REVIEWS

ANTITRUST IN PERSPECTIVE: THE COMPLEMENTARY ROLES OF RULE AND DISCRETION. By Milton Handler. New York: Columbia University Press, 1957. Pp. 151. $3.00.

SCHOLARSHIP about antitrust has been, on the whole, ephemeral. The Supreme Court speaks and soon the law reviews are teeming with interpretations, predictions, recriminations. But let a year pass and yesterday's decision is forgotten as the pack takes off, in full cry, after today's sensation. There seems to be neither time nor inclination for the long view. With only a few exceptions, the role of antitrust theoretician has been assumed by economists. And aside from one recent outbreak of introspection by committee,[1] antitrust lawyers have been content to abide by the injunction that sufficient unto the day is the evil thereof. It is, therefore, a matter of some moment when a scholar-practitioner of experience and standing chooses to give his reflections on antitrust theory the permanence and weight that hard covers imply.

In this series of three lectures delivered at the University of Buffalo School of Law, Professor Milton Handler of Columbia University sets down "ideas on certain dynamic aspects of antitrust law which have fascinated [him] during the past three decades."[2] These ideas seem to converge in a single dominant theme: application of the antitrust laws, whether under sections one or two of the Sherman Act or under sections three or seven of the Clayton Act "must be animated by a rule of reason whose scope and significance should be measured by the statutory purposes it is designed to effectuate."[3] So viewed, Mr. Handler's second and third lectures, dealing with exclusive arrangements and mergers, merely illustrate his thesis. For the text of his sermon we must look to the first lecture, "The Judicial Architects of the Rule of Reason." There Mr. Handler examines the views of six Supreme Court Justices—Peckham, White, Taft, Holmes, Brandeis and Stone—who, he says, are the "outstanding representatives of the main schools of antitrust thought."[4] He hopes that this examination will reveal "the basic contours of our modern law."[5] In my opinion, it fails signally to do so.

Mr. Handler's approach may have largely precluded his saying anything meaningful about his subject. Comparison of Judge *A*'s statement of "the

1. REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS (1955).
2. This appears in Mr. Handler's book in the section entitled "Acknowledgments."
3. P. 48.
4. Pp. 3-4.
5. P. 4.

law" with Judge *B*'s is not likely to be significant apart from the facts of the cases in which each stated his views. Particularly is this likely to be true if, when Judge *A* says *X* and Judge *B* says *Y*, it is assumed that *X* and *Y* are different. Mr. Handler repeatedly indulges in this assumption, with unfortunate results for his analysis.

In discussing early attempts to give content to the broad language of the Sherman Act, Mr. Handler, dismissing Peckham's literalism in *Trans-Missouri*,[6] contrasts Taft's words in *Addyston*[7] with those of White in *Standard Oil*.[8] Taft had said in effect that only restraints which are ancillary to a lawful purpose are legal and that nonancillary restraints, reasonable or not, are illegal. White, on the other hand, said that the legality of all restraints is to be measured by their reasonableness. Mr. Handler apparently thinks the distinction significant. But his emphasis on verbal formulations obscures not only the essential identity of the problem with which Taft and White were grappling but also the striking similarity of their solutions. Both were trying to construct a rule to define forbidden conduct. Both rejected Peckham's technique of making the phrase "restraint of trade" carry the whole load of definition. Both ended up saying that some restraints are legal and some are not. Taft said, if the restraint is ancillary, it is legal; White said, if it is reasonable, it is legal. But what is an ancillary restraint? It is a restraint which is incidental to a dominant, legal purpose. Its characterization as ancillary rests on a finding of necessary incidence to some justifiable activity in which the parties are trying to engage. And whatever the process of deciding whether there is such an activity and whether it is justifiable, the result, presumably, is labelled "reasonable." Or start at the other end. When is a restraint reasonable? When the parties are trying to do something whose social utility is thought to outweigh the impairment to competition which it causes. This determination is based on evaluation of the dominant purpose or effect of the parties' conduct. If this dominant purpose or effect is to do something other than restrain for the sake of reducing competition, and we think the end worth encouraging, we call the restraint "ancillary"—or, again, reasonable. In short, a start at constructing a theory for applying section one of the Sherman Act can be made with either Taft's or White's verbal formulation. Which one is used is unimportant; it is the beginning but scarcely the end of wisdom to recognize that all commercial conduct restrains and that the legality of any given restraint depends on someone's view of benefit and detriment to something or other. A little more talk about the "something or other" would have been welcome.

