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Milton Handler
Columbia University

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Antitrust--Past and Present

By MILTON HANDLER*

Ashley, in his authoritative treatise on the *Economic Organization of England*,¹ distinguishes four principal stages of economic development: (1) the family or household system in which the material needs of an agricultural society are satisfied by the production of goods in the farm or manor house; (2) the guild or handicraft system in which professional craftsmen produce wares on a small scale in their own dwellings on a custom made basis for their consumer-customers; (3) the domestic system or house industry in which commercial middlemen act as intermediaries between the makers of goods in small domestic workshops and the ultimate users; and (4) the factory system in which production is organized on a large scale in spacious factories equipped with costly machinery and distribution is controlled by the manufacturers who supply retail establishments either directly or through marketing middlemen. It is in the last or final stage that antitrust comes to the fore. Only the highly developed and industrialized societies are concerned with restraint of trade and monopoly

Antitrust is the peculiar contribution of the English speaking world. It is customary to attribute its genesis to a statute enacted in my country in 1890 bearing the name of Senator Sherman, who actually was not its real author.² But Canada had an antimonopoly law as early as 1889³ and the legislation of both countries is deeply rooted in the English common law⁴ Since World War II, many countries have paid us the high compliment of emulating our

* Professor of Law, Columbia University.

¹ Ashley, *The Economic Organization of England* 35-36 (1928).

² See Hamilton & Till, *Antitrust in Action* 10 (TNEC Monograph No. 16, 1940).

³ Act for the Prevention and Suppression of Combinations in Restraint of Trade, 1889, 52 Vict. c. 41 Can. And, as Thorelli notes, "Before the enactment of [the Sherman Act], at least 14 states and territories had incorporated provisions against monopolies, trusts and similar devices to fix prices or otherwise to restrict competition in their constitutions, and at least 13 had statutory prohibitions. Several states even had both constitutional and statutory prohibitions." Thorelli, *The Federal Antitrust Policy* 155 (1954).

⁴ The early common law materials are collected in Handler, *Cases on Trade Regulation* c.1 & c.2 §§3, 4 (3d ed. 1960).

experience by the enactment of comprehensive codes preventing restrictive trade practices.⁵ This new corpus of legislation, understandably, varies country by country, and is in no sense a slavish imitation of American law. It is fair to say, however, that in general, the basic philosophy of our antitrust jurisprudence has been accepted, but the statutory details, the methodology of administration and the procedures of enforcement have been adapted to the traditions and needs of each particular country. Antitrust, thus, is no longer of parochial interest to American lawyers alone. It has achieved an international status, or perhaps I should say, a community of interest among nations.

What I have called the basic philosophy of antitrust was succinctly epitomized by the Supreme Court of the United States in a recent judgment:

The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.⁶

Compressed within these few pregnant words are ideas about which many volumes have been written. It is worth pausing to appraise the concepts so eloquently articulated by our highest tribunal. Competition, as the Court points out, is the principal instrument for the social control of private business activity in a mature economy such as we have in America. It is the means by which our material resources are allotted to various social and economic ends. The market and not the fiat of the state determines what shall be produced, in what quantity, quality, and at what price. Since vital decisions are made by the individual and not by his government, the laws preserving competition constitute a charter of economic freedom, and are the counterpart of the

⁵ See Guide to Legislation on Restrictive Business Practices (O.E.E.C. 1960); ECOSOC Council Off Rec. 16th Sess., Supp. No. 11A at 12 (E/2379) (1953); Antitrust Laws: A Comparative Symposium (Friedmann ed. 1956).

⁶ *Northern Pacific Ry. v. United States*, 356 U.S. 1, 4 (1958).

political or human freedoms safeguarded by the Bill of Rights of our Constitution.⁷ In a democracy, economic liberty goes hand in hand with political freedom; they are interdependent; neither can prosper without the other. These, in any event, are our articles of faith; on their verity we have staked our all in the great experiment in nationhood we have carried on in the western hemisphere since achieving our independence. I emphasize that these are our articles of faith; they have more than met the pragmatic test in our ever-growing, prosperous and dynamic economy; their suitability for other societies when they reach higher levels of economic development is of course a matter for their own determination.

