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Statutory Unfair Competition

IRVIN H. FATHCHILD*

The succession of statutes directed against "unfair competition" indicate that either the non-statutory substantive law upon the subject or the processes for enforcing it are regarded as inadequate. The Federal Trade Commission Act declares "unfair methods of competition" in interstate commerce unlawful and creates a Commission to enforce it.¹ The Tariff Act of 1930 following the Tariff Act of 1922 declares "unfair methods of competition and unfair acts in the importation of articles" unlawful, and empowers the Tariff Commission to hear and initiate complaints.² The National Industrial Recovery Act³ contained provisions, declared unconstitutional in the *Schechter case*,⁴ for the adoption and enforcement of "Codes of Unfair Competition." The recent Guffey bill provides for a code for the bituminous coal industry and specifies certain acts to be proscribed by such code as "unfair methods of competition."⁵ State legislatures are enacting statutes in this field, of broad or limited application.⁶ Canada adopted a rather comprehensive statute upon the subject in 1932;⁷ and Japan, in 1934.⁸

Do these statutory enactments carry the substantive law of unfair competition beyond the fundamental scope of the non-statutory law upon the subject or only add to the remedial processes for enforcing it, or both? In considering these questions, it is essential that we have in mind rather clearly the fundamental basis and vitality of the non-statutory law upon the subject.

*Member of the Chicago Bar; Member of Committee on Federal and State Trade-Mark Legislation and Committee on N. R. A. Codes, in the Patent, Trade-Mark and Copyright Law Section of the American Bar Association; articles and notes in legal periodicals.

1. 38 STAT. 717 (1914), 15 U. S. C. A. § 45 (1927).
2. 46 STAT. 590 (1930), 19 U. S. C. A. § 1337 (1934).
3. 48 STAT. 195, 15 U. S. C. A. § 701 *et seq.* (1933).
4. *Schechter Poultry Corp. v. United States*, 295 U. S. 495 (1935).
5. 49 STAT. ---, 15 U. S. C. A. § 807 (1935).
6. In addition to the State enactments which were designed to supplement the National Industrial Recovery Act, we find a wave of legislative action adopting a statute, of limited application, known as the Fair Trade Act. Calif. Laws 1931, c. 278, as amended by Laws 1933, c. 260; Ill. Laws 1935, p. 1436; Iowa Laws 1935, S. B. 222; Md. Laws 1935, c. 212; N. J. Laws 1935, c. 58; N. Y. Laws 1935, c. 976; Ore. Laws 1935, c. 245; Pa. Laws 1935, Act No. 115; Wash. Laws 1935, c. 177; Wis. Laws 1935, c. 52. This act is in process of adoption in many of the other states. California has also an Unfair Practice Act. Calif. Laws 1935, c. 477; and Wisconsin, a State Industrial Recovery Act, with provisions for codes against "unfair competition." Wis. Laws 1935, cc. 182 and 451. Connecticut has a Retail Drug Control Act. Conn. Laws 1935, c. 135a.

7. AN ACT RESPECTING UNFAIR COMPETITION IN TRADE & COMMERCE, 22-23 GEO. V. c. 38 (1932).

8. THE UNFAIR-COMPETITION LAW, see PATENTS, UTILITY MODELS, DESIGNS AND TRADE-MARKS IN JAPAN, MANCHUKUO AND CHINA (1935) Kusaba & Co. 4.

I.

NON-STATUTORY FUNDAMENTALS

A search into the origin of the law of unfair competition confirms what we find elsewhere in legal research, viz., that the law is a growth rather than a science. A decision becomes a precedent, a precedent an analogy, and an analogy a fiction. Then in time the fiction is discarded for a more analytical statement of the basis of the ultimate result and the evolutionary process sets in anew. As said by the late Mr. Justice Holmes, more than half a century ago, but in his characteristic expressiveness:

"The truth is that the law is always approaching, and never reaching consistency. . . . It will become entirely consistent only when it ceases to grow."⁹

Thus, we find no juridical postulates in the Year Books from which the present decisions upon unfair competition follow as the logical result of *a priori* processes. Nor does the evolutionary process commence with a momentous decision upon the subject. On the contrary, so far as published records are available, the birth of this important branch of the law took place without any pomp or ceremony and entirely unnoticed in an action at common law for deceit brought and maintained in 1580 or 1595 for counterfeiting a trade-mark.¹⁰ For a century and a half the record is then a blank. In that encyclopedic digest of the law, Bacon's *Abridgement*, published in 1736, we find no mention of any law of trade-marks—much less any law of unfair competition.

In 1742, we find the Chancery Courts appealed to for injunctive relief against alleged trade-mark infringement. The injunction was denied. Lord Hardwicke said:¹¹

" . . . there is no foundation for this court to grant such an injunction. Every particular trader has some particular mark or stamp; but I do not know any instance of granting an injunction here, to restrain one trader from using the same mark with another; and I think it would be of mischievous consequences to do it.

"Mr. Attorney-General has mentioned a case, where an action at law was brought by a cloth-worker against another of the same trade, for using the same mark, and a judgment was given that the action would lie. Poph. 151.

"But it was not the single act of making use of the mark that was sufficient to maintain the action, but doing it with a fraudulent design, to put off bad cloths by this means, or to draw away customers from the other clothier; and there is no difference between a

9. HOLMES, *THE COMMON LAW* (1881) 36.

10. 8 *HOLDSWORTH, HISTORY OF ENGLISH LAW* (1926) 430.

11. *Blanchard v. Hill*, 2 *Atk.* 484 (1742).

tradesman's putting up the same sign, and making use of the same mark, with another of the same trade. . . .

"An objection has been made that the defendant in using this mark prejudices the plaintiff by taking away his customers. But there is no more weight in this than there would be in an objection to one inn-keeper setting up the same sign with another. . . ."

The reports give us no further light on the developments of this branch of the law until in the period from 1833 to 1847.¹² We there find a substantial advance in the recognition and protection of trade rights. The law courts, in actions upon the case for fraud, establish that even if trade-mark and trade name proprietors cannot show actual damages, they are nevertheless entitled to nominal damages in vindication of recognized legal rights.¹³ During the same period, we find the chancery courts recognizing the right to injunctive relief in these cases and carrying forward the evolutionary process to the position that the interests of the trade-mark user are property, as such, and are to be protected from invasion and injury irrespective of the fraudulent or deceitful intent of the defendant.¹⁴

From that period forward, the law upon this subject expands rapidly, but, until comparatively recent times, such expansion has been more in the detail of its application than in its substantive content. Its substantive content, as thus established in the early part of the nineteenth century continues essentially without change into the beginning of the present century. Thus, Street in that able analysis of the foundations of legal liability, published in 1906, says:¹⁵

"Though the law concerning infringement of trade-marks and that concerning unfair competition have a common conception at their root, namely, the idea that one shall not misrepresent that his goods or his business is the goods or the business of another, the law concerning trade-marks occupies in a way a somewhat higher plane. The infringement of a trade-mark, for instance, is conceived of as an invasion of property. . . . Unfair competition, on the other hand, cannot be placed on the plane of invasion of property right. This

12. The apparent gaps in the history of the law on this subject probably reflect, more fundamentally, the gaps in the development of the industrial, social and political trends which give rise to the development of law. A more intelligent picture, as suggested by Mr. Durant in his colossal undertaking, *The Story of Civilization*, partly published, would be a portrayal of the industrial, social, political and juristic developments in their natural interrelation.

13. *Blofeld v. Payne*, 4 B. & Ald. 410 (1833); *Morison et al. v. Salmon*, 2 Man. & G. 385 (1841); *Rodgers v. Nowill*, 5 C. B. 109 (1847); *Thomson v. Winchester*, 36 Mass. 214 (1837).

