1939); *Our Market Opinion*, THE CHEESE REPORTER 5 (Jan. 18, 1952); Lampson, Fraser & Huth, Inc., *March Sapphire Sale*, 18 FUR. J. 9 (March-April 1952); LOESER, THE OVER-THE-COUNTER SECURITIES MARKET cc. I-IV (1940); Wexman, *Financial Advice and Guidance for Small Business*, 11 LAW & CONTEMP. PROB. 334, 338 (1945); KAPLAN, SMALL BUSINESS: ITS PLACE AND PROBLEMS 119 (1948). Even managers of steel mills find it advantageous to utilize the services of brokers in buying scrap iron. *The Scrap Men*, 39 FORTUNE 86, 88 (Jan. 1949).

50. GORDON, ECONOMICS FOR CONSUMERS 517, 519 (2d ed. 1944); K Aidanovsky, CONSUMER STANDARDS 211 (TNEC Monograph 24, 1941). But see *Hearings before Temporary National Economic Committee*, Part 8, 76th Cong., 2d Sess. 3380 (1939) (complaint that "Good Housekeeping" seal of approval granted too liberally).

51. K Aidanovsky, CONSUMER STANDARDS 312 (TNEC Monograph 24, 1941); SORENSON, THE CONSUMER MOVEMENT 33 (1941). An example of significant service rendered by such organizations in bringing new products to the attention of consumers is found in *Plastic Dishes*, 30 CONSUMERS' RESEARCH BULL. 10 (July 1952). Some observers have held high hopes for consumer advisory services, *e.g.*, SIMONS, ECONOMIC POLICY FOR A FREE SOCIETY 73, 85 (1948); STEWART AND DEWHURST, DOES DISTRIBUTION COST TOO MUCH? 350, 352 (1939); Oxenfeldt, *Consumer Knowledge: Its Measurement and Extent*, 32 REV. ECON. & STATISTICS 300, 306, 312, 313 (1950).

52. Mitchell, THE BACKWARD ART OF SPENDING MONEY IN AMERICAN STANDARDS AND PLANES OF LIVING 377, 384 (Eliot ed. 1931); Montgomery, *Consumer Standards and Marketing*, 209 ANNALS 141, 142 (1950); LYON, *et al.*, GOVERNMENT AND

Hence private efforts have not been wholly successful in overcoming such frictions.⁵³

STATUTORY EFFORTS TO REDUCE IMPERFECTIONS

Much governmental activity has been directed at the reduction of frictions in the market place.⁵⁴ Establishment of uniform weights and measures by statute has contributed immensely to the smooth flow of commerce.⁵⁵ Many agencies and particularly those of the federal government, such as the Departments of Agriculture and Commerce, are constantly engaged in the collection and dissemination of information concerning crops, minerals, finished products and their prices.⁵⁶ The whole census of manufactures can be regarded as an effort to improve our knowledge of industry and hence to reduce imperfections arising out of ignorance. In the labor field, establishment of an employment service on a national basis at public expense

ECONOMIC LIFE 235 (1939); BORDEN, *THE ECONOMIC EFFECTS OF ADVERTISING* 646 (1942); Beem, *Consumer-Financed Testing and Rating Agencies*, 16 J. MARKETING 272, 274, 278 (1952). In part the difficulty arises from an attempt to determine which commodity is "best" for everyone and hence, in some degree, to limit consumer sovereignty. But see Clark, *An Appraisal of Certain Criticisms of Advertising*, 15 AM. ECON. REV. 5, 11 (Supp. 1925) (Proceedings American Economic Association); DUESENBERY, *INCOME, SAVING AND THE THEORY OF CONSUMER BEHAVIOR* 1 (1949). Attempts to avoid the standardization inherent in an effort to specify which commodity is "best" encounter the obstacle of consumer failure to understand the technical problems involved. Beem, *CONSUMER-FINANCED TESTING AND RATING AGENCIES*, 16 J. MARKETING 272, 280 (1952); K Aidanovsky, *CONSUMER STANDARDS* 351 (TNEC Monograph 24, 1941). Take, for example, Administrator, Production and Marketing Division, U.S. Department of Agriculture, U.S. Standards, Fruit Preserves, 17 FED. REG. 11,683 (1952). In section 52.30.333(f) (4) of that Regulation, the Administrator was attempting to specify grades of jams. His method was to weigh various factors. The "flavour" was given a weight of 40%. In the discussion of flavour, however, all the Administrator could say was that it should be "good" and "characteristic" of the kind of fruit involved.

53. It has sometimes been urged that consumers be organized for political purposes into "pressure groups." GORDON, *ECONOMICS FOR CONSUMERS* 291, 397, 518, 592 (2d ed. 1944). On the other hand, it appears that agencies purportedly representing the interest of consumers have sometimes held other objectives. Such political objectives have probably hindered the agencies in the accomplishment of their ostensible purposes. SORENSON, *THE CONSUMER MOVEMENT* 127, 226 (1941); *Hearings before Temporary National Economic Committee*, Part 8, 76th Cong., 2d Sess. 3381 *et seq.* (1939).

54. Interventionist measures adopted by government should, of course, be distinguished from activity designed to reduce imperfections. Some legislation may fall on the border line. Take, for example, the prescription of minimum wages and the prohibition of usury. 52 STAT. 1062 (1938), 29 U.S.C. § 206 (1946), as amended, 63 STAT. 912 (1949), 29 U.S.C. § 206 (Supp. 1952); Illinois Act to revise the law in relation to the rate of interest, ILL. REV. STAT. c. 74, § 1 (1947). If free market prices are above the minima prescribed by the wage legislation or below the rates fixed by the usury statutes, then governmental action merely removes imperfections in that it protects ignorant workers and borrowers who are unfamiliar with market values.

55. LYON, *et al.*, *GOVERNMENT AND ECONOMIC LIFE* 217 (1939); K Aidanovsky, *CONSUMER STANDARDS* 20 (TNEC Monograph 24, 1941). Similarly, our whole system of commercial law has a like purpose.

56. LYON, *et al.*, *GOVERNMENT AND ECONOMIC LIFE* 240, 243, 245 (1939); GORDON, *ECONOMICS FOR CONSUMERS* 570 (2d ed. 1944).

reflects a congressional desire to assist both employers and employees through the rapid dissemination of information concerning the availability of jobs and workers.⁵⁷

Misrepresentations, of course, are a prime source of ignorance in the market place. Although the rule of *caveat emptor* may still hold some sway, the common law always protected buyers against active deceit.⁵⁸ In recent years statutory regulation, both state and federal, has gone far to protect buyers against positive misstatements. Measures to protect the public against adulterated and mis-branded foods have long enjoyed popularity and recent amendments have made those measures more effective.⁵⁹ Regulation has not been limited, however, to situations in which public health and safety are affected. Several federal statutes require affirmative labeling of goods in the market place. The names which can be applied to furs, for example, are now controlled under statutory authority.⁶⁰ In the sale of securities governmental requirements are particularly strict and detailed. "Blue Sky" legislation compels sellers of stocks and bonds to make full disclosure of all pertinent facts to their customers.⁶¹

It has often been urged that governmental action should go far beyond mere prohibitions of misrepresentation. As indicated above,

57. 48 STAT. 114, 29 U.S.C. § 49(b) (1946) (Federal Employment Service). But see SIMONS, *ECONOMIC POLICY FOR A FREE SOCIETY* 61 (1948); LYON, *et al.*, *GOVERNMENT AND ECONOMIC LIFE* 241 (1939). Particular attention has been devoted to supplying information to small business. H.R. REP. No. 2,513, 82d Cong., 2d Sess. 31 (1952) (Select Committee on Small Business, Final Report); 56 STAT. 351 (1942), 50 U.S.C. § 1101 (1946) (Small Business Mobilization). But see 53 STAT. 1435 (1939), 44 U.S.C. §§ 301 *et seq.* (1946), as amended, 63 STAT. 381 (1949), 44 U.S.C.A. §§ 301 *et seq.* (Supp. 1952); 1 SHARFMAN, *THE INTERSTATE COMMERCE COMMISSION* 22, 284 (1931) (requirement that railroad tariffs be published).