The statements of six Supreme Court Justices are, I think, not the most promising of bases for an examination of what Mr. Handler calls "the complementary roles of rule and discretion" in the administration of the Sherman Act.

6. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897).
7. United States v. Addyston Pipe & Steel Co., 85 Fed. 271 (6th Cir. 1898).
8. Standard Oil Co. v. United States, 221 U.S. 1 (1911).

But however that may be, no such examination, even on Mr. Handler's terms, can be very useful that fails to account for the ambitious attempt to formulate per se rules of illegality, most broadly demonstrated by Mr. Justice Douglas in *Socony-Vacuum*.[9] One passing text reference is all that decision gets.[10] Apparently, Mr. Handler does not care for per se rules because he thinks them too restrictive. Although this is not the place for reappraising the price-fixing dogma, a more accurate criticism might be that the *Socony-Vacuum* rule fails not because it is too restrictive (which implies that the rule is consistently employed), but because it is too broad to be workable. Later Supreme Court and lower court decisions indicate that it is simply not true that "any combination which tampers with price structures is engaged in an unlawful activity"[11] or that "a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging or stabilizing the price of a commodity in interstate . . . commerce is illegal *per se*."[12] If we look to what courts have done rather than said, it becomes apparent that the price-fixing dogma, as well as the related doctrine that concerted refusals to deal are illegal per se, is no more than a procedural device for shifting the burden of justification to defendants once their conduct has been shown to evidence a design to produce an impairment of "automatic" price determination by "market forces"—in other words, a departure from the economists' model of pure competition. The per se rules are simply ignored in many situations where literally they apply. Only the most mechanical reading of the cases supports Mr. Handler's generalization that "the authorities upholding loose-knit arrangements are extremely sparse, deal with the *sui generis* states of fact, and have little precedential force."[13]

9. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

10. P. 25.

11. 310 U.S. at 221.

12. *Id.* at 223.

13. P. 26. Mr. Handler buttresses this statement by footnote citation to four Supreme Court cases, the last of which was decided in 1933. He ignores, in this context, Sugar Institute, Inc. v. United States, 297 U.S. 553 (1936); Hartford-Empire Co. v. United States, 323 U.S. 386 (1945); Associated Press v. United States, 326 U.S. 1 (1945); Transparent-Wrap Mach. Corp. v. Stokes & Smith Co., 329 U.S. 637 (1947). Each of these cases, whether in the government's "won" or "lost" column, is in some respects an authority "upholding loose-knit arrangements," if by that term Mr. Handler still means arrangements not involving corporate affiliation. Of course, if cases in the lower courts are inspected, the problem becomes one of selecting a representative few of recent vintage and special interest. Without any attempt to be exhaustive, one might consider: Cutter Laboratories, Inc. v. Lyophile-Cryochem Corp., 179 F.2d 80 (9th Cir. 1949); Tag Manufacturers Institute v. FTC, 174 F.2d 452 (1st Cir. 1949); United States v. National Football League, 116 F. Supp. 319 (E.D. Pa. 1953); United States v. Morgan, 118 F. Supp. 621 (S.D.N.Y. 1953); see also United States v. Insurance Bd., 144 F. Supp. 684 (N.D. Ohio 1956). Each of these decisions leaves in effect "loose-knit arrangements" which fall within the sweeping proscription of the *Socony-Vacuum* dicta.