But you must not think we delude ourselves that the competition which we strive so hard to preserve is a pure and pristine one, that it is the same in quality, intensity and effectiveness in all industries, that competition is always beneficent, or that it serves as an adequate instrument of social control in all fields. There is no such thing as perfect competition or complete monopoly⁸ just as there is no such thing as pure socialism. The industrial spectrum contains many variations of competition. Some industries are composed of a multiplicity of sellers and buyers and consequently their operations closely resemble the theoretical textbook descriptions of competition. But there are highly concentrated industries consisting of a limited number of producers in which competition functions quite differently. Competition, having proven ineffective as a guardian of the public interest in some industries, is bolstered by diverse regulatory devices. Sometimes competition is completely supplanted by pervasive regulatory schemes.⁹ Where private monopoly is countenanced, the public interest is protected through regulation of prices and quality¹⁰ and the legal compulsion to serve all comers without discrimination.¹¹ And there are areas where the state steps in and both owns and operates the facilities of produc-

⁷ Cf. *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 360 (1933).

⁸ See Att'y Gen. Nat'l Comm. Antitrust Rep. 318-19 (1955); Wilcox, *Competition and Monopoly in American Industry* 1-3, 9-10 (TNEC Monograph No. 21, 1940).

⁹ See Jones et al., *Symposium, Antitrust and the Regulated and Exempt Industries*, 19 ABA Antitrust Section Rep. 261 (1961); Att'y Gen. Nat'l Comm. Antitrust Rep. 261-77 (1955); Fulda, *Competition in the Regulated Industries: Transportation* (1961); Note, *Regulated Industries and the Antitrust Laws*, 58 Colum. L. Rev. 673 (1958).

¹⁰ See Bonbright, *Principles of Public Utility Rates passim* (1961).

¹¹ See *id.* at 33.

tion and distribution, either as the sole enterpriser¹² or in competition with private industry¹³

In short, our industrial landscape consists of all types of competitive enterprises, as well as regulated and state operated industries. Diversity, not uniformity, is the order of the day. Antitrust is one of the methods by which the public welfare is promoted. It applies to that sector of our economy which is competitively organized. But the rich arsenal of public control contains instruments by which the greatest good for the greatest number can be achieved in other ways. These apply to the so-called regulated industries.

I believe it is fair to say that competition is replaced by other regulatory procedures when it fails to yield "the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress." It is important for those who are unfamiliar with the pragmatic approach Americans take to their public and private problems to bear in mind that we are suspicious of all absolutes; that we are firm believers in the art of compromise; that our concepts are never rigid; and that they are constantly being molded to the everchanging needs of our society. Competition is one of our social goals. It is a *summum bonum*. But it is not a fetish to which we blindly adhere. While recognizing its significant social advantages, we endeavor to overcome its shortcomings. Nevertheless, enforced competition tends to be the rule and special regulation the exception. For whatever may be its shortcomings, a competitively organized society means a free economy in which the role of the state is reduced to a minimum. We must never forget that men were not always free under English law to select a calling of their own choice, to set up shop in any part of the realm, to establish their own standards of quality, to choose their own customers and suppliers, to produce in quantities and styles of their own determination and to fix their own prices.¹⁴ These freedoms were won only after many centuries and are not lightly to be discarded. Historically we started with authoritarian control of

¹² See Atomic Energy Act, 68 Stat. 929 (1954), 42 U.S.C. §2072 (1958) (special nuclear material).

¹³ See *e.g.*, Tennessee Valley Authority Act, 48 Stat. 58 (1933), 16 U.S.C. §831 (1958); 28 Stat. 603 (1895), 44 U.S.C. §31 (1958) (Government Printing Office).