58. Kittelle and Campbell, *Power of the Federal Trade Commission to Require Informative Labeling of Textiles*, 20 B.U.L. REV. 23, 29 (1940); RESTATEMENT, TORTS § 525 (1938).

59. 34 STAT. 1260 (1907), 21 U.S.C. § 71 (1946) (Meat Inspection); 61 STAT. 163 (1947), 7 U.S.C. § 135 (Supp. 1952) (Federal Insecticide, Fungicide and Rodenticide Act); 52 STAT. 1040 (1938), 21 U.S.C. § 301 *et seq.* (1946) (Federal Food, Drug and Cosmetic Act); Handler, *The Control of False Advertising under the Wheeler-Lea Act*, 6 LAW & CONTEMP. PROB. 91 (1939); Legis., *The Federal Trade Commission Act of 1938*, 39 COL. L. REV. 259, 263 (1939); Lindahl, *The Federal Trade Commission Act as Amended in 1938*, 47 J. POL. ECON. 497 (1939). But see Schlink, *What Government Does and Might Do for the Consumer*, 173 ANNALS 125, 127, 135, 137 (1934).

60. 15 U.S.C.A. § 69 (Supp. 1952) (Fur Products Labeling Act); 15 U.S.C. § 68 (1946) (Wool Products Labeling Act); 49 STAT. 977 (1935), 27 U.S.C. § 201 (1946) (Federal Alcohol Administration Act); KADANOVSKY, *CONSUMER STANDARDS* 94, 96, 158, 235 (TNEC Monograph 24, 1941). Activities of the National Bureau of Standards in co-operation with trade associations to encourage use of more informative labeling are described in Briggs, *Services of the National Bureau of Standards to Consumers*, 173 ANNALS 153, 156 (1934).

61. Note also the legislation compelling disclosure in the solicitation of proxies and the like. 15 U.S.C. § 78 (1946) (Securities Exchange Act); Loss, *SECURITIES REGULATION* 492, 523 (1951). Similarly, attempts have been made to compel issuers of securities to sell them on a basis of competitive bidding. *Id.* at 264.

the standardization of commodities is necessary for them to achieve that homogeneous character requisite for both pure and perfect competition. Buyers cannot act rationally if they do not identify goods by precise quality standards. Hence it has been urged that statutes should authorize the standardization and "grade labelling" of all commodities.⁶² Standardization and grading activities, however, are subject to several objections. Complicated machines, for example, reflect a series of compromises among various engineering aims and it would be difficult to grade them in terms which would be significant and meaningful to all buyers.⁶³ Similarly, standardization could be carried so far as unduly to limit consumer choice and hence to defeat the very consumer sovereignty which a free market economy seeks to achieve.⁶⁴ Again, standardization and grading activities might be subject to political pressures of a monopolistic character and hence—if not for other reasons—tend to curb innovation and stultify the economy.⁶⁵ We find, however, a number of statutes which do require governmental action looking to the standardization and grading of commodities. Most of them fall in the field of agriculture and were designed primarily for the promotion of producers' interests.⁶⁶ The present Food, Drug and Cosmetic Act,⁶⁷ however, has a broader purpose and it has been applied so as to prohibit the production and sale of whole-

62. SEN. DOC. NO. 35, 77th Cong., 1st Sess. 447 (1941); HOYT, CONSUMPTION IN OUR SOCIETY 110 (1938); Agnew, *The Movement for Standards for Consumer Goods*, 173 ANNALS 60 (1934); Auerbach, *Quality Standards, Informative Labeling, and Grade Labeling as Guides to Consumer Buying*, 14 LAW & CONTEMP. PROB. 362, 366 (1949). Earlier literature is summarized in KAIDANOVSKY, CONSUMER STANDARDS 355, 361 (TNEC Monograph 24, 1941).

63. STOCKING AND WATKINS, MONOPOLY AND FREE ENTERPRISE 509, 510 (1951); WATKINS, PUBLIC REGULATION OF COMPETITIVE PRACTICES IN BUSINESS ENTERPRISE 132 (National Industrial Conference Board, 3d ed. 1940).

64. STOCKING AND WATKINS, MONOPOLY AND FREE ENTERPRISE 508 (1951); WATKINS, PUBLIC REGULATION OF COMPETITIVE PRACTICES IN BUSINESS ENTERPRISE 124 (National Industrial Conference Board, 3d ed. 1940). But see Mack, *Clothing and Household Goods for Consumers*, 173 ANNALS 35, 42 (1934); LYON, *et al.*, GOVERNMENT AND ECONOMIC LIFE 236 (1939).

65. Note, for example, the authoritarian over-tone in SORENSON, THE CONSUMER MOVEMENT 24 (1941). Congressional reaction to OPA efforts looking to the standardization of commodities is illustrative of such fears. Auerbach, *Quality Standards, Informative Labeling, and Grade Labeling as Guides to Consumer Buying*, 14 LAW & CONTEMP. PROB. 362, 374 (1949).

66. See, *e.g.*, INT. REV. CODE § 1922 *et seq.*; 42 STAT. 1517 (1923), 7 U.S.C. §§ 52, 56 and 57 (1946) (United States Cotton Standards Act); 37 STAT. 250 (1912), 21 U.S.C. § 20 (1946) (an act to establish a standard barrel and a standard grade for apples); 42 STAT. 1435 (1923), 7 U.S.C. § 93 (1946) (Naval Stores Act); 39 STAT. 482, 483 (1916), 7 U.S.C. §§ 74, 76 (1946) (United States Grain Standards Act); LYON, *et al.*, GOVERNMENT AND ECONOMIC LIFE 227, 230 (1939). An example of a recently promulgated standard will be found in Administrator, Production and Marketing Division, U.S. Dep't of Agriculture, U.S. Standards, Cauliflower, 17 FED. REG. 11,137 (1952). A detailed account of federal activity in the field of standardization will be found in KAIDANOVSKY, CONSUMER STANDARDS 14, 23, 77, 93, 97, 111, 197 (TNEC Monograph 24, 1941).

67. 52 STAT. 1040 *et seq.* (1938), 21 U.S.C. §§ 301, 401, 403(h)(1) (1946) (Federal Food, Drug and Cosmetic Act).

some and honestly labeled food. Such utilization of the statute was approved by the Supreme Court on the express ground that the intent of the Congress was to protect consumers against a confusing variety of products through exercise of a standardization power. In the case referred to, The Quaker Oats Company was prevented from marketing a type of farina enriched with certain vitamins. The Quaker product was unacceptable because it was neither plain farina nor enriched with all the vitamins prescribed in the governmental standard for "enriched farina."⁶⁸ Whether such statutory restrictions are desirable may be open to debate. Their existence, however, indicates a Congressional intent to reduce the imperfection of ignorance through administrative standardization.

EFFECTS UPON INTERPRETATION OF THE ANTI-TRUST STATUTES

Anti-trust decisions have always taken account of market imperfections.⁶⁹ There has, however, been little if any explicit discussion of such frictions in anti-trust opinions. It is thus possible that the role of imperfections has not received due recognition: judicial zeal to extirpate "impurities" may have been so powerful as to blind the courts to the desirability of curbing market frictions. No doubt such frictions are present in every situation from which an anti-trust case arises. In subsequent paragraphs we shall only consider decisions in which the role of imperfections has been most obvious.⁷⁰

Trade Commission Activities against Fraud:—There has been much dissatisfaction with the performance of the Federal Trade Commission.⁷¹ As many observers have noted, the commission was expected to take vigorous action against monopoly but has devoted most of its attention to the suppression of misrepresentations in trade. That shift in emphasis has been the subject of many biting comments. Mr. Henderson rebuked the commission

68. Federal Security Administrator v. Quaker Oats Co., 318 U.S. 218, 226, 230, 231 (1943).

69. But see Oppenheim, *Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy* 50 MICH. L. REV. 1139, 1151, 1154 (1952).

70. Many other examples could be cited in which imperfections have played a role, e.g., United States v. United Shoe Machinery Corp., 110 F. Supp. 295, 336 (D. Mass. 1953); RESTATEMENT, CONTRACTS § 516(a) (1932). Indeed, the whole problem of entry into competition may be profoundly affected by the imperfections of inertia and ignorance. See Wright, *Some Pitfalls of Economic Theory as a Guide to the Law of Competition*, 37 VA. L. REV. 1083 (1951).