Mr. Handler's view comes down to little more than that the government wins more § 1 cases than it loses.

Further, in his discussion of the evolution of section one doctrine, Mr. Handler omits consideration of what may well be a most significant factor. The Sherman Act is a criminal statute, and the offense under section one is typically treated as an application of conspiracy doctrines. In order to instruct juries in criminal cases, judges must articulate the law with some precision. It is hardly an accident that the per se rules, representing as they do an attempt to import precision into Sherman Act administration, were chiefly enunciated in rulings on the correctness of jury instructions in two criminal cases: *Trenton Potteries*,[14] about which Mr. Handler says little, and *Socony-Vacuum*, about which he says less. And the *Nash* case,[15] which is surely one of the half-dozen most significant section one decisions, rates only one reference in a footnote. There, its holding is summarized as follows: "[H]eld that Sherman Act conspiracy was punishable without an overt act."[16] That is true. It is also true

14. United States v. Trenton Potteries Co., 273 U.S. 392 (1927).

15. Nash v. United States, 229 U.S. 373 (1913).

16. P. 86 n.107. A footnote may be the appropriate place to comment on the apparatus accompanying Mr. Handler's lectures. The text of the lectures occupy sixty-seven pages. The notes, which are at the end of the book, occupy seventy-seven pages. About twenty of these pages are given over to six omnibus notes, listing the antitrust opinions written, and decisions participated in, by Mr. Handler's six Justices. Each case is capsulized in a few words, usually too few to convey anything unless the reader is already familiar with the decision. It is unfortunate that the prodigious labor which must have been invested in constructing these notes was not instead expended in ways not so closely resembling existing mechanical research aids in the antitrust field. In particular, it is unfortunate that a little more care was not taken with the occasional note undertaking to discuss a particular case rather than to list a string of them. For example, in note 172, the omnium gatherum of Stone's antitrust work, Mr. Handler pauses, at p. 101, to discuss the important decision in Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940). He says:

> "In Apex . . . , Stone denied a manufacturer the right to use antitrust to curb labor's abuse of power, leaving to other laws the policing of union activities. Since *Apex*, the antitrust liability of unions has been limited to their cooperation with industrial groups to suppress market competition. Allen Bradley Co. v. Local Union No. 3, 325 U.S. 797 (1945)."

Of course, United States v. Hutcheson, 312 U.S. 219 (1941), not *Apex*, resulted in the drastic limitation of the Sherman Act's applicability to labor activities. Mr. Handler seems to have misconceived the import of *Apex*. The *Apex* rationale leaves ample room for striking down labor activities aimed at the destruction of commercial competition. It was, however, abandoned the next year in *Hutcheson*, over Stone's protest (formally a concurrence and therefore so designated by Mr. Handler, p. 104 n.172).

In the same note, at p. 103, Mr. Handler touches on conspiracy and "conscious parallelism." He states that misinterpretation of Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939), "led to the notion that conscious parallelism was the substantive equivalent of conspiracy—a notion now happily discarded. Theatre Enterprises v. Paramount [Film] Distrib[uting] Corp., 346 U.S. 537 (1954)." As authority, Mr. Handler cites the REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 37-40 (1955) and two of his own recent articles, Handler, *Recent Antitrust Developments*, 9 THE RECORD 171, 173-75 (1954); Handler, *Contract, Combination or Conspiracy*,

that *Marbury v. Madison* held that the issuance of a writ of mandamus to the Secretary of State is not within the Supreme Court's original jurisdiction.

I have suggested that Mr. Handler's tendency to take at face value what the Supreme Court says it is doing in antitrust cases often blunts his analysis. Within the confines of section one decisions, two examples among several seem worth special attention. First, he states that "actually there was no real conflict among the four trade association cases."[17] He suggests that the cases are factually distinguishable and that therefore their diametric results do not reflect division within the Court concerning the principle to be applied. Because of the importance of these cases in the development of section one doctrine, the point merits examination.