¹⁴ See Handler, *op. cit. supra* note 4, at 36-43.

private business—first local and then national—and progressed by revolution and evolution to the modern business system where our principal reliance is on the automatic operation of competitive forces, supplemented or supplanted by regulation wherever competition is found wanting. The historical sequence is not from laissez-faire to state control, as commonly believed, but rather from a regimented to a free society¹⁵

The object of the antitrust laws, as the Supreme Court pointed out in the short excerpt which I quoted, is to keep competition free from collusive restraint and unfettered by monopolistic encroachment. The intellectual stuff out of which this vast jurisprudence has been developed is quite simple. Our basic statute consists only of two sentences. It declares illegal *every* contract, combination or conspiracy in restraint of trade and makes it a misdemeanor for any person to monopolize, attempt to monopolize, or combine or conspire with others to monopolize any part of the trade or commerce among the several states or with foreign nations.¹⁶ To understand the scope and meaning of antitrust, we must probe the meaning of the key concepts of restraint of trade and monopoly

Both of these concepts have an ancient common law lineage. Restraint of trade at the common law embraced not only the familiar ancillary contracts not to compete, but also collusive arrangements among competing businessmen suppressing competition.¹⁷ The chief concern of the common law with monopoly related to the illicit crown grants during the reign of the Tudors.¹⁸ As early as the eighteenth century, a rule of reason evolved validating ancillary agreements not to compete incident to the sale of a business and its good-will or a contract of employment when the restriction was limited in time and space.¹⁹ The precedents prior to 1890 were not uniform as to whether the rule of reason applied to non-ancillary or naked agreements affecting competition such as arrangements fixing prices, dividing territories, controlling

¹⁵ See *id.* at 36-47.

¹⁶ Sherman Act, 26 Stat. 209 (1890), 15 U.S.C. §§1, 2 (1958).

¹⁷ See Handler, *op. cit. supra* note 4, c.2 §4.

¹⁸ See Case of Monopolies (Darcy v. Allen), 11 Coke 84, 77 Eng. Rep. 1260 (1602); Thorelli, *op. cit. supra* note 3, at 25-26.

¹⁹ Mitchel v. Reynolds, 1 P. Wms. 181, 24 Eng. Rep. 347 (K.B. 1711); Handler, *Restraint of Trade*, Encyc. of Social Sciences 13 (1934).

production or allocating markets.²⁰ The weight of authority limited the test of reason to the ancillary covenants.²¹

The questions which perplexed the courts at the common law continued to vex them after the passage of the Sherman Act of 1890. That statute forbade every restraint of trade. Did this mean that even the ancillaries were interdicted? Was the law violated if the prices fixed by agreement among competitors were reasonable or if the parties to the agreement lacked monopoly power and were themselves subject to the effective competition of non-members of the combine? If the word "every" in the statute meant what it implied, then there was no room for any rule of reason and the statute achieved a total outlawry of all restrictive programs.

The early years of the statute saw a spirited debate among the members of the Supreme Court as to whether the inhospitable and unqualified words of the legislation meant what they said or whether they were to be moderated by a rule of reason.²² In 1911, the Court, under the leadership of Chief Justice White, in the landmark *Standard Oil of New Jersey* decision,²³ confined the prohibitions of the statute to those restraints which unreasonably restrained trade.

The precise ambit of the rule of reason has been unclear from its inception. Does it confer censorial power upon the judges to approve or reject business arrangements on the basis of their personal predilections—their idiosyncratic and subjective views of what is good or bad for the economy? Is it up to the judges to determine whether prices set by private treaties are reasonable? Is the very existence or the abusive exercise of monopoly power the hallmark of illegality? Or is the rule of reason still to be circumscribed to the ancillary covenants not to compete?