71. The organic statute is the Federal Trade Commission Act, 15 U.S.C. § 41 (1946). Section 45(a), as amended, provides: ". . . Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."

for wasting time "upon petty squabbles and dishonesties."⁷² Even so sophisticated a jurist as Mr. Justice Brandeis did not believe that the Federal Trade Commission Act was designed directly to protect consumers.⁷³ A statutory amendment in 1938⁷⁴ was required before the courts recognized that misrepresentations may be harmful even though no competitor is directly affected.⁷⁵ Sophisticated sneers greeted the opinion in the *Standard Education Society* case,⁷⁶ in which one court finally permitted the commission to pursue a stringent anti-fraud policy. Most lawyers preferred the opinion of Judge Learned Hand in the court below and agreed that the commission's "trivial niceties" were "too impalpable for practical affairs."⁷⁷

It may be conceded that the commission could easily push its powers too far. Elimination of all puffing and a requirement of absolute truth in advertising could result in a bureaucratic paternalism of dangerous proportions.⁷⁸ Any such program would probably exceed the needs of the market place. If consumer ignorance, however, con-

72. HENDERSON, *THE FEDERAL TRADE COMMISSION* 339 (1925). See Watkins, *An Appraisal of the Work of the Federal Trade Commission*, 32 COL. L. REV. 272, 277 (1932); WATKINS, *PUBLIC REGULATION OF COMPETITIVE PRACTICES IN BUSINESS ENTERPRISE* 125 (National Industrial Conference Board, 3d ed. 1940); COMMITTEE ON INDEPENDENT REGULATORY COMMISSIONS, *REPORT TO THE COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT* 119, 120 (1949); STOCKING AND WATKINS, *MONOPOLY AND FREE ENTERPRISE* 548 n.7 (1951); H.R. REP. No. 2513, 82d Cong., 1st Sess. 278 (1952).

73. *FTC v. Klesner*, 280 U.S. 19, 27, 28 (1929). Cf. *FTC v. Gratz*, 253 U.S. 421, 427 (1920); *American Washboard Co. v. Saginaw Mfg. Co.*, 103 Fed. 281, 284, 285 (6th Cir. 1900); *Allen B. Wrisley Co. v. FTC*, 113 F.2d 437, 442 (7th Cir. 1940). See Handler, *The Jurisdiction of the Federal Trade Commission over False Advertising*, 31 COL. L. REV. 527, 529, 533 (1931); Handler, *Unfair Competition and the Federal Trade Commission*, 8 GEO. WASH. L. REV. 399, 401 (1940).

74. The 1938 amendment to the Federal Trade Commission Act.

75. *Scientific Mfg. Co. v. FTC*, 124 F.2d 640, 643 (3d Cir. 1941); *Pep Boys v. FTC*, 122 F.2d 158, 160 (3d Cir. 1941). Compare *FTC v. Standard Education Society*, 302 U.S. 112, 116 (1937). See Handler, *The Control of False Advertising under the Wheeler-Lea Act*, 6 LAW & CONTEMP. PROB. 91, 96 (1939); Handler, *Unfair Competition and the Federal Trade Commission*, 8 GEO. WASH. L. REV. 399, 404 (1940); Kittelle and Campbell, *Power of the Federal Trade Commission to Require Informative Labeling of Textiles*, 20 B.U.L. REV. 23, 27 (1940); Legis., *The Federal Trade Commission Act of 1938*, 39 COL. L. REV. 259, 261, 262 (1939).

76. *FTC v. Standard Education Society*, 302 U.S. 112 (1937). Cf. (earlier cases) *FTC v. R. F. Keppel and Bro., Inc.*, 291 U.S. 304 (1934); *FTC v. Algoma Lumber Co.*, 291 U.S. 67, 81 (1934). *Accord* (later cases), *Book-of-the-Month Club, Inc. v. FTC*, 202 F.2d 486 (2d Cir. 1953); *Rothschild v. FTC*, 200 F.2d 39 (7th Cir. 1952); *R. J. Reynolds Tobacco Co. v. FTC*, 192 F.2d 535 (7th Cir. 1951); *P. Lorillard Co. v. FTC*, 186 F.2d 52 (4th Cir. 1950); *Carlay Co. v. FTC*, 153 F.2d 493 (7th Cir. 1946); *Gulf Oil Corp. v. FTC*, 150 F.2d 106 (5th Cir. 1945); *Charles of the Ritz Distributors Corp. v. FTC*, 143 F.2d 676, 679 (2d Cir. 1944); *Moretrench Corp. v. FTC*, 127 F.2d 792, 795 (2d Cir. 1942); *Ford Motor Co. v. FTC*, 120 F.2d 175, 182 (6th Cir. 1941).

77. *FTC v. Standard Education Society*, 86 F.2d 692, 696 (2d Cir. 1936). See *Allen B. Wrisley Co. v. FTC*, 113 F.2d 437, 440 (7th Cir. 1940). See also WATKINS, *PUBLIC REGULATION OF COMPETITIVE PRACTICES IN BUSINESS ENTERPRISE* 152 (National Industrial Conference Board, 3d ed. 1940).

78. WATKINS, *PUBLIC REGULATION OF COMPETITIVE PRACTICES IN BUSINESS ENTERPRISE* 141, 146 (National Industrial Conference Board, 3d ed. 1940). See BORDEN, *THE ECONOMIC EFFECTS OF ADVERTISING* 760, 774 (1942); GORDON, *ECONOMICS FOR CONSUMERS* 198 (2d ed. 1944).

tributes as greatly to market imperfections as this study indicates, the position of the Federal Trade Commission may be more rational than heretofore supposed. Common law remedies are often inadequate⁷⁹ and, without expressing a view as to any particular decision, we may well find ourselves sympathetic to the position taken by the commission.⁸⁰ Similarly, there may be more justification than has heretofore been recognized for the affirmative labeling requirements contained in various trade practice conference rules of the commission. Those advisory interpretations of the commission's organic act have often been regarded as ultra vires to the extent that they imposed an affirmative duty upon sellers of labeling goods.⁸¹ For reasons expressed above, we may well hesitate to endow the commission with broad powers to standardize goods.⁸² To the extent that such regulation removes market imperfections, however, it may contribute to an economic allocation of resources.⁸³

79. Watkins, *An Appraisal of the Work of the Federal Trade Commission*, 32 COL. L. REV. 272, 276 (1932); LYON, *et al.*, GOVERNMENT AND ECONOMIC LIFE 318 (1939).

80. Profesor Handler is one of the few experts in the field who has vigorously approved the commission's activities in the area of misrepresentation. Handler, *The Control of False Advertising Under the Wheeler-Lea Act*, 6 LAW & CONTEMP. PROB. 91, 98 (1939); Handler, *Unfair Competition and the Federal Trade Commission*, 8 GEO. WASH. L. REV. 399, 405, 406, 418, 420 (1940). To the same general effect see STOCKING AND WATKINS, MONOPOLY AND FREE ENTERPRISE 351 (1951); KNIGHT, RISK, UNCERTAINTY AND PROFITS 78 (1921); MILLER, UNFAIR COMPETITION 115 (1941). It should be recorded, however, that few voices were raised in support of the commission's position at the University of Chicago's anti-trust seminar on June 17, 1953.

81. Att'y Gen. Comm. Ad. Proc., FTC, SEN. DOC. NO. 186, PART 6, 76th Cong., 3d Sess. 31 (1940); Hale, *Agreements Among Competitors*, 33 MINN. L. REV. 331, 335 (1949); Note, *Federal Trade Commission Cosmetic Trade Practice Rules*, 65 HARV. L. REV. 1261, 1262 (1952); 16 CODE FED. REGS. §§ 204.2, 204.5 (Cum. Supp. 1952) (Federal Trade Commission, Rayon and Acetate Textile Industry). See also Kittelle and Campbell, *Power of the Federal Trade Commission to Require Informative Labeling of Textiles*, 20 B.U.L. REV. 23, 26, 34, 36 (1940); Kittelle and Mostow, *A Review of the Trade Practice Conferences of the Federal Trade Commission*, 8 GEO. WASH. L. REV. 427, 439, 446 (1940).