14. *Lewis v. Langdon*, 7 Sim. 421 (1835); *Millington v. Fox*, 3 Myl. & C. 338 (1838); *Perry v. Truefitt*, 6 Beav. 66 (1842).

15. 1 STREET, FOUNDATIONS OF LEGAL LIABILITY (1906) 421.

tort is strictly one of fraud, and a fraudulent intent or its equivalent is essential to liability.”

But is this stated difference between the law of trade-marks and the general law of unfair competition fundamental? Does not this statement reflect only a *stage in the development* of a fundamental rather than a fundamental itself? If the courts, by their inherent judicial power, may evolve the proposition that the user of a particular trade-mark, trade-name, or label, acquires an exclusive property right therein, even as against an innocent adoption or use by others, may they not evolve also the proposition that the originator of a particular trade dress, not a technical trade-mark, acquires an exclusive property right therein, whether the later competitor acts fraudulently or innocently? So, also, if the courts, by such inherent power, can evolve the proposition that it is “unfair competition” and illegal for one competitor intentionally to copy the distinctive *trade dress* of another competitor, may they not similarly evolve the proposition that one competitor may not intentionally copy the original *designs* of another competitor, whether in fabrics, millinery or otherwise, during the useful trade life of such designs? True, the one is “palming off” and the other is not; but if the courts may declare “palming off” to be an unfair and illegal competitive practice, why may they not proceed to declare illegal, actionable and enjoicable any other competitive practice which, at least according to unquestioned and unquestionable standards, is “unfair”?

We are not now considering the *advisability* of so doing or the precise extent to which the courts should go if they possess the power, or what the requisites should be to determine whether a proffered standard is qualified for judicial recognition. We are now considering only whether the fundamentals underlying the non-statutory substantive law of unfair competition are sufficiently broad in scope to permit the courts to proceed to such results. We believe that they are.¹⁶

A substantial advance toward that ultimate position—if not beyond it—is found in the decision of the Supreme Court of the United States in the *Associated Press* case.¹⁷ There, on complaint of the Associated Press against another organization engaged in the gathering and transmitting of news, the court enjoined, *inter alia*, the copying of news items from bulletin boards and early editions of newspapers identified as part of the Associated Press system. While the District Court was of the opinion that such use of the complainant’s news items constituted “unfair trade,” it was recognized that the question was one of first impression, and accordingly the court denied the injunction against that practice to await the action of the appellate court.¹⁸ The Circuit

16. See, generally on the scope of the judicial power, Jerome Frank, *Law and the Modern Mind* 32, *et seq.*

17. *International News Service v. Associated Press*, 248 U. S. 215 (1918).

18. 240 Fed. 983 (S. D. N. Y. 1917).

Court of Appeals (one of the Judges dissenting) concurred in the view expressed by the District Court that the practice in question was "unfair trade" and directed that the injunction should be enlarged to restrain also that practice.¹⁹ The Supreme Court, by a concurrence of six of the justices, affirmed the judgment of the Circuit Court of Appeals.²⁰ Mr. Justice Brandeis dissented upon the merits, Mr. Justice Holmes dissented as to the scope and form of relief granted, and Mr. Justice Clark did not participate in the decision.

This decision is remarkable enough in its result, but it is all the more remarkable in the underlying principle announced in arriving at that result. The court definitely rejected the restrictive view as to the substantive content of the law of unfair competition and adopted as its basis a principle which establishes at once a substantive content far more extensive and which makes the purported basis of the restrictive view merely an *application* of an underlying fundamental rather than a fundamental itself.

The rejection of the restrictive view appears in the following quotation:

"It is said that the elements of unfair competition are lacking because there is no attempt by the defendant to palm off its goods as those of the complainant, characteristics of the most familiar, if not the most typical cases of unfair competition. *Howe Scale Co. v. Wyckoff, Seamans & Benedict*, 198 U. S. 118, 140. But we cannot consider that the right to equitable relief is confined to that class of cases."²¹

The adoption of an underlying principle establishing a broader substantive content appears in the following quotation:

"The parties are competitors in this field; and, on fundamental principles, applicable here as elsewhere, when the rights or privileges of the one are liable to conflict with those of the other, each party is under a duty so to conduct its own business as not unnecessarily or unfairly to injure that of the other. *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 254. Obviously, the question of what is unfair competition in business must be determined with particular reference to the character and circumstances of the business."²²

In answer to the defendant's contention that the news was *published* when it appeared in the newspapers of the members of the Associated Press, and that such publication put an end to any special rights in the news, the court said:

"The fault in the reasoning lies in applying as a test the right of the complainant as against the public, instead of considering the rights of

19. 245 Fed. 244 (C. C. A. 2d, 1917).

20. 248 U. S. 215 (1918).

21. *Id.* at 241.

22. *Id.* at 235.

complainant and defendant, competitors in business, as between themselves. . . . The transaction speaks for itself and a court of equity ought not to hesitate long in characterizing it as unfair competition in business."²³

While the progressivism of the court, manifested in this decision, is to be commended, we cannot bring ourselves into positive disagreement with Mr. Justice Brandeis' dissent. His progressivism needs no footnote references. Indeed, he confirms it even in his dissent. He there said:

"The unwritten law possesses capacity for growth; and has often satisfied new demands for justice by invoking analogies or by expanding a rule or principle. This process has been in the main wisely applied and should not be discontinued."²⁴

Mr. Justice Brandeis' point of dissent was that the case presented a complexity of private and public interests—to sustain the position of the complainant was to augment its power in the field—query whether that power should be so augmented by judicial decision when courts are not in a position to supervise the granting or withholding of the rights and privileges of membership in the Associated Press System or the terms and conditions of service—there may be some fields of alleged unfairness where the substantive readjustment or amplification of juristically recognized positions had better be left to the legislative branch of the government where an entire subject-matter may be dealt with more comprehensively and where administrative or enforcement agencies may be created if desirable for the more effective dealing with the complexity of the subject-matter. A meritorious dissent and an arresting challenge to judicial thought, not only in dealing with non-statutory cases, but also in interpreting and applying general statutes against "unfair competition," as we shall hereinafter consider.

This more fundamental concept of the underlying basis of the law of unfair competition has found expression also in a case now going through the Illinois Courts, viz., the *Barber's Trade* case.²⁵ There the trial court entertained a bill in equity by an incorporated Barbers' Union, alleging that the barbers' trade in Chicago had become demoralized due to the alleged fact that many barbers were cutting prices below socio-economically sound levels, that a certain schedule of service charges was fair and reasonable, and that the maintenance of the same was essential for the well-being of the trade. The bill sought an injunction against the defendants who were non-union barbers, to restrain them from engaging in alleged unfair and destructive trade practices, including price-cutting. A decree was entered April 15, 1935, finding,

23. *Id.* at 239.

24. *Id.* at 262.

25. *Master Barbers' Ass'n. v. Jos. Baiata*, Superior Court of Cook County, Illinois, Docket No. 34 S-18528.

inter alia, that the court should order the defendants to "refrain from unsocial and destructive conduct and nefarious practices," that certain service charges, as listed by the Court, had for some time been regarded as normal and reasonable in the Chicago area, and that the defendants should be and were, by said decree, enjoined from "singly or collectively engaging in destructive or ruinous trade practices or nefarious competition" and specifically, *inter alia*, from engaging in "price cutting."

No direct appeal was taken from such decree, but later, in August, 1935, a commitment order for contempt was entered for violation of the decree and an appeal from such order to the Illinois Appellate Court, First District, was allowed but has not as yet been perfected.

Whatever our views may be as to the ultimate result which should be pronounced upon the facts disclosed in that record, the willingness of the court to step into present-day socio-economic industrial problems, without statutory specification of the substantive rights of the various interests involved in that complexity, should satisfy, or at least relieve the despondency of, the most severe critics of our juridical guild.²⁶

The foregoing brief review indicates, we believe, that the vitality of the non-statutory substantive law has only been tapped. With the tremendous industrial growth since the period of 1833-1847 we may expect to find, and should find, that vitality utilized in an increasingly fuller measure throughout the entire field of competitive enterprise, resulting in the development of broad rules of general application, as the "palming off" rule, and corollaries of more specific application in particular industries or special situations.