Two of the cases, *Hardwood* [18] and *Maple Flooring*,[19] arose in very similar settings and should therefore provide a fair test of the validity of Mr. Handler's generalization. I think that the two cases do not reflect variant views on the evidence presented (as Mr. Handler suggests) but rather differences on matters of economic policy—which is to say, differences in legal doctrine. *Hardwood* represents the view that a trade association may not lawfully make it easy for its members to achieve price uniformity or stability by circulating data about past transactions which may be used as a basis for restricting output and fixing prices. *Maple Flooring* represents the view, advanced by Brandeis in his *Hardwood* dissent,[20] that it is better to permit such activity, even at the cost of lessening price competition, than to repress it, thereby encouraging competitors to accomplish once and for all by merger what they would otherwise do sporadically by looser forms of collaboration. Of the five Justices who sat in both cases, only one—Van Devanter—voted with the majority in both. Taft and McReynolds, who were with the majority in condemning the ar-

1953 ABA ANTITRUST SEC. REP. 38, 42. I have examined these authorities and they appear to bear out Mr. Handler's statement. However, the decision in *Theatre Enterprises* does not. That case held only that it was not error for a trial court to refuse to direct a verdict for plaintiff in a treble damage action on the basis of the prima facie effect of a decree adverse to defendants in a former government action plus a showing that each defendant followed an identical policy of refusing to deal with plaintiff. Even if there had been evidence from which a jury could find direct agreement among the defendants, that would not have compelled the direction of a verdict for plaintiff. The question would still have been for the jury, as the Court held it was here. One wonders why the Court bothered to grant certiorari in this profoundly insignificant case, especially following Milgram v. Loew's, Inc., 192 F.2d 579 (3d Cir. 1951), *cert. denied*, 343 U.S. 929 (1952), which, had certiorari been granted, might have compelled solution of the problem which Mr. Handler thinks was solved by *Theatre Enterprises*.

17. P. 21.

18. American Column & Lumber Co. v. United States, 257 U.S. 377 (1921).

19. Maple Flooring Manufacturers Ass'n v. United States, 268 U.S. 563 (1925).

20. 257 U.S. at 418-19. Mr. Handler quotes a passage from Brandeis's opinion to this effect, p. 20, but on the very next page tells us that this was just an argument about facts.

rangements in *Hardwood*, dissented from the decision condoning the arrangements in *Maple Flooring*. Holmes and Brandeis, who dissented in *Hardwood*, were with the majority in *Maple Flooring*. That hardly seems like a dispute about facts. True, Stone, who wrote the opinion in *Maple Flooring*, said that the cases were reconcilable. That seems to settle the point for Mr. Handler. Interested readers will want to compare Brandeis's dissent in *Hardwood* and draw their own conclusions.