82. See *Alberty v. FTC*, 182 F.2d 36 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 818 (1950); *Scientific Mfg. Co. v. FTC*, 124 F.2d 640 (3d Cir. 1941). *But cf.* *Perma-Maid Co. v. FTC*, 121 F.2d 282 (6th Cir. 1941). Instances may arise in which the expense of precise labeling is more costly than the imperfections which would thereby be removed, *e.g.*, *Gimbel Bros., Inc. v. FTC*, 116 F.2d 578 (2d Cir. 1941); K Aidanovsky, CONSUMER STANDARDS 350 (TNEC Monograph 24, 1941). It is also not impossible that regulation of the type in question could take on an interventionist character. Thus the following statement was found in a trade journal: "After considerable discussion it was the general opinion that the Fur Products Labeling Act held great promise of eliminating a substantial part of the unfavorable competition from low grade pelts and means were agreed upon to advance this project as fast as expedient." National Board of Fur Farm Organizations, *Report of Meeting of Executive Committee*, 19 FUR J. 11 (Sept.-Oct. 1952). See Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133, 1138, 1148, 1152 (1931); MILLER, UNFAIR COMPETITION 113 (1941).

83. Lotteries have been forbidden as a means of selling goods. *FTC v. R. F. Keppel and Bro., Inc.*, 291 U.S. 304 (1934); *Deer v. FTC*, 152 F.2d 65 (2d Cir. 1945); Handler, *Unfair Competition and the Federal Trade Commission*, 8 GEO. WASH. L. REV. 399, 415 (1940). Elimination of the lottery feature in a sale consti-

Horizontal Size.—We experience great difficulty in defining a monopoly. It is hard to say how small firms must be in order to avoid "impurities."⁸⁴ In that effort, however, account should be taken of the often repeated view that small firms are more likely to deceive their customers than large enterprises.⁸⁵ No positive proof of that tendency has been found, nor can any specific size be named as indicative of questionable representations. It is true, however, that the extensive services offered by large concerns to teach consumers how to use their products and the like, could scarcely be offered by their smaller competitors.⁸⁶ Mass merchandisers can inspect the goods

tutes standardization and to that extent appears to be meritorious. The commission's activities in the field of commercial bribery and false disparagement of competitors can likewise be supported as tending to remove market imperfections. *Id.* at 408; *Perma-Maid Co. v. FTC*, 121 F.2d 282 (6th Cir. 1941); Nims, *Unfair Competition by False Statements or Disparagement*, 19 CORNELL L.Q. 63 (1933); OXENFELDT, *INDUSTRIAL PRICING AND MARKET PRACTICES* 254 (1951). But see HENDERSON, *THE FEDERAL TRADE COMMISSION* 216 (1924). *Query*, however, whether the commission should be empowered to prevent firms from advertising, or to control the manner in which business is solicited. *Cf.* *New Jersey Asbestos Co. v. FTC*, 264 Fed. 509, 511 (2d Cir. 1920). See HENDERSON, *THE FEDERAL TRADE COMMISSION* 224 (1924).

84. Hale, *Size and Shape*, 1950 U. OF ILL. L. FORUM 515, 525.

85. OXENFELDT, *INDUSTRIAL PRICING AND MARKET PRACTICES* 255 (1951); STOCKING AND WATKINS, *MONOPOLY AND FREE ENTERPRISE* 317 (1951); *Hearings before Subcommittee on Study of Monopoly Power, Committee on the Judiciary*, Serial 12, 82d Cong., 1st Sess. 493 (1952); *Hearings before Temporary National Economic Committee*, Part 8, 76th Cong., 2d Sess. 3336 (1939); LOSS, *SECURITIES REGULATION* 380 (1951).

Many judicial findings could be cited to the same effect. Thus, in *Radio Shack Corp. v. Radio Shack, Inc.*, 180 F.2d 200, 202 (7th Cir. 1950) it was said: "Some 22 years after plaintiff herein was organized, and long after the plaintiff had widely used its corporate name as its trade name, defendants deliberately went into direct competition, using for all practical purposes the identical corporate and trade name. For some four years prior to incorporation of the defendant company at least one of its officers had knowledge of the plaintiff and of the operation of its business."

As to the importance of integrity upon the part of producers and distributors see BORDEN, *THE ECONOMIC EFFECTS OF ADVERTISING* 678 (1942).

Considerable thought has been given to the possibility of a survey which would test the suggestion made in the text that small firms are more likely to deceive their customers than large ones. It was proposed, for example, to select five scattered volumes of Federal Trade Commission decisions and to determine whether more cease and desist orders had been entered against small producers and distributors than against their larger competitors. Aside from the merely mechanical difficulties of ascertaining the size of the various firms against which the commission has entered orders over the years, several insuperable obstacles have prevented the making of such a survey. One obvious difficulty is that the Federal Trade Commission's jurisdiction extends only to interstate commerce. In earlier years particularly, that restriction upon its activities might result in the elimination of many smaller firms from its purview. A second obstacle lies in the fact that there are degrees of misrepresentation. If it appeared that small firms engage in flagrant frauds while their larger competitors merely fail to make information in their hands available to their customers, the action taken by the commission in such cases would scarcely be comparable in character. For these reasons it is not now known how the comparative integrity of small business can be tested. It is probable that imperfections play a considerably more important role in the determination of appropriate size than indicated in this study. It is hoped that the topic may be expanded in future research.

86. GORDON, *ECONOMICS FOR CONSUMERS* 508 (2d ed. 1944). In many instances, large firms insist that their salesmen enjoy considerable technical ability, *e.g.*,

they offer for sale to the ignorant consumer with much greater care and expert knowledge than small independent merchants. Indeed, some of the largest distributing concerns maintain their own laboratories for the benefit both of consumers and producers.⁸⁷ It follows that the confidence which consumers have placed in such large scale distributors, evidenced by acceptance of their private brands (often available at prices below those established for heavily advertised brands of the same commodities), may not be misplaced.⁸⁸

Recognition of market imperfections will not, in all likelihood, lead to any alteration in our notions as to an acceptable size for manufacturing concerns. As just indicated, however, mass merchandisers render services to consumers of a type which little merchants cannot match. Display advertising of chain and department stores in

MINNEAPOLIS-HONEYWELL REGULATOR Co., 1950 ANNUAL REPORT 15 (1951); PARKE, DAVIS & Co., 84TH ANNUAL REPORT 10 (1951). A flour miller conducts a cooking school with a tremendous registration, develops and promulgates new recipes, and broadcasts the information over a radio network of 187 stations. GENERAL MILLS, INC., 20TH ANNUAL REPORT 38 (1948). A public utility concern conducted a cooking school with over 9,000 home demonstrations given during a single year. Its electricians worked with architects and contractors to make recommendations for the wiring of residential and commercial buildings. OHIO EDISON Co., 1950 ANNUAL REPORT 7 (1951). Metropolitan Life Insurance Company engages in activities designed to promote public health, and also conducts a nursing service for some of its policy holders. *Hearings before Temporary National Economic Committee*, Part 12, 76th Cong., 2d Sess. 5838, 5840 (1939). A firm which the Attorney General seeks to break into five separate competing companies produced six motion pictures in 1950 showing customers how to carve meat and how to cook foods. ARMOUR & Co., 1950 ANNUAL REPORT 3, 5 (1951). A company engaged in the lending of money has published a number of helpful pamphlets telling its patrons how to buy intelligently. The pamphlets appear to be reliable and to give sound, non-political advice which should be of considerable assistance to consumers. HOUSEHOLD FINANCE CORPORATION, BETTER BUYMANSHIP: MEAT, FISH, POULTRY AND EGGS (1951); HOUSEHOLD FINANCE CORPORATION, MONEY MANAGEMENT: YOUR HOME FURNISHINGS DOLLAR (1952). Note also, the activities of large firms as buyers. They conduct extensive investigations, standardize the commodities they require, and probably thus contribute in an important manner to the reduction of market imperfections at that level. KADANOVSKY, CONSUMER STANDARDS 191, 192 (TNEC Monograph 24, 1941). Such benefits may reflect the balancing of monopoly with monopsony which has, of course, effects in the realm of "impurities." It has been suggested that large firms are more likely to indulge in undesirable types of advertising than small ones. See STOCKING AND WATKINS, MONOPOLY AND FREE ENTERPRISE 73 (1951). If that assertion can be proven, it may relate only to very large firms and not to those of middle size. Another factor worthy of mention is that firms may be too small to comply with regulations designed to remove market imperfections. Take, for example, the case of a firm desiring to raise a small amount of capital by public sale of its securities. See note 61 *supra*.