If this may be accomplished under the non-statutory substantive law of unfair competition, why then this succession of statutes upon the subject?

II

PURPOSE, SCOPE AND INTERPRETATION OF THE STATUTES

It is to be remembered that the courts did not establish the ultimate position, considered in the foregoing inquiry, by a single stroke. It has been an evolutionary process. Indeed, there are probably some courts still unwilling to concede so comprehensive a scope to the non-statutory law upon this subject. Mr. Edward S. Rogers has said:

"It must not be assumed that the progress from the state of mind of Lord Hardwicke in 1742 to the enlightened rule applied by the courts today was a steady and uninterrupted one. Quite the contrary.

26. The most recent of these critics is Dr. Robinson of the Institute of Human Relations, Yale University, as set forth in his book *Law and the Lawyers* (1935). While much of that criticism rests upon questionable premises, the importance of recognizing that man is a *sociological* being in a *sociological* environment, and all that that signifies, perhaps needs emphasis in so caustic a criticism as Dr. Robinson makes.

As a general thing the infringer has always been a little ahead of the courts. By the time the judicial machinery arrives at a place where the pirate was yesterday, ready to deal with him, that illusive person has moved forward and is still a little ahead—at a place where the courts will not reach until tomorrow—and is there engaged in doing something which will enable him to advantage himself at someone's else expense in some manner hitherto unthought of."²⁷

Whether this lag in the development of the substantive law is chargeable to the bench or bar or both, and whether it is due to a fetishism of precedent, or to an auto-paralyzation of the judicial power, or to a necessary or desirable deference to the legislative branch of the government, or otherwise, we need not here consider. That the lag exists is sufficient occasion for the statutes in question. The public demand for development of the law upon a subject often will not await the evolutionary process, but carries forward its will more promptly and more definitely by specific legislative action.

Furthermore, even if the courts were willing to go forward in exact synchronism with "the march of time," still there may be fields of alleged unfairness into which the courts may properly refuse to enter until the legislative branch of the government has delineated the substantive rights in the matter. We suggest the following:

(1) The alleged unfairness may be in a subject-matter which is inherently, or has become, a domain exclusively for legislative action, and should, accordingly, be left for such action.

(2) Also, the courts may properly be unwilling to give effect to a proffered trade standard, the soundness of which may well be open to debate. Proffered standards, the soundness of which, in an organized community, may properly be debated, should be given effect, if at all, only by legislative action, not by judicial decision.

(3) And again, as emphasized by Mr. Justice Brandeis in his dissent in the *Associated Press* case, above-considered, the alleged unfairness may present a complexity of interests which can more readily be adjusted and supervised by legislative action rather than by the judicial process.

Still another reason for legislative action may be found in remedial considerations. Even in some of the most ordinary cases of unfair competition, as, for instance, false or misleading labeling or advertising of articles of commerce, there may be no competitor sufficiently interested to bring suit and the injury to the consumer may be so distributed that no single consumer is sufficiently interested to bring suit. In such situations the creation of an administrative agency to represent and protect the public interest may be desirable.

27. ROGERS, GOOD WILL, TRADE MARKS AND UNFAIR TRADING 272.

Accordingly, howsoever progressive the courts may be, there still remains sufficient occasion for legislative action.

In considering the scope of these statutes, we should distinguish between those of specific and those of general application. Certain statutes single out particular practices and proscribe them as unfair competition—others merely bluster forth in general language, vague and indefinite in content, proscribing “unfair methods of competition” or “unfair acts.”

An illustration of the first type is found in a Federal Statute which was enacted for the purpose of “prevention of unfair methods of competition” *but which specifies* what is proscribed, viz., importing and selling articles in this country, commonly and systematically, at a price substantially less than the market value or wholesale price in the country of production at the time of export.²⁸ Similarly, the Fair Trade Act, being adopted by many States and hereinabove referred to,²⁹ provides that knowingly selling or advertising trade-marked articles at less than the retail price specified by the manufacturer is “unfair competition.” So, also, the Guffey bill specifies a list of particular acts to be proscribed as “unfair competition.” The NRA codes were detailed specifications of acts in the respective industries which were to be regarded as “unfair competition.”

In this type of enactment questions as to the purpose and scope of the proscriptive inclusions are relatively few because of the specificness of those proscriptions. Constitutional questions, however, may be presented. Thus, the Fair Trade Act of New York has been held invalid by the court of last resort in that state.³⁰ The similar California act has been held invalid and the Illinois act valid by lower courts in those respective states. The rulings that such statutes are invalid appear to rest upon the position that the retailer may not be restricted in his re-sale of the article by a price stipulation to which he was not a party. And the NRA codes have been declared invalid as resting upon an invalid delegation of legislative power.

The broad type of legislative enactment upon the subject is a more prolific source of controversy. Does it extend the substantive law of unfair competition beyond the fundamental scope of the non-statutory law upon the subject; or is it intended only to provide additional remedial processes? If it purports to extend the fundamental scope of the substantive law, does it infringe upon constitutional limitations applicable to legislative action? If we are satisfied on all this, what are the bounds of the enlarged scope? Howsoever liberal we may desire to be, there must be boundaries somewhere. Where are they, and how shall they be determined?

Uncertain as to the fundamental basis or substantive scope of the non-statutory law upon the subject, the courts have properly taken this type of

28. 39 STAT. 798 (1916), 15 U. S. C. A. § 71, *et seq.* (1926).

29. *Supra* p. 20.

30. Associated Press Dispatch, Jan. 7, 1936.

enactment as a legislative declaration that the law upon this subject should move forward and that the courts are given the power to determine the direction and extent of the advance. Thus, the Supreme Court, in the *Schechter* case, its latest pronouncement upon the subject, has said:

“Debate apparently convinced the sponsors of the legislation (the Federal Trade Commission Act) that the words ‘unfair competition,’ in the light of their meaning at common law, were too narrow. We have said that the substituted phrase has a broader meaning, that it does not admit of precise definition; its scope being left to judicial determination as controversies arise. *Federal Trade Commission v. Radadam Co.*, 283 U. S. 643, 648, 649, 51 S. Ct. 587, 75 L. Ed. 1324, 79 A. L. R. 1191; *Federal Trade Commission v. R. F. Keppel*, 291 U. S. 304, 310-312, 54 S. Ct. 423, 78 L. Ed. 814.”

We recognize the difficulty with which the courts are necessarily confronted in their effort to reduce to definite application that which is inherently indefinite. But merely to declare that in the application of these shibboleths it is for the courts to say what is proscribed but that this cannot be delineated in advance and must await to be decided in each case upon its particular facts leave us—and, indeed, the court itself—without guide or compass in an uncharted sea. With such an empty postulate, we shall probably not arrive at substantial results—haphazard conclusions are likely to occur with high probability of error. We do not state this in criticism of the courts. What is most amazing is that, in the rapidity with which the judicial machinery must move, it turns out so few foibles. If the several courts put as much time in deciding the cases on this subject as the writer has consumed in the preparation of this article, the wheels of justice would well-nigh come to a stand-still. While the writer has been interested as counsel in a number of phrases in this subject-matter, what is here set forth is submitted as strictly professional reflection and not as partisan argument. If it be suspected that professional reflection may have become warped by partisan bias, let the suggestions stand on their own substance.