In analyzing the *Cracking* case,[21] Mr. Handler seems once more to confuse appearance with reality. The Court upheld an agreement among four companies holding dominant patents on processes for increasing the gasoline yield of crude petroleum by "cracking"—applying heat and pressure to the residuum after ordinary distillation. The contracting parties purported to eliminate a patent deadlock by pooling the patents; minimum royalties were fixed and the proceeds were shared among the collaborators. This is clearly a *Socony-Vacuum* "price-affecting" activity as to gasoline. Mr. Handler agrees and seems to think that the *Cracking* case would be differently decided in the light of *Socony-Vacuum*. His position rests on what Brandeis said in his opinion in the *Cracking* case. The Justice took the position that the agreement was lawful because gasoline made by the cracking process still had to face the competition of uncracked gasoline. This Mr. Handler generalizes into what he calls a "concentric circle" theory: "Treating the boundaries of the market as the outside and the combine as the inside circle, there is no violation if the smaller circle remains at a respectable distance from the outer periphery."[22] The suggestion, apparently, is that so long as enough uncracked gasoline is available to compete with the cracked variety, parties to the pooling arrangement may reduce competition in cracked gasoline *inter sese*. The trouble with Mr. Handler's figure of speech is that it is irrelevant to the economic facts of the *Cracking* case. Consumers do not differentiate between cracked and uncracked gasoline. Nor do the two compete in the sense that buyers have a preference for one or the other. Wholesalers and jobbers do not care how gasoline is made. Contrary to Mr. Handler's analysis, neither cracked nor uncracked gasoline is a "thing." Cracking is, from the economist's viewpoint, a reduction in the cost of refining gasoline. Its value is measured not by what will be paid for cracked as against uncracked gasoline but by the increase in the yield of gasoline refined from crude oil achieved by using the cracking process. The rationale of the *Cracking* case is not that people may agree on price if the "thing" whose price they are fixing competes with some other "thing."[23] It is rather that under some circumstances a purpose to eliminate a patent deadlock will justify an arrangement that affects price. In terms of the analysis suggested earlier, the defendants have successfully borne the burden of justifying an arrange-

21. Standard Oil Co. v. United States, 283 U.S. 163 (1931).

22. P. 20.

23. Mr. Handler seems to be under a similar misapprehension about Board of Trade v. United States, 246 U.S. 231 (1918). P. 19. *But see* p. 94 n.130.

ment which is prima facie illegal because price-affecting.[24] *Socony-Vacuum* does not seem to have changed that.[25]

Generalizations founded on flawed analysis of particulars are not likely to be very helpful. Mr. Handler's are no exception. If there is any consistency in what courts have been doing with section one of the Sherman Act, or any set of principles by which to discriminate between better and worse decisions, neither has been made manifest by Mr. Handler. And neither can be revealed without at the very least, and as a starting point, a detailed re-examination of the section one cases, based on economic as well as legal analysis.

Weak generalizations are not cured by leaving off generalizing; they are only palliated. And surely the time for palliation in the antitrust field is over. Antitrust is, after all, pre-eminently an area of common-law development, where one must work case by case from the particular to the general. But it is common law with a difference, for antitrust demands analysis of facts far more complex than those typically involved in litigation and the drawing of inferences for which common sense and everyday experience give little help. It calls, in short, for application of a body of specialized knowledge—economics and, more particularly, price theory. Without that application talk about antitrust doctrine is just noise.

Within the broad framework of the Sherman Act and the scarcely less broad framework of the Clayton Act, the courts have for the last sixty-seven years been attempting to put together a body of decisional law, with only intermittent recognition that it is both difficult and necessary to define ends and to identify means appropriate to those ends. It is important that this work of the courts be criticized with all the help that economic theory can give and with the combination of fidelity to detail and imaginative exegesis that characterizes legal scholarship at its best. This is important not simply because of the intellectual challenge—although that would be justification enough. It is important because antitrust is this country's unique contribution to the concept of a free society, because it would be a major catastrophe if antitrust development were seriously restricted or perverted beyond what has already occurred and because that development can be as easily damaged by inadvertence as by design.

Mr. Handler's book does not make a start at the kind of analysis we need. To expect the appearance of antitrust's Wigmore would be premature. But it is cause for genuine regret that we must wait a while longer for its Thayer.

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24. It would unduly lengthen this review to examine in detail the facts in the *Cracking* case, which are set forth in the district court opinion. United States v. Standard Oil Co., 33 F.2d 617 (N.D. Ill. 1929). It appears, however, that defendants had much more of a strangle hold on the use and licensing of cracking processes than Brandeis's opinion indicates and also that their claimed purpose of avoiding a patent deadlock may have been only a cloak for cartelization, since it was by no means clear that their patents were mutually infringing. *Id.* at 625-26.

25. See cases cited note 13 *supra*, particularly *Transparent-Wrap and Lyophile-Cryochem.*

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