87. STOCKING AND WATKINS, MONOPOLY AND FREE ENTERPRISE 316 (1951); GORDON, ECONOMICS FOR CONSUMERS 511 (2d ed. 1944); SEARS, ROEBUCK & Co., 1952 ANNUAL REPORT 15-9 (1953). The catalog published by the rival mail order firm of Montgomery Ward & Company is famous for its detailed information on various products such as radios, hot water tanks and the like.

88. EDWARDS, MAINTAINING COMPETITION 368 (1941); SORENSON, THE CONSUMER MOVEMENT 11 (1941); BORDEN, THE ECONOMIC EFFECTS OF ADVERTISING 42, 605 (1942). It does not follow, of course, that the private brand of merchandise is always of the highest available quality. 1953 TV *Receivers*, 30 CONSUMERS' RESEARCH BULL. 5, 8 (Dec. 1952). As to the value of endorsements by publishers of magazines and the like, some information will be found in Hearst Magazines, Inc., 32 F.T.C. 1440 (1941).

metropolitan newspapers is often highly informative.⁸⁹ It is clear, also, that some degree of size is necessary to permit sellers to engage in those market research activities which we have noted as important in the reduction of ignorance of demand.⁹⁰ Thus it is possible that a desire to reduce market imperfections could affect the problem of horizontal size in the field of distribution.

Trade-Mark "Monopolies".—In recent years the view has often been expressed that trade-marks are monopolistic in character. Judge Jerome Frank, perhaps the most active proponent of that point of view, has stated that legal protection of trade names does not engender competition but, on the contrary, creates lawful monopolies.⁹¹ A producer seeking to enjoin use of his trade-mark on goods sold to the same type of consumers through identical channels of distribution was rebuked by the court of appeals for the seventh circuit, which referred to "[t]he unconscionable efforts of the plaintiffs to monopolize the food market by their monopoly of the word Sunkist."⁹² A more sophisticated view finds trade-marks objectionable in that they permit that product differentiation utilized by oligopolists to avoid the impact of pure competition.⁹³ Upon whatever ground, some of the literature can be read as an argument in favor of the abolition of trade-marks and similar identifying mechanisms.⁹⁴

89. Note also that mass merchandisers may be able to reduce advertising costs. BORDEN, *THE ECONOMIC EFFECTS OF ADVERTISING* 465, 470, 483 (1942). Compare NELSON AND KEIM, *PRICE BEHAVIOR AND BUSINESS POLICY* 88 (TNEC Monograph 1, 1941).

90. White, *Marketing Research*, 209 ANNALS 183, 184 (1940).

91. *Eastern Wine Corp. v. Winslow-Warren, Ltd.*, 137 F.2d 955, 957, 958, 959 (2d Cir.), cert. denied, 320 U.S. 758 (1943); *Standard Brands, Inc. v. Smidger*, 151 F.2d 34, 38 (2d Cir. 1945) (concurring opinion). See STOCKING AND WATKINS, *MONOPOLY AND FREE ENTERPRISE* 509 (1951); Pattishall, *Trade-Marks and the Monopoly Phobia*, 50 MICH. L. REV. 967, 968, n.3, 974, 976 (1952).

92. *California Fruit Growers Exchange v. Sunkist Baking Co.*, 166 F.2d 971, 975 (7th Cir. 1947).

93. Timberg, *Trade-Marks, Monopoly, and the Restraint of Competition*, 14 LAW & CONTEMP. PROB. 323, 325 (1949). Cf. *Consolidated Book Publishers, Inc. v. FTC*, 53 F.2d 942 (7th Cir. 1931), cert. denied, 286 U.S. 553 (1932).

94. See Brown, *Advertising and the Public Interest*, 57 YALE L.J. 1165, 1190 (1948); Timberg, *Trade-Marks, Monopoly, and the Restraint of Competition*, 14 LAW & CONTEMP. PROB. 323, 326 (1949); MILLER, *UNFAIR COMPETITION* 116 (1941). As Mr. Timberg points out trade-marks can be used as vehicles for both horizontal and vertical price fixing schemes. Timberg *supra*, at 328, 352. It is also true, as indicated in the text, that if a commodity becomes known only by its brand name the producer using that mark will gain a monopoly advantage. *Id.* at 324; Montgomery, *Consumer Standards and Marketing*, 209 ANNALS 141, 144 (1950); Stocking, *Modern Advertising and Economic Theory*, 21 AM. ECON. REV. 43, 52 and n.17 (1931). At that point, however, the mark has ceased to distinguish the brand of the commodity in question from other brands of the same commodity. It becomes descriptive in character and hence is denied protection. RESTATEMENT, TORTS § 735 (1938); CALLMANN, *THE LAW OF UNFAIR COMPETITION AND TRADE-MARKS* § 74.1 (1st ed. 1945); Oppenheim, *The Public Interest in Legal Protection of Industrial and Intellectual Property*, 40 T.M. REP. 613, 625, 626 (1950). But see Timberg *supra*, at 332 (expensive to litigate issue of loss of distinctiveness).

Supporters of trade-marks point out the difference between a patent or a copyright and a mere trade-mark.⁹⁵ Resources of the language, they argue, are inexhaustible and the existence of 6,000 brands of shoes and 10,000 brands of wheat flour is cited as evidence of that fact.⁹⁶ Trade-marks, they urge, are mere means of identification and do not in themselves confer any monopoly in the commodities to which they are attached.⁹⁷ In some degree, at least, trade-marks constitute a certificate of quality⁹⁸ and the fact that the Federal Trade Commission has moved against those using the trade-marks of others indicates that infringement of a mark constitutes a positive misrepresentation.⁹⁹ In short, if the courts refused to enjoin the use of trade-marks by those not entitled to them under the established law of unfair competition, their decisions would tend to promote rather than suppress market imperfections.

The conflict between those who would curb impurities and those who would suppress imperfections through restricting or encouraging the use of trade-marks comes to a focus in cases wherein it must be decided how far trade-mark protection shall be extended. The most ardent "restrictionist" (with the exception of those who would abolish trade-marks altogether) would not permit a second user of the mark to apply it to identical goods. He would, however, deny the trade-mark owner injunctive relief in cases wherein the infringer is not

95. Pattishall, *Trade-Marks and the Monopoly Phobia*, 50 MICH. L. REV. 967, 971 (1952); Oppenheim, *The Public Interest in Legal Protection of Industrial and Intellectual Property*, 40 T.M. REP. 613, 614 (1950); Oppenheim, *Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy*, 50 MICH. L. REV. 1139, 1217 (1952).

96. Wilcox, *Brand Names, Quality and Price*, 173 ANNALS 80, 82 (1934); BORDEN, *THE ECONOMIC EFFECTS OF ADVERTISING* 633 (1942); see Best & Co. v. Miller, 167 F.2d 374, 378 (2d Cir. 1948) (Judge Clark's dissenting opinion).

97. Rogers, *The Lanham Act and the Social Function of Trade-Marks*, 14 LAW & CONTEMP. PROB. 173, 176-7 (1949). Cf. *Mishawaka Rubber Co. v. S. S. Kresge Co.*, 316 U.S. 203, 205 (1942). Query whether trademarks could survive governmental grade-labeling. See Agnew, *The Movement for Standards for Consumer Goods*, 173 ANNALS 60, 66 (1934).

98. BORDEN, *THE ECONOMIC EFFECTS OF ADVERTISING* 23, 629, 631-2 (1942). Note the following statement: "CR Bulletins have often mentioned the desirability of knowing by what manufacturer an article has been produced, and the need, as a practical matter, and for very good reasons, of avoiding the purchase of any important food, beverage, or other article or appliance of unknown origin." *Clinical Thermometers*, 31 CONSUMERS' RESEARCH BULL. 24 (Jan. 1953). But see GORDON, *ECONOMICS FOR CONSUMERS* 247 (2d ed. 1944).