1. *To extend these general enactments beyond the full fundamental scope of the non-statutory substantive law upon the subject would involve serious constitutional questions, and, accordingly, the enactments should not be so interpreted.*

Are these broad and indefinite generalities to be taken as anything more than an expression of the public will to “step up” the evolutionary process in the application of *judicial* fundamentals—a direction to the courts to amplify, *by their own inherent power*, the application of *their own basic fundamentals upon the subject* with additional remedial facilities for enforcing the broadened application of those fundamentals? If it be assumed that the *judicial* power in the subject-matter *has been exhausted* and that *legislative* action was *necessary to enlarge the substantive scope* of the law upon this subject,

we are confronted with some very serious constitutional limitations applicable to substantive legislative action.

The Supreme Court held in the *Schechter* case that empowering the *executive branch* of the government to prescribe or approve regulatory codes "for the government of trades and industries" was an *invalid delegation of legislative power*. Is it any less a *delegation of legislative power* to pass that function over to the *judicial branch* of the government by a *general and indefinite grant* assumedly extending *beyond the inherent judicial power in the subject-matter*? We think not. Chief Justice Marshall said in *Wayman v. Southard*:³¹

"It will not be contended that Congress can delegate to the courts, or to any other tribunal, powers which are strictly and exclusively legislative."

Let us look at the question from another angle—the due process clause. Legislation which penalizes, or restricts rights or industrial activity must be reasonably specific and definite. Accordingly, the Supreme Court has held invalid a statute which made it illegal, and punishable by fine or imprisonment, to make any "unjust" or "unreasonable" rate or charge in handling or dealing in necessities.³² In holding that such statute was invalid also in its civil applications, the court said:

"The defendant attempts to distinguish those cases because they were criminal prosecutions. But that is not an adequate distinction. The ground or principle of the decisions was not such as to be applicable only to criminal prosecutions. It was not the criminal penalty that was held invalid, *but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all*. Any other means of exaction, such as declaring the transaction unlawful or stripping a participant of his rights under it, was equally within the principle of those cases."³³

If these statutes proscribing, without further specification, "unfair methods of competition" and "unfair acts" are intended to impose restrictions and prohibitions upon industrial activity *beyond the full scope of the non-statutory substantive law upon the subject*, their validity must seriously be questioned. Accordingly, on well-settled principles of statutory interpretation they should not be so construed.³⁴

31. 23 U. S. 311 at 325 (1825).

32. *United States v. Cohen Grocery Co.*, 255 U. S. 81 (1920); *Connally v. General Construction Co.*, 269 U. S. 385 (1925).

33. *Small Co. v. American Sugar Refining Co.*, 267 U. S. 233, 239 (1925); dissenting opinion in *Frischer & Co. v. Bakelite Corp.*, 39 F. (2d) 247, 261, 266 (C. C. P. A. 1930), and re such dissenting opinion see *Frischer & Co. v. Elting*, 60 F. (2d) 711, 714 (C. C. A. 2d, 1932).

34. *Richmond Screw Anchor Co. v. United States*, 275 U. S. 331, 346 (1928).

2. *Neither the non-statutory law upon the subject nor these indefinite enactments should be held to extend to fields of alleged unfairness, the subject-matter of which is inherently, or has become, a domain exclusively for legislative action.*

In delimiting the jurisdiction between the State and Federal power in regulations of commerce, the Courts have long since developed and observed a three-fold classification of the subject-matter, viz.: (1) that in which Congressional jurisdiction is exclusive; (2) that in which State jurisdiction is exclusive; and (3) that in which the State has jurisdiction until Congress has taken possession of the field by action therein.³⁵

This classification serves as a helpful analogy in determining the delimitation of judicial and legislative jurisdiction in the instant subject-matter. There are some fields of alleged unfairness in which the judicial power may freely exert itself without awaiting action by the legislative power; other fields in which the judicial power should not take jurisdiction because the legislative power has dominated the field by its own action therein; and still other fields in which the judicial power should not presume jurisdiction even in the absence of action by the legislative power, since the subject-matter is inherently legislative in character.

Patents are inherently legislative in character. The Constitution has made it so. But, in addition, Congress, pursuant to the Constitutional grant upon the subject, has enacted, and from time to time amended, a comprehensive legislative structure for the granting of patents, and specifying the scope of rights therein and the remedies for the protection thereof. To change the substantive law of patents *from without* by application of the non-statutory law of unfair competition would appear to be an unwarranted usurpation by the judiciary upon the legislative domain; and to change it from without by definite implication from these indefinite enactments would be an unwarranted and probably unconstitutional interpretation of such enactments.

A series of cases has gone through the courts recently involving the provisions of the Tariff Act hereinabove referred to³⁶ declaring "unfair methods of competition and unfair acts in the importation of articles" unlawful and empowering the Tariff Commission to hear complaints and to recommend to the President the exclusion of products violating such provisions.

In *Frischer & Co. v. Bakelite Corporation*³⁷ the Tariff Commission has found that certain products manufactured abroad were being imported and sold in this country in competition with, and at lower prices than, products manufactured here; that the domestic producers were protected by United States patents; and that the imported products infringed said patents. The

35. (1914) 5 R. C. L. 699.

36. *Supra* p. 20.

37. 39 F. (2d) 247 (C. C. P. A. 1930).

Commission concluded that this practice was an "unfair method of competition" and an "unfair act" in the importation of articles within the aforesaid provisions, and, accordingly, recommended the exclusion of such foreign made products. The Court of Customs and Patent Appeals affirmed the action of the Commission—one of the Judges dissenting. The Supreme Court denied certiorari.³⁸ This decision was followed by the Court of Customs and Patent Appeals in the case of *In Re Orion Co.*—also involving the importation of products covered by United States patents.³⁹

In the case of *In Re Northern Pigment Co.*,⁴⁰ the subject-matter was a product imported from Canada, and there manufactured by a process alleged to have been covered by a United States process patent. The *Frischer* case was held controlling.

Then came the discovery of error and correction. Under the substantive law of patents a process patent is infringed only by use of the process. Sale or use of products manufactured in this country by such process does not constitute infringement of such process patent. If the product itself is patentable, patent therefor should be procured. *A fortiori*, sale or use in this country of products manufactured abroad but not covered by United States product patents does not constitute infringement of any United States process patents even though such manufacture abroad is by a process patented here. Accordingly, to hold that it was unfair competition to import and sell in this country products manufactured abroad by a process covered by United States patents was, in effect, to change the substantive law of patents. The non-statutory substantive law of unfair competition should not be so extended, and these general enactments upon unfair competition should not be so interpreted.

The Court of Customs and Patent Appeals, in the recent case of *In Re Amtorg Trading Corporation*,⁴¹ frankly recognized its error and reversed its previous decision. The Supreme Court denied certiorari on jurisdictional grounds.⁴² The point of reversal is clearly stated in the following excerpt from the opinion of the Court of Customs and Patent Appeals:

"Such must be the holding unless the court finds that it was the purpose of the Congress in enacting section 337 of the Tariff Act of 1930 (19 USCA Sec. 1337) to broaden the field of substantive patent rights, and create rights in process patents extending far beyond any point to which the courts have heretofore gone in construing the patent statutes.

"Mature consideration of the question leads us to the conclusion that Congress did not do this. Hence, we conclude that our decision in the

38. 282 U. S. 852 (1930).

39. 71 F. (2d) 458 (C. C. P. A. 1934).

40. 71 F. (2d) 447 (C. C. P. A. 1934).

41. 75 F. (2d) 826 (C. C. P. A. 1935).

42. *International Agricultural Corp. v. Amtorg Trading Corp.*, 56 S. Ct. 102 (1935).

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Northern Pigment Co. Case, *supra*, went further than the statute provides, and that, in so far as said decisions involved process claims, it was erroneous. We also withdraw any expressions of adjudication relating to process patents appearing in the Frischer and Orion Co. Cases, *supra*.”

This clear-cut reversal and the judicial candor in making it are indeed commendable. We believe, however, that the corrective action has not gone far enough.

Throughout the cases on this subject, the Court of Customs and Patent Appeals has held that its functions in this subject-matter are not judicial, as such, and that, therefore, it does not have jurisdiction to pass upon the *validity* of patents and the several claims thereof.⁴³ So far we need not take issue. The Court then concludes, however, that it must *assume* the validity of the patents and the several claims thereof, *and exclude everything, within the reasonable scope of those several claims*. With this conclusion we must respectfully take issue. If that court does not have jurisdiction to inquire into the validity of the patent and its claims, it would seem to follow that the court does not have jurisdiction to step into any subject-matter where the position of the claimant rests upon alleged patent rights. The granting of a patent (issued by the United States Patent Office) is an *administrative* act, not a *legislative* act, and is subject to inquiry and adverse decree wherever those alleged rights are asserted. The reported cases demonstrate that relatively few patents in litigation have all of their claims sustained, and many patents are declared invalid in their entirety. To hold that the Court cannot inquire into the validity of patents and the claims thereof, but that it can nevertheless bring about the exclusion of products *because of those alleged patent rights* is to transform an administrative act (the issuance of the patent) into a legislative or judicial act, and thereby again affect the substantive law of patents.

Accordingly, at least where the invalidity of patents or any of the pertinent claims thereof are properly contestable, neither the non-statutory law nor these general enactments should be extended to apply to such subject-matters. The rule of equity courts to refuse injunctions where the legal rights are in doubt would appear to be a pertinent analogy.⁴⁴ We believe, however, that since the subject-matter of patents is inherently legislative, and the rights of patent owners and the procedure for the enforcement of the same are provided in a comprehensive code upon the subject, neither the non-statutory law of unfair competition nor these indefinite enactments should be held to apply substantively or even remedially to alleged unfairness consisting exclusively

43. Frischer & Co. v. Bakelite Corp., 39 F. (2d) 247, 267 (C. C. P. A. 1930), *cert. denied*, 282 U. S. 852 (1930); In Re Northern Pigment Co., 71 F. (2d) 447, 453 (C. C. P. A. 1934); In Re Orion Co., 71 F. (2d) 458, 464 (C. C. P. A. 1934).

44. (1916) 14 R. C. L. 355.

or essentially of alleged violation or threatened violation of asserted patent rights.

There are also other fields which, either because of their inherent character or by legislative action therein, have become exclusively the domain of the legislative power and not for judicial intercession either under the non-statutory law of unfair competition or under these indefinite enactments upon the subject.

The entire subject of criminal law should generally be left for enforcement through the specific procedure provided therefor. In addition to the constitutional questions, above considered, there is here also the Constitutional guaranty of trial by jury in criminal cases, with which provision the usual Commission procedure may conflict.

In proceedings before the Federal Trade Commission, where it was alleged that the respondent company's labeling and advertising violated the Pure Food and Drug Act, the Supreme Court said:

"Whether the respondent in what it was doing was subjecting itself to administrative or other proceeding under the Statute relating to the misbranding of foods and drugs, we need not now inquire, for the administration of that Statute is not committed to the Federal Trade Commission."⁴⁵

In *Keppel v. Federal Trade Commission*,⁴⁶ the Commission ruled that certain packages of candy for retail sale, a number of pieces of which had special centers entitling the purchaser to an additional piece of candy or other object as a prize, was "unfair competition." The Circuit Court of Appeals, Third Circuit (one of the Judges dissenting) vacated the order of the Commission, and held that since there was no misrepresentation or fraud the subject matter was not within the jurisdiction of the Commission. While the dissenting Judge was of the opinion that the misrepresentation existed—accordingly sustaining the conclusion of "unfair competition"—he was willing to concede that alleged violation of State or Federal lottery statutes would not *per se* sustain the jurisdiction of the Commission.⁴⁷

The Supreme Court granted certiorari, however, and reversed the position of the Court of Appeals.⁴⁸ This result would appear to depart from the trend of the suggestions here developed and accordingly calls for more detailed inquiry.

Surely the subject-matter of the *Keppel* case is not comprehended within the substantive scope of the *non-statutory law* of unfair competition. How then can it be within the valid substantive scope of these indefinite enactments?

45. *Federal Trade Comm. v. Raladam*, 283 U. S. 643 at 654 (1931).

46. 63 F. (2d) 81 (C. C. A. 3rd, 1933).

47. 63 F. (2d) 81 at 84 (C. C. A. 3rd, 1933).

48. *Federal Trade Comm. v. Keppel*, 291 U. S. 304 (1934).

While its opinion manifests a recognition that the court was treading at the very fringe of the asserted jurisdiction, the rationale of its conclusion does not clearly appear. The court emphasizes three elements in its decision, but whether those elements are relied upon singly or in necessary combination is not clear. Such elements are the following: (1) The Commission's purported finding of injury to the morals of the consumer; (2) the Commission's purported finding of general trade disapproval; and (3) the opinion that the subject-matter was not exclusively for legislative action but fundamentally contrary even to the common law itself. The first and second elements will be discussed under the next sub-heading. The third element is pertinent to the present sub-heading and will here be discussed.

Is the subject-matter of chance merchandise, where no dishonesty, fraud or misrepresentation is involved, to be regarded as exclusively within the domain of legislative action or is it so fundamentally against public policy that the instant jurisdiction should be held to extend to the same? Here again, historical perspective clarifies our view.

At the English common law, even ordinary wagering contracts were valid and enforceable.⁴⁹ The English Statute of 1845 against wagering contracts⁵⁰ was held not applicable to pending actions, even though the statute provided that no suit shall be brought "or maintained" for the recovery of money upon a wager.⁵¹ That such was the common law in this country was recognized, also, by Chief Justice Cranch, speaking for the Circuit Court of the District of Columbia, in 1834.⁵² While a contrary position has been expressed in some State decisions and appears to have found expression also in several Supreme Court cases⁵³, such position is hardly maintainable *in the Federal Courts*. There is no common law of the United States as distinguished from the individual States;⁵⁴ and, of course, the individual States have the constitutional right to determine their own law, and do have different and varying statutory provisions in this subject-matter. The Supreme Court was confronted with this difficulty in *Bond v. Hume*⁵⁵ and it was there held that a contract, not invalid as a wagering contract under the laws of New York (a stock exchange transaction) but invalid as a wagering contract under the laws of Texas, would nevertheless be enforced in the Federal courts sitting in Texas, even against a Texas citizen, the contract having been made in New York. Even

49. 25 English and Empire Digest, 397. Similarly see Lord Chief Baron Pollock in *Egerton v. Brownlow*, 4 H. L. Cas. 1, 150 (1853); Lord Campbell in *Thackoorseydass v. Dhondmull*, 6 Moore P. C. C. 300 (1848); and Lord Kenyon, Chief Justice, in *Good v. Elliott*, 3 T. R. 697, 704 (1790).

50. 8 & 9 Vict., c. 109, § 18.

51. *Moon v. Durden*, 2 Exch. 22 (1848).

52. *Fleming v. Foy*, Fed. Cas. No. 4,862 (C. C. D. C. 1834).

53. *Irwin v. Williar*, 110 U. S. 499 (1884).

54. (1917) 12 C. J. 196.

55. 243 U. S. 15 (1917).

horse-race betting was not illegal at common law, and in times not so far distant was freely participated in even by the clergy.⁵⁶ Similarly, as to lotteries, where the clergy prayed for the success of their communicants in drawings about to take place.⁵⁷ And in early English statutes we find certain class prohibitions against playing games for money, but with more liberality as to "Knights and Clergymen."⁵⁸

Does the trend of legislation on matters of chance, betting, etc., indicate a constant progression to an absolute finality in social judgment? A moment's reflection gives the answer. New York in 1926 amended its provisions regarding horse-racing and in 1934 further modified its statutes upon bookmaking at the race tracks.⁵⁹ In 1927, Illinois amended its statutes, again legalizing betting at horse-races.⁶⁰ In 1931 Florida similarly amended its statutes.⁶¹ In 1933 California, Ohio, Texas, and Washington similarly amended their statutes.⁶² Massachusetts joined the ranks of these States in 1934⁶³ and Oregon in 1935.⁶⁴ This is not a complete listing but only illustrative—a number of other States have within recent years adopted similar legislation. England, also, in 1928 adopted The Race-Course Betting Act amending the prohibitive act of 1853, and again legalized betting at horse-races.⁶⁵ We find also State legislation recently adopted, modifying the statutes against lotteries and gambling to permit chance features in advertising programs.⁶⁶ The State of Florida has recently adopted a statute legalizing and licensing slot machines, and the Supreme Court of Florida, in an interesting decision, has sustained the enactment in spite of a Constitutional prohibition against "lotteries."⁶⁷ Even technical lotteries, as such, are undergoing a social reappraisal. An Act sponsored and supported by many prominent citizens is now pending in Congress for the legalization of lotteries for public or charitable purposes; an association of such citizens has been organized under the laws of New York⁶⁸ to bring about their desired change in statutory provisions, and a nationwide

56. See BEVERIDGE, *LIFE OF JOHN MARSHALL* (1916) 177-180. We, of course, are not in sympathy with delvings into the private lives of leading citizens, but when those lives reveal sociological facts pertinent to sociological problems, those facts should not be overlooked.

57. ASHTON, *THE HISTORY OF GAMBLING IN ENGLAND* (1898) 230.

58. ASHTON, *HISTORY OF ENGLISH LOTTERIES* (1893) 13.

59. N. Y. Laws, c. 440. *Id.* 1934, c. 233.

60. Ill. Laws 1927, p. 28, *et seq.*

61. Fla. Acts 1931, c. 14832.

62. Calif. Laws 1933, c. 436; Ohio Laws 1933, p. 367, *et seq.*; Tex. Laws, p. 433, *et seq.*; Wash. Laws 1933, c. 55.

63. Mass. Laws 1934, c. 374.

64. Ore. Laws 1935, c. 244.

65. 18 & 19 GEO. V, c. 41.

66. OKLA. STAT. (1929) art. 65, § 2310; WY. REV. STAT. (1931), § 32-815; NEV. COMP. LAWS § 10201.

67. *Lee v. City of Miami*, 163 So. 486 (Fla. 1935).

68. National Conference for the Legalization of Lotteries, Inc.

poll conducted by one of our current magazines indicates an amazingly substantial sentiment for statutory modification.⁶⁹ The subject is of such current and widespread interest that the Library of Congress has recently prepared an exhaustive bibliography of foreign and domestic research materials. Punch boards and push cards have been used so extensively in interstate commerce that the Federal Government through its National Industrial Recovery Administration recognized the Punch Board Manufacturing Industry and approved a Code of Fair Competition for that industry.⁷⁰ Punch boards, etc. are being taxed, as "games" under the federal excise tax laws.⁷¹

The foregoing emphasizes what has been stated by Dr. Smith, one of our contemporary historians in sociological trends:

"The task, once assumed by the theologian of discovering and proclaiming the laws of right and wrong, has now been taken over by the psychologist and sociologist. To the historian falls the humbler duty of recording the infinite variety of moral practice and ethical theory. There is no act, however repugnant to the prejudices of one society, which has not been tolerated and encouraged in some other community; there is no act, however socially deleterious it may appear to be, that has not at some time and in some place, been tolerated and encouraged."⁷²

Recognizing this, the courts have repeatedly announced that they should not and will not decree a "public policy" on a legislative subject-matter beyond the provisions of the legislative enactments in that regard and will apply those legislative enactments only to the extent therein provided—and not beyond. That has been specifically held as to lotteries by the Supreme Court of the United States in the *License Tax* cases,⁷³ and has been recognized, generally, in at least two other Supreme Court decisions.⁷⁴ That position was followed also by the Circuit Court of Appeals, Tenth Circuit, with reference to "chance drawings" in theatre tickets in *General Theatres, Inc. v. Metro-Goldwyn-Mayer*,⁷⁵ and has been followed, also, by the English

69. FORTUNE MAGAZINE, October, 1935, 170.

70. NRA approved Code No. 316.

71. See Treasury Department Cumulative Bulletin XI-2, p. 478.

72. 1 SMITH, HISTORY OF MODERN CULTURE, c. XVII, 525; 10 ENCYCLOPEDIA OF SOCIAL SCIENCES, 643, *et seq.*

73. 72 U. S. 462 (1866).

74. Patton v. U. S., 281 U. S. 276, 306 (1930); Twin City Co. v. Harding Glass Co., 283 U. S. 353, 357 (1931).

75. The Circuit Court of Appeals on February 8, 1935, granted an injunctive order in aid for its appellate jurisdiction, thereby in effect reversing the action of the lower court reported in 9 Fed. Supp. 546. On the particular point of interest, the court, as reported to us by counsel in the case, asked the District Attorney whether the chance-drawing feature there in question would sustain prosecution, to which "the District Attorney replied 'Not successfully.' The Judge said, 'That means not at all. So you admit the chance drawings do not violate the letter of the law?' To which the District Attorney replied 'Yes.' 'But,'

courts.⁷⁶ The common law, from very early times, classified this subject-matter as at most *malum prohibitum*, not *malum in se*.⁷⁷

None of the foregoing citations appear to have been called to the Court's attention in the *Keppel* case; none of them are discussed in the opinion in that case; and, indeed, no citation is given for the purported statement of law there set forth.

If our suggestions thus far are sound, the position of the courts in the subject-matter involved in the *Keppel* case should be that if such subject-matter is prohibited by the specific Federal enactments against lotteries, the enforcement of such enactments is for the criminal branch of the government, not for the Federal Trade Commission; if such subject-matter is not within such specific enactments, as is conceded, the subject-matter is in a legislative field and the instant jurisdiction should not be held to extend thereto. Since the Commission would not have jurisdiction to enforce a *Federal* criminal statute upon the subject, *a fortiori* it does not have jurisdiction to enforce State enactments in this subject-matter, not only because of the basic lack of jurisdiction but also because of the diversity in statutory provisions in the several States.

Accordingly, the result of the *Keppel* decision would appear to be of questionable soundness unless it may be sustained upon either of the other two elements above mentioned. Those elements will be considered under the next subject heading.

3. *This jurisdiction should not be held to extend to subject-matters, the alleged "unfairness" of which rests upon assertions in the realm of controversial opinion, as such, as distinguished from ascertainable fact. Such fields should be left for determination and specification by legislative action, not by judicial decision.*

In *Silver Company v. Federal Trade Commission*,⁷⁸ the Commission charged and purported to find that the respondent company was guilty of "unfair competition" in its representations as to the breed of its hogs. The record showed that the respondent's hogs had been developed from earlier types of stock, but there was a sharp conflict in the testimony of experts as to whether such developing process could bring about a change in breed classification. The court held that since the charge of "unfairness" rested upon an assertion on which there was an intelligent difference of opinion among those qualified to speak, and not upon an issue of ascertainable fact, as such, the Commission's jurisdiction over "unfair competition" did not extend to such subject-matter.

said the Judge, 'you claim they violate the *spirit* (italics in report) of the law, is that correct?' To which the answer was, 'Yes.' 'Then,' said the Judge, 'there must be two laws.'"

76. *Macnee v. Persian Investment Corp.* 44 Ch. D., 306, 312-13 (1890).

77. 2 BOUVIER'S LAW DICTIONARY, "Malum In Se", 99.

78. 289 Fed. 985 (C. C. A. 6th, 1923).

A similar situation is found in the case of *Raladam v. Federal Trade Commission*.⁷⁹ The Commission there charged and purported to find that the respondent company was guilty of "unfair competition" in advertising that its product (claimed to be an obesity cure) was "scientific" and could be used with "safety." There was a sharp conflict of reputable medical testimony on that question. In vacating the Commission's order, the court said:

"Considering and contrasting these views, it seems to us quite impossible to say that the problem, whether this remedy, in the environment of these advertisements, is or is not 'scientific', presents a question of fact, capable of being dogmatically fixed, in one way or the other, as disputed facts are decided. We think that it was at the beginning of the proceeding and continued to the end to be a matter of opinion. . . ."⁸⁰

An analogous situation is found in the case of *American School of Magnetic Healing v. McAnnulty*,⁸¹ where the Postmaster General sought to declare the representations of a mind-healing cure establishment as fraudulent and issued a statutory stop order against their use of the mails. In holding that the bill of complaint stated a good cause of action for injunction against the Postmaster General's order, the Supreme Court held that the efficacy of the healing of apparently physical diseases by mental processes was a subject on which there was an intelligent difference of opinion, as, also, there was an intelligent difference of opinion as to the healing efficacy of electro-therapeutics and as to the preventive efficacy of vaccination, and, within the strictly medical profession itself, a sharp difference of opinion as to the healing efficacy of the homeopathic or allopathic remedies; and that if the Postmaster General could under these statutes against "fraud" stop one, he could, of course, stop any of the others or all, depending upon his own particular views in the subject-matter. Such power and jurisdiction, the Court held, was not contemplated by the Act. The pertinent point of the decision was stated as follows:

"Unless the question may be reduced to one of *fact* as distinguished from *mere opinion*, we think these statutes cannot be invoked. . . ."

79. 42 F. (2d) 430 (C. C. A. 6th, 1930), *aff'd*, Federal Trade Comm. v. Raladam, 283 U. S. 643 (1931).

80. 42 F. (2d) 430, 433 (C. C. A. 6th, 1930); while in the Supreme Court opinion affirming this decision a passing expression is made which throws some doubt upon the applicability of the quoted position of the Court of Appeals upon that record (283 U. S. 643, 646), the Supreme Court makes it clear that it was considering one point only—a point clearly sufficient to sustain the judgment of the Court of Appeals and not here involved (283 U. S. 643, 647). In light of the decision of the Supreme Court in *American School of Magnetic Healing v. McAnnulty*, next considered (*infra*, Note 81) it can hardly be supposed that upon direct consideration of the question the Supreme Court will depart from the judicially sound position there taken.

81. 187 U. S. 94 (1902).

If the foregoing is sound—as we believe it to be—the recent ruling of the Court of Appeals in *Hughes v. Federal Trade Commission*,⁸² would seem to be erroneous. The subject-matter of that case was a medicinal preparation, the efficacy of which appeared to be in substantial controversy among reputable members of the medical profession who testified in the case. So far as appears from the opinion, however, the point and authorities here considered were not brought to the court's attention.

We return to consider the two remaining elements in the *Keppel* case. The commission's findings in that case recited that the candy packages there involved were sold principally in school stores and neighborhood candy stores, patronized largely by children; that the retail distribution of such packages having prizes distributable by lot or chance taught and encouraged gambling among children; that many competitors regarded such method of distribution as morally bad and encouraging gambling among the children and either refused to manufacture similar products or manufactured them by compulsion of competition, but contrary to their moral judgment.

If those purported findings of alleged moral injury and their implications are *factually true*, no one will desire to contest the result of the *Keppel* case. But are those purported findings *factually true* or are they only *opinions* in a socially controversial subject-matter? There is the crux of the *Keppel* case.

In fairness to the Supreme Court and in explanation of the *Keppel* decision, it should be stated that the case was presented virtually upon a default record. The respondent, though time and the place were set therefor, produced no evidence. The allegations and affirmative testimony of consumer injury and trade disapproval went into the record, and the respondent offered not one iota of evidence in contradiction. Consequently, the court was without an adequate exposition of the trade and consumer facts pertinent to the issues before it.

The plausibility of such purported findings and implications, without any adverse testimony in the record to contradict them or to challenge inquiry is, we recognize, persuasive. But perhaps open-minded inquiry into the facts would explode that plausibility. John Dewey reminds us that *facts* are necessary before there can be any *thinking* upon a subject; and that "open-mindedness" as an essential attitude in real *thinking* includes an active desire "to give heed to facts from whatever source they come; to give full attention to alternative possibilities; to recognize the possibility of error even in the beliefs that are dearest to us."⁸³ This caution, as pointed out by one of our social scientists of international recognition, is particularly in order in approaching problems of sociological involvement;⁸⁴ and doubly so when the

82. 77 F. (2d) 886 (C. C. A. 2nd, 1935).

83. DEWEY, *HOW WE THINK* 30, 34.

84. "Such self-detachment is more readily achieved in the natural sciences than in the social sciences. It is an easy matter to look at an ant with the sceptical disinterestedness of

problem involves considering the moral fibre and intelligence of children and the effect of their environment and experiences thereupon.⁸⁵ And yet—how amazing, if true, in the very subject-matters of sociological involvement, according to critics whose views should not lightly be disregarded, our profession is *there* most willing to act upon prepossession, unreasoned learnings, and superficial notionalizing.⁸⁶

In a more recent proceeding against another candy concern, the Johnson Candy Company, the Federal Trade Commission again went forward with the opinion testimony of several members in the industry, to the effect that the product was morally injurious to the children and that such members of the industry were morally opposed to the manufacture and sale of said products. *In that case, however, the respondent took issue.* He offered to prove that the product was not morally injurious and did not induce gambling habits, that such products had been a substantial part of the candy industry as long as there had been a candy industry; that millions of people now in adult life had enjoyed those candies in their childhood and had not been injured thereby; that similar products in competing industries enjoyed national distribution as the "lucky stick" in ice cream bars and "free" coupons in chewing gum; that such products, including the products in question were extensively purchased by religious denominational schools, of several different denominations, for resale to their pupils in their own candy counters, and also by public schools where teachers had absolute control over the purchases made for the school cafeteria, etc. The respondent offered to prove, also, by parents and teachers themselves, that the children enjoyed these candy packages and were not injured thereby. The respondent offered also the testimony of sociologists of national standing to contradict the charge against these packages and to show that at most the alleged objections were not matters of factual ascertainment, but only of individual bias, belief and opinion; that as many people distinguish between a glass of wine and a glass of alcohol, although the exhilarating element in the wine is its alcoholic content, so millions of people distinguish between prize candies and "gambling schemes." The respondent offered, also,

experimental science. It is much more difficult to look at human beings that way. But even if complete success in such an effort is impossible, we can at least try to succeed in part, and reduce the power and influence of sentiments, preconceptions, beliefs, to a minimum. Only at that price can progress in the social sciences be achieved." 1 PARETO, *THE MIND AND SOCIETY* 72.

85. See JAMES SULLEY, *STUDIES OF CHILDHOOD* 228; HALL, *EDUCATIONAL PROBLEMS* preface and pp. 243-244, 258-259; SIDONIE MATSNER GRUENBERG, Director of the Child Study Association of America, *PARENTS, CHILDREN AND MONEY* 24-25, 31 and *GUIDANCE OF CHILDHOOD AND YOUTH-READINGS IN CHILD STUDY* 117, 120; also DEWEY, *HOW WE THINK*, particularly the section, *THINKING DEMANDS A NATURAL DEVELOPMENT FROM CHILDHOOD*.

86. See ROBINSON (of the Institute of Human Relations, Yale University and lecturer in the Yale School of Law) *LAW AND LAWYERS* (1935). The truth is, unless we ourselves are spinning with prepossessions, that our judicial decisions reflected far more sociological realism than Dr. Robinson finds there, but perhaps less than our critics should find there.

the testimony of others in the industry—some manufacturing similar products and others manufacturing different specialties, not at all involved in the controversy—that they had no objection to the packages in question, morally or otherwise; and that numerous reputable concerns in the candy industry were manufacturing and distributing the products in question or products similar thereto.

The Commission's Trial Examiner excluded or disregarded all this proffered testimony as immaterial. His position was that the fact that some men in the industry *thought* it was morally bad, and accordingly objected thereto, was sufficient; that although their beliefs might be wrong and although others in the industry might not be in accord with such beliefs, that was not material. The mere existence of *adverse beliefs*, whether *right or wrong*, in the minds of *some part of the industry* was the critical factor.

The error in that position is, we believe, self-evident. Nevertheless the Court of Appeals sustained it.⁸⁷ Having appeared as Counsel in that case, we shall not amplify our disagreement.

That moralistic issues are not for judicialistic determination, however, is confirmed by the very same court (a different grouping of Judges sitting) in a more recent case. In *City of Chicago v. Kirkland*,⁸⁸ it appeared that the Mayor of Chicago had revoked the license of a theatre exhibiting a performance deemed by him to be immoral. There were civic leaders in the record on both sides of the question as to the alleged immoral effect upon the observer. The court held that adjudication of the moral issue was not for the court; that since it did not appear that the Mayor had acted arbitrarily, his action was not subject to further review.

Such jurisdiction, however, has not been, and perhaps cannot validly be, vested in the Federal Trade Commission.⁸⁹ And clearly no such jurisdiction has been or can be vested in a fractional part of an industry.⁹⁰ If in complaints

87. *Walter H. Johnson Candy Co. v. Federal Trade Comm.*, 78 F. (2d) 717 (C. C. A. 7th, 1935).

88. 79 F. (2d) 963 (C. C. A. 7th, 1935).

89. *Silver Co., Raladam, and American School of Magnetic Healing cases*, *supra* pp. 38, 39. It is for the courts and not the Federal Trade Commission to determine what is "unfair competition" within the meaning of these enactments. *Federal Trade Comm. v. Gratz*, 253 U. S. 421, 427 (1920); *Federal Trade Comm. v. Raladam*, 283 U. S. 643, 648 (1931); and the numerous citations following such references. See also *National Harness Manufacturers' Ass'n. v. Federal Trade Comm.*, 268 Fed. 705 (C. C. A. 6th, 1920).

90. *Schechter Poultry Corp. v. United States*, 295 U. S. 495, 537 (1935); *Federal Trade Comm. v. Sinclair Co.*, 261 U. S. 463, 475 (1923). In the Johnson case, *supra* note 87, it appeared that approximately 85% of the membership of the industry's principal trade association had been manufacturing candies within the general subject-matter there concerned, and that the aggregate volume of business of those who testified that in their opinion the candies in question were harmful was less than one per cent (1%) of the total volume of the industry; and none of those, either within or without the industry, who took issue with the professed moralism of that fractional part of the industry were permitted to testify.

of alleged "unfair competition" it appears that the alleged unfairness of the subject-matter rests upon assertions in the realm of controversial opinion, as such, and not in the realm of ascertainable fact, it should be held that such subject-matters are neither for a fractional part of the industry nor for the Federal Trade Commission nor for the courts to proscribe as "unfair competition." If a portion of the industry or a portion of the public want proscriptions in such subject-matters, their objections should be addressed to the legislative and not to the judicial branch of the Government.

If, contrary to the considerations here suggested, some courts may nevertheless be tempted, either by outward or inward persuasions, to assume jurisdiction of such subject-matters, they would do well, if they genuinely desire to be right, analytically, or at least in historical perspective, to follow the precedent of "the Judges of the Areopagus, who finding themselves baffled by a case, ordered the litigants to come back again in a hundred years."⁹¹

In conclusion on this phase of the consideration, we refer to the comprehensive Canadian enactment on this subject. Adopted in 1932, the Canadians had the benefit of our experience with these general enactments and have profited thereby. They devised an expression broad enough to be comprehensively effective, but not so broad as to be meaningless. Their statute, after proscribing two classes of specific acts, proscribes also "any other business practice contrary to honest industrial and commercial usage."⁹² That far, we believe, even the vitality of our non-statutory substantive law of unfair competition extends; beyond that our indefinite enactments should not be held to extend.

4. *The alleged unfairness may present a complexity of interests and considerations more readily to be adjusted, if adjustment is needed, by comprehensive legislative action rather than by judicial process.*

We have heretofore pointed to the progressivism of the Supreme Court in the *Associated Press* case⁹³ but have also expressed our inability to disagree with Mr. Justice Brandeis' dissent.⁹⁴ The position put forth in that dissent is sound and even the other members of the court undoubtedly do not dispute it—their difference lies on the issue of its applicability to the record there before the court. That issue we need not here consider.

But if that position was not applicable to prevent the court from entering the fields of news piracy, it hardly can be urged as an objection to their entering also the fields of style and design piracy. We recognize that using the word "piracy" may be reasoning in a circle. The courts, however, used such expression rather constantly through the successive decisions in the *Associated Press* case, and such use may perhaps be justified if it is found

91. LOWENTHAL, *THE AUTOBIOGRAPHY OF MONTAIGNE* 237.

92. *THE UNFAIR COMPETITION ACT*, 22-23 GEO. V, c. 38 (1932).

93. *International News Service v. Associated Press*, 248 U. S. 215 (1918).

94. *Supra* p. 25.

to reflect a general usage in the industry concerned. As such, it may be evidence of a trade standard in general recognition throughout the industry.

Many industries have sought to secure protection in the field of styles, designs and models. Relief by specific legislation has not been forthcoming. Code provisions were adopted under the NRA⁹⁵, but this, of course, is now of no avail. Perhaps the subject-matter is legislative in character, and accordingly the instant jurisdiction should not be held to extend thereto. Perhaps, however, it is not legislative in character for want of Congressional power. Or, perhaps, it is more akin to trade-marks, and, therefore, of judicial origin and substantive character. Or, perhaps, in any event, there is a complexity of public and private interests requiring a comprehensive legislative treatment rather than judicial intercession. These are questions which warrant judicial inquiry in considering the substantive scope of the instant jurisdiction—non-statutory as well as statutory—in its relation to an increasing industrial demand for amplification of rights in the subject-matter of styles, designs and models.

The position here considered is, we believe, strikingly applicable to the subject-matter considered in the *Keppel* and *Johnson* cases, but will not be enlarged upon here. Its general pertinence in this field of the law cannot be over-emphasized.

CONCLUSION

The interpretation of these indefinite enactments against "unfair competition" is a fairly recent field of judicial labor. We believe that the courts will be the first to concede that because of that indefiniteness, there has been much groping and stumbling in their efforts to apply them. But the courts have been striving to find the unfindable, viz., an applicable Congressional intent. The only intent manifested is that there should be no intent. The fundamental approach must be different. We have endeavored to suggest it.

But, as heretofore pointed out, we have been interested. Our point of view may have become warped. We may have erred. Nevertheless, we feel freer in speaking our convictions through these channels than through briefs—there is not the restraint of the presumption of partisan banter.

If what we have said serves only to stimulate a deeper research and more fundamental consideration of these problems than the courts have had time to give them heretofore, we shall feel fully compensated for our efforts even if all that we have said is discarded. Our dominant purpose, in which all can agree, is that in the utilization of this instrument of industrial control, we should wield it efficiently and not awkwardly or oppressively.

95. See, e. g., Advertising Specialty Mfg. Code, art. VIII, § (b); Blouse & Skirt Code, art. V, § 4; Carpet & Rug Code, art. VII, § 9; Lace Curtain Code, art. VIII, § 5; Millinery & Dress Trimming Code, art. VII § (b) (5); Silk Textile Code, art. VIII, § 2 (a) (5); Silverware Mfg. Code, art. VIII, § 5; Velvet Code, art. VII, § 9; Wall Paper Code, art. VII, § (a); Watch Case Mfg. Code, art. VII, § 5.