In his judgment, Chief Justice White treated restraint of trade and monopoly as synonymous principles.²⁴ Hence it was inferable that he intended to differentiate between collusion by those possessing monopoly power and restrictive action by minority groups

²⁰ See Handler, *op. cit. supra* note 4, c.2 §§3, 4.

²¹ See the review of the authorities by Taft, J., in *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 284-91 (6th Cir. 1898), *aff'd.* 175 U.S. 211 (1899).

²² See the discussion of these decisions in Handler, *Antitrust in Perspective* c. I (1957).

²³ *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911).

²⁴ *Id.* at 61.

faced with and surrounded by vigorous outside competition. Under this view, illegality would attach to the existence of monopoly power alone—restraint in the absence of monopoly would be deemed reasonable and therefore lawful. His opinion was not clear on this point. Nor was it entirely clear that he was not directing his censure to the abuse of monopoly power, permitting monopolistic combinations restraining trade so long as the public interest was not prejudiced by the affirmative acts of the combine. Yet he took pains to affirm the prior rulings of the Court forbidding horizontal price fixing despite the fact that he had himself dissented in those cases. The earlier decisions, he pointed out, rested on the proposition that any undue limitation on competitive conditions was unlawful as a matter of law.²⁵

These obscurities have been eliminated by the later course of decision. Agreements suppressing competition are unlawful whether or not the participants control their market and regardless of the inherent reasonableness of the restrictions they impose. It matters not whether the parties may be endeavoring to set a floor below a ruinous price structure in time of depression²⁶ or to impose a ceiling on prices in times of a runaway inflation.²⁷ Such actions by private groups are unreasonable because they are antithetical to the free and unfettered competition which the statute presupposes and seeks to preserve. The legislation not only forbids monopoly and the abuse of monopoly power, but its condemnation extends as well to restraints on competition which deny the public the full benefits of an unfettered competition even though they do not assume monopoly proportions. Price-fixing,²⁸ division of markets,²⁹ control of production,³⁰ boycotts,³¹ tying arrangements by

²⁵ *Id.* at 63-68.

²⁶ See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

²⁷ See *United States v. McKesson & Robbins*, 351 U.S. 305, 310 (1956) (dictum); cf. *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951).

²⁸ *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940); *United States v. Trenton Pottery Co.*, 273 U.S. 392 (1927).

²⁹ *United States v. National Lead Co.*, 63 F. Supp. 513, 523 (S.D.N.Y. 1945), *aff'd* 332 U.S. 319, 328 (1947); *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 241 (1899).

³⁰ *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 497 (1940) (dictum); *Att'y Gen. Nat'l Comm. Antitrust Rep.* 12 (1955).

³¹ *Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. 207 (1959), discussed in *Handler, Recent Developments in Antitrust Law: 1958-1959*, 59 *Colum. L. Rev.* 843, 862 (1959).

dominant sellers,³² vertical price agreements³³ are all beyond the pale and are denounced as unreasonable per se.

Justice Brandeis during his tenure on the Court unsuccessfully advocated a different approach to the rule of reason.³⁴ It was his firm conviction that small business was vital to the very survival of a democracy such as ours. The object of antitrust, as he saw it, was to curb big business. Bigness was a curse—whether it be big business or big government. The large aggregations of economic power were to be dissolved and reorganized. If small business was to prosper, it was necessary that it be permitted to engage in some restraints of trade such as defensive combinations against big business, resale price maintenance, collection, dissemination and interpretation of trade statistics, and kindred practices. The test of legality was not merely whether concerted action restrained competition among the parties but whether competition in the industry as a whole was adversely affected. If the quality of competition in the market was not impaired and if the hand of small business was strengthened, some restraint could well be tolerated, for without small business, the true goals of a competitively organized economy were unattainable. Legality thus depended on the facts of each case with the interest of small business a major societal concern. This interesting conception of the public interest in the administration of our antitrust laws never prevailed.

You will get the flavor of