99. *Juvenile Shoe Co. v. FTC*, 289 Fed. 57 (9th Cir. 1923); *Pep Boys v. FTC*, 122 F.2d 158 (3d Cir. 1941); *FTC v. Real Products Corp.*, 90 F.2d 617 (2d Cir. 1937); HENDERSON, *THE FEDERAL TRADE COMMISSION* 169, 170 (1924); WATKINS, *PUBLIC REGULATION OF COMPETITIVE PRACTICES IN BUSINESS ENTERPRISE* 184 (National Industrial Conference Board, 3d ed. 1940); CHAMBERLIN, *THE THEORY OF MONOPOLISTIC COMPETITION* App. E (5th ed. 1946). But cf. *FTC v. Klesner*, 280 U.S. 19 (1929). See also Handler, *The Jurisdiction of the Federal Trade Commission over False Advertising*, 31 COL. L. REV. 527, 538 (1931). In the Lanham Act it was specifically provided that a false designation of origin should be considered a tort. 15 U.S.C. §1125 (1946).

a competitor. Apparently that view is based on the belief that such protection of the trade-mark against "dilution" encourages a persuasive rather than an informative use of advertising. Informative advertising is recognized as desirable in that it reduces consumer ignorance. Mere persuasive advertising is, however, identified with product differentiation and hence with monopoly.¹⁰⁰

Historically, the basic principle of the law of unfair competition has been protection of the consumer from confusion.¹⁰¹ That view is, of course, closely related to the suppression of market imperfections. Undoubtedly, a narrow scope of legal protection would weaken the persuasive force of trade-marks. Tiffany, the jeweler, would not have sought an injunction against the use of his name in the production of motion pictures¹⁰² had he not believed that such use would detract from his good will;¹⁰³ and if advertising which is merely persuasive in character is a principal weapon of the oligopolist, then refusal to issue the injunction against a non-competitor may contribute in some degree to the enforcement of our anti-trust policy. On the other hand, if likelihood of confusion¹⁰⁴ can be proven even in a minor degree, the court denying injunctive relief may be striking a feeble blow against market impurities while adding in considerable measure to market imperfections.

Cooperation Among Competitors:—Trade associations often promulgate codes of ethics and take similar action against misrepresentation and other forms of activity regarded as unfair competition.

100. Timberg, *Trade-Marks, Monopoly and the Restraint of Competition*, 14 LAW & CONTEMP. PROB. 323, 351 (1949); Brown, *Advertising and the Public Interest*, 57 YALE L.J. 1165, 1184, 1194 (1948). The proprietor of a trade-mark which has achieved public acceptance may well wish to use it in the promotion of other or new goods. See, e.g., SUNBEAM CORP., ANNUAL REPORT 3 (1953); BORDEN CO., 1950 ANNUAL REPORT 5 (1950). See also RESTATEMENT, TORTS § 731 (1938). Hence the problem may become one of diversification. See Hale, *Diversification: Impact of Monopoly Policy upon Multi-Product Firms*, 98 U. OF PA. L. REV. 320, 340 (1950).

101. Oates, *Relief in Equity Against Unfair Trade Practices of Non-Competitors*, 25 ILL. L. REV. 643, 655 (1931). See CALLMANN, THE LAW OF UNFAIR COMPETITION AND TRADE MARKS § 3.4 (1st ed. 1945).

102. See *Tiffany & Co. v. Tiffany Productions*, 264 N.Y. Supp. 459 (1932), *aff'd*, 237 App. Div. 801, 260 N.Y. Supp. 821 (1932), *aff'd*, 262 N.Y. 482, 188 N.E. 30 (1933); Callmann, *Trade-Mark Infringement and Unfair Competition*, 14 LAW & CONTEMP. PROB. 185, 189 (1949).

103. Development of the view that a trade-mark is property and should be protected even on non-competing goods can be traced in Schechter, *Fog and Fiction in Trade-Mark Protection*, 36 COL. L. REV. 60, 84 (1936); Oates, *Relief in Equity Against Unfair Trade Practices of Non-Competitors*, 25 ILL. L. REV. 643, 650 (1931); Lunsford, *Trade-Mark Infringement and Confusion of Source: Need for Supreme Court Action*, 35 VA. L. REV. 214, 217 (1949); Note, *Trade-Marks, Unfair Competition and the Courts: Some Unsettled Aspects of the Lanham Act*, 66 HARV. L. REV. 1094 (1953).

104. RESTATEMENT, TORTS § 730; Note, *Trade-Marks, Unfair Competition and the Courts: Some Unsettled Aspects of the Lanham Act*, 66 HARV. L. REV. 1094, 1096 (1953). *But cf.* MILLER, UNFAIR COMPETITION 116 (1941).

Support of "better business bureaus" and of the Federal Trade Commission's trade practice conferences constitute conspicuous examples of such trade association practices.¹⁰⁵ Whether such groups should be permitted to curb style piracy, protect the public against indecency and prohibit the practice of medicine by corporations¹⁰⁶ is, of course, debatable. To the extent, however, that such activity reduces fraud and unethical practices in the market place, it should at least receive the sympathetic consideration of the courts.¹⁰⁷

Trade associations also engage in market research activities¹⁰⁸ and particularly in the gathering and dissemination of trade statistics.¹⁰⁹ Over the years the permissible boundaries of such trade association activity have been delineated with reasonable clarity.¹¹⁰ The courts have, for example, insisted that the information circulated should be made available to purchasers and the public at large as well as to producers.¹¹¹ Such restrictions are highly desirable because publication of trade statistics has often formed a convenient vehicle for price fixing conspiracies.¹¹² Those who take the extreme position

105. HENDERSON, *THE FEDERAL TRADE COMMISSION* 181 (1924); PEARCE, *TRADE ASSOCIATION SURVEY* 345 (TNEC Monograph 18, 1941); LYON, *THE A.B.C. OF THE N.R.A.* 175-180 (1934); Hale, *Agreements Among Competitors*, 33 *MINN. L. REV.* 331, 349 (1949); SORENSON, *THE CONSUMER MOVEMENT* 11, 198-9 (1941); GORDON, *ECONOMICS FOR CONSUMERS* 516, 517 (2d ed. 1944); *Hearings before Temporary National Economic Committee*, Part 10, 76th Cong., 1st Sess. 4634 (1939); 16 *CODE FED. REGS.* § 135.1(c) (2d ed. 1949) (silk industry rule).

106. *Fashion Originators' Guild, Inc. v. FTC*, 312 U.S. 457 (1941); *American Medical Association v. United States*, 317 U.S. 519 (1943); Hale, *Agreements Among Competitors*, 33 *MINN. L. REV.* 331, 352, 375, 377, 379. (1949); Comment, 40 *COL. L. REV.* 736, 739 (1940).

107. A leading authority said some years ago: "Regulation of unfair and deceptive competitive practices, the arbitration of commercial disputes, the standardization of identity and quality of products, the improvement of conditions of labor, the registration of trade-marks and original styles and designs, the conservation of natural resources, the elimination of wasteful practices, and the promotion of efficiencies in production and distribution are only a few of the fields in which trade associations perform a distinct social service." HANDLER, *A STUDY OF THE CONSTRUCTION AND ENFORCEMENT OF THE FEDERAL ANTI-TRUST LAWS* 28 (TNEC Monograph 38, 1941).

108. White, *Marketing Research*, 209 *ANNALS* 183, 186 (1940); GORDON, *ECONOMICS FOR CONSUMERS* 508 (2d ed. 1944); KAPLAN, *SMALL BUSINESS: ITS PLACE AND PROBLEMS* 124-5, 132 (1948).

109. PEARCE, *TRADE ASSOCIATION SURVEY* c. 5 (TNEC Monograph 18, 1941); MILLER, *UNFAIR COMPETITION* 285 (1941).

110. HANDLER, *A STUDY OF THE CONSTRUCTION AND ENFORCEMENT OF THE FEDERAL ANTI-TRUST LAWS* 18 (TNEC Monograph 38, 1941); Comment, 18 *U. OF CHI. L. REV.* 380 (1951).

111. See *Tag Manufacturers Institute v. FTC*, 174 F.2d 452, 462 (1st Cir. 1949). *But cf.* *Sugar Institute, Inc. v. United States*, 297 U.S. 553, 604 (1936); HANDLER, *A STUDY OF THE CONSTRUCTION AND ENFORCEMENT OF THE FEDERAL ANTI-TRUST LAWS* 21 (TNEC Monograph 38, 1941).

112. *American Column and Lumber Co. v. United States*, 257 U.S. 377 (1921); EDWARDS, *MAINTAINING COMPETITION* 26 (1949); Comment, 18 *U. OF CHI. L. REV.* 380, 381 (1951).

of advocating abolition of such activities,¹¹³ however, apparently overlook the contribution they make to the reduction of imperfections. Mr. Justice Brandeis argued that the Sherman Act did not require competition to be pursued blindly and Mr. Justice Holmes suggested that the ideal of commerce was an intelligent interchange made with full knowledge of the facts as a basis for a forecast of the future.¹¹⁴ It is true that governmental agencies do provide much the same service in the agricultural field which presumably, could be extended to those areas now served by trade associations.¹¹⁵ Any extension of such governmental activity, however, carries its own hazards of the development of intervention and in any event the trade associations perform an important role during a period when such public service is undeveloped.

As we have noted, standardization of commodities is important both for the suppression of impurities and imperfections in competition. Unless the product is homogeneous, pure competition cannot exist. Similarly, a bewildering array of differentiated goods may so confuse consumers as to prevent them from exercising their sovereignty in the market place.¹¹⁶ Trade associations have played a prominent role in the standardization and simplification of many types of goods. They have formulated standards of quality and "simplified" products to eliminate large numbers of shapes, sizes and models felt to be unnecessary. In some instances, associations have "graded" merchandise and applied certification marks thereto.¹¹⁷ As the record of anti-trust litigation shows, it is possible for groups of competitors to cloak price fixing and similar activities in the raiment of standardization and simplification.¹¹⁸ For such reasons § 14(d) was inserted in the Lanham

113. Some observers take the position that all price reporting systems tend to eliminate competition from their very nature. Fly, *Observations on the Anti-Trust Laws, Economic Theory and the Sugar Institute Decisions*, 45 YALE L.J. 1339, 1345 (1936); OXENFELDT, *INDUSTRIAL PRICING AND MARKET PRACTICES* 318 (1951).

114. See *American Column and Lumber Co. v. United States*, 257 U.S. 377, 412, 415-6 (1921) (dissenting opinion). See *Maple Flooring Manufacturers Ass'n v. United States*, 268 U.S. 563, 582-3 (1925); *Sugar Institute, Inc. v. United States*, 297 U.S. 553, 598 (1936); HANDLER, *A STUDY OF THE CONSTRUCTION AND ENFORCEMENT OF THE FEDERAL ANTITRUST LAWS* 22 (TNEC Monograph 38, 1941); LYON AND ABRAMSON, *THE ECONOMICS OF OPEN PRICE SYSTEMS* 88 (1936).

115. MUND, *OPEN MARKETS* 246 (1948); STOCKING AND WATKINS, *MONOPOLY AND FREE ENTERPRISE* 255 (1951).

116. *But see* MARSHALL, *PRINCIPLES OF ECONOMICS* 325 (8th ed. 1920).

117. K Aidanovsky, *CONSUMER STANDARDS* 193, 196, 198, 201, 225 (TNEC Monograph 24, 1941); Hale, *Agreements Among Competitors*, 33 MINN. L. REV. 331, 362 (1949); Agnew, *The Movement for Standards for Consumer Goods*, 173 ANNALS 60, 66 (1934); *Hearings before Temporary National Economic Committee*, Part 8, 76th Cong., 2d Sess. 3421, 3428 (1939). Professional and technical societies engage in similar activities. K Aidanovsky, *supra*, at 210, 224.

118. *C-O-Two Fire Equipment Co. v. United States*, 197 F.2d 489, 493 (9th Cir.), *cert. denied*, 344 U.S. 892 (1952). See also *Hearings before Temporary National Economic Committee*, Part 8, 76th Cong., 2d Sess. 3420, 3430 (1939);

Act to provide for cancellation of certification marks if used to restrain trade or to discriminate against producers.¹¹⁹ On the whole, however, there has been widespread acceptance of the desirability of such standardization programs. Unless used as a cloak for direct restraints of trade or carried to the extent where consumer sovereignty is effectively suppressed, most observers have found standardization and simplification to be meritorious.¹²⁰ In that connection it is interesting to note that the governmental programs of the same type often lean heavily upon trade standards previously adopted by private groups.¹²¹

Exchanges:—Unities of time and place are achieved when traders gather in organized markets. Imperfections can be removed from the flow of commerce when all trading is focused on a single exchange. Economists are agreed upon the desirability of such institutions,¹²² and in many decisions over the decades the courts have approved them.¹²³ Indeed, the courts have permitted members of the exchanges

EDWARDS, MAINTAINING COMPETITION 29 (1949); PEARCE, TRADE ASSOCIATION SURVEY 84 (TNEC Monograph 18, 1941); Hale, *Monopoly and Mobilization: The Conflict Between Direct Controls and the Antitrust Laws*, 47 NORTHWESTERN U.L. REV. 606, 631 (1952).

119. 60 STAT. 433 (1946), U.S.C. § 1064(d) (1946) (Lanham Act). See CALLMANN, THE LAW OF UNFAIR COMPETITION AND TRADE-MARKS § 68.3 (1st ed. 1945); Timberg, *Trade-Marks, Monopoly and the Restraint of Competition*, 14 LAW & CONTEMP. PROB. 323, 343, 352 (1949); Diggins, *The Lanham Trade-Mark Act*, 35 GEO. L.J. 147, 182 (1947); SEN. DOC. NO. 35, 77th Cong., 1st Sess. 304 (1941). An example of desirable certification is found in K Aidanovsky, CONSUMER STANDARDS 233 (TNEC Monograph 24, 1941).

120. Hale, *Agreements Among Competitors*, 33 MINN. L. REV. 331, 365 (1949); EDWARDS, MAINTAINING COMPETITION 194 (1949); Tag Manufacturers Institute v. FTC, 174 F.2d 452, 462 (1st Cir. 1949). But cf. Paramount Famous Lasky Corp. v. United States, 282 U.S. 30, 41 (1930).

121. K Aidanovsky, CONSUMER STANDARDS 16 (TNEC Monograph 24, 1941); LYON, et al., GOVERNMENT AND ECONOMIC LIFE 231 (1939); *Hearings before Temporary National Economic Committee*, Part 8, 76th Cong., 2d Sess. 3437, 3484 (1939). See Atlas Powder Co. v. Ewing, 201 F.2d 347 (3d Cir. 1953).

122. ROBINSON, THE ECONOMICS OF IMPERFECT COMPETITION 51 (1948); Harrod, *Doctrines of Imperfect Competition* 48 Q.J. ECON. 442, 445 (1934); SEN. DOC. NO. 35, 77th Cong., 1st Sess. 403 (1941). But see Chamberlin, *An Experimental Imperfect Market*, 56 J. POL. ECON. 95 (1948). A particularly vigorous advocacy of organized exchanges will be found in MUND, OPEN MARKETS 212, 234-5, 238, 244, 257 (1948). An example of the market place in action is reported in *To Market, To Market*, 40 FORTUNE 87 (July 1949).

123. In *United States v. New York Coffee and Sugar Exchange, Inc.*, 263 U.S. 611, 619 (1924), it was said: "The usefulness and legality of sales for future delivery, and of furnishing an Exchange where under well-defined limitations and rules the business can be carried on, have been fully recognized by this court. . . . The machinery of such an Exchange has been at times made the means of promoting corners . . . thereby restraining and obstructing foreign and interstate trade. In such instances, the manipulators subject themselves to prosecution and indictment under the Anti-Trust Act. . . . But this is not to hold that such an Exchange with the facilities it affords for making contracts for future deliveries is itself a combination and conspiracy thus to restrain . . . trade." See *Anderson v. United States*, 171 U.S. 604, 616 (1898); *Board of Trade v. Christie Grain and Stock Co.*, 198 U.S. 236, 249 (1905); *New York and Chicago Grain and Stock Exchange v. Board of Trade*, 127 Ill. 153, 161, 19 N.E. 855, 858 (1889); *State v. Duluth Board of Trade*, 107 Minn. 506, 521, 121 N.W. 395, 401 (1909). The importance of organized exchanges to the economy is recognized in *Commodity Exchange Act* §§ 3, 4a, 4d, 4e,

to agree not to trade with non-members and even to fix the rate of commission which should be charged for dealings in the organized market. In the early *Anderson* case, the court examined such an exclusive trade arrangement and found "there is no feature of monopoly in the whole transaction."¹²⁴ In the famous *Chicago Board of Trade* case, Mr. Justice Brandeis wrote an opinion sustaining a rule of that body prohibiting a change in the price of grain after the close of trading and until the exchange opened the following morning.¹²⁵ Recent legislation appears to approve such rules of organized exchanges, at least if governmental supervision be exercised over them.¹²⁶

Transactions in restraint of trade can, of course, be carried out through the facilities of an organized exchange. Similarly, such an institution may be used as a cloak for price fixing or other undesirable practices.¹²⁷ It was, however, disturbing when the Supreme Court of the United States recently cast doubt on prior favorable decisions.¹²⁸ That doubt arises from an assertion that the older cases rested upon the ground that only local commerce was involved.¹²⁹ The statement was made in a case involving real estate brokers, who are not, of course, traders on organized exchanges. Such agents, however, perform essentially the same service as brokers upon stock and grain exchanges. It is true that an agreement among such brokers looking to the fixing of commission rates flies in the face of the rule that price fixing is illegal *per se* under the anti-trust laws. If, however, the informal exchanges operated by real estate and similar brokers be properly credited with the important role they play in diffusing information to both buyers and sellers,¹³⁰ a different result may well follow. Experience

4h, 6(b), 42 STAT. 999-1002 (1922), as amended, 7 U.S.C. §§ 2, 5, 6, 9 (1946). Note that § 4b of that statute is aimed at gambling on organized markets, a practice which has been suppressed by private exchanges with judicial approval in the past. *Moore v. New York Cotton Exchange*, 270 U.S. 593 (1926); *Board of Trade v. Christie Grain and Stock Co.*, 198 U.S. 236, 252 (1905) (by implication).

124. *Anderson v. United States*, 171 U.S. 604 (1898); *cf. Hopkins v. United States*, 171 U.S. 578 (1898).

125. *Board of Trade v. United States*, 246 U.S. 231 (1918). Other illuminating opinions were prepared in *Chamber of Commerce of Minneapolis v. FTC*, 13 F.2d 673 (8th Cir. 1926); *State v. Duluth Board of Trade*, 107 Minn. 506, 121 N.W. 395 (1909). *But cf. United States v. New England Fish Exchange*, 258 Fed. 732 (D. Mass. 1919); *State v. Wilson*, 73 Kan. 334, 80 Pac. 639 (1906).

126. 15 U.S.C. § 78f(d) (1946); 15 U.S.C. § 78s(d) (1946).

127. See *United States v. New York Coffee and Sugar Exchange, Inc.*, 263 U.S. 611, 619 (1924).

128. *United States v. National Ass'n of Real Estate Boards*, 339 U.S. 485 (1950).

129. *Id.* at 492. There is language in *Hopkins v. United States*, 171 U.S. 578, 588 (1898), which supports the recent statement made by the Court. *But cf. id.* at 592; *Anderson v. United States*, 171 U.S. 604, 615-6 (1898); *Stafford v. Wallace*, 258 U.S. 495, 524 (1922); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 229-30 (1948).

130. See LYON AND ABRAMSON, *THE ECONOMICS OF OPEN PRICE SYSTEMS* 9 (1936); ATKINSON, *FUNDAMENTALS OF REAL ESTATE PRACTICE* 291, 295, 309 (1946); MUND, *OPEN MARKETS* 244 (1948).

appears to indicate that fixing of commission rates on organized exchanges is essential to facilitate the fast flow of transactions. In informal markets similar considerations may apply. Fixing of rates of commission, of course, diverts competition among the brokers into service channels.¹³¹ While in the field of industry as a whole such diversion may be undesirable, it is entirely possible that buyers and sellers of the commodities dealt in by brokers benefit from the commission fixing. In other words, it may be more important for the vendor or purchaser of real estate to secure service competition in the making of a sale or purchase rather than some small concession from the broker's normal rate of commission. If that be true, considerable question is cast upon the merits of cases holding that brokers of real estate, sugar and insurance cannot agree upon rates of commission.¹³²

CONCLUSIONS

In the nature of things, we cannot assess the relative importance of impurities as against imperfections in the total commerce of the nation. Hence no firm suggestion can be made to a court trying a particular case as to the relative weight to attach to those two obstacles to an economic allocation of resources. Within the boundaries of a single suit, however, it is conceivable that calculations roughly approximating quantitative appraisals might be possible. Economists should be able to make an informed guess as to the cost of monopolistic factors in a given situation. Similarly, the expense of continuing those market imperfections which a trade practice seeks to suppress could be

131. *State v. Duluth Board of Trade*, 107 Minn. 506, 551, 121 N.W. 395, 414 (1909). A vivid illustration of service competition by a real estate broker is furnished in a direct mail advertising circular published by A. H. Gruetzmacher & Co. of 29 S. LaSalle Street, Chicago (1953). In that circular the broker offered to have a picture taken of the owner's premises by a professional photographer and to mail a brochure containing that photograph to 25,000 prospective purchasers. He also offered to furnish the picture and a listing of property to 2,500 brokers place advertisements in the newspapers and render other services all at no cost whatever to the property owner and at no increase in commission above the standard rate charged in the city.

132. *But cf.* *United States v. Sugar Institute, Inc.*, 15 F. Supp. 817, 903 (S.D.N.Y. 1934), *aff'd*, 297 U.S. 553, 587-9 (1936). See *United States v. Southeastern Underwriters Ass'n*, 322 U.S. 533 (1944). A question may arise as to whether the foregoing reasoning can be applied to the "fair trade" statutes so as to afford economic justification for those measures. Comment, *Resale Price Maintenance and the Anti-Trust Laws*, 18 U. OF CHI. L. REV. 369 (1951); *Hearings before Anti-trust Subcommittee of the Committee on the Judiciary on H.R. 4365, H.R. 4593, H.R. 4662, H.R. 6367*, 82d Cong., 2d Sess. (1952). For several reasons it is believed that the arguments applicable to organized and informal exchanges should not be extended to all retail trade. "Fair trade" statutes protect retailers who take title to the goods they sell and thus incur risks in reselling them. Brokers by definition merely act as agents for the trading parties. Hence there is a marked distinction between the retail druggist, for example, on the one hand, and the real estate broker on the other. There are several other reasons why the argument advanced in the text should not be applied to justify resale price maintenance.

appraised in some rough form. If a court were considering, for example, the validity of commission fixing by real estate brokers, it would not be too difficult to make an estimate of the additional expense resulting therefrom. Perhaps more difficulty would be encountered in assessing the counter-vailing cost of lethargy in service competition. If, however, markets could be found where commissions had not been so fixed by agreement among the brokers, testimony as to experience in those areas might be helpful in assessing the relative merits of the two systems.

It is submitted that the anti-trust laws cannot be enforced without taking account of frictions in the market place. A blind-zeal to remove all monopoly elements in the economy might well result in a less efficient allocation of resources than previously obtained.¹³³ What we are urging is, of course, little more than a formalized application of the familiar rule of reason;¹³⁴ and the fact that quantitative standards for its application may often be lacking cannot excuse a refusal to consider the impact of judicial action upon the economy as a whole. Extension of the doctrine of violations *per se* is not, in other words, a rational approach to the solution of most anti-trust problems.

133. Compare EDWARDS, *MAINTAINING COMPETITION* 30-49 (1949) with NELSON AND KEIM, *PRICE BEHAVIOR AND BUSINESS POLICY* 56-7 (TNEC Monograph 1, 1941).

134. Oppenheim, *Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy*, 50 MICH. L. REV. 1139, 1145, 1156 (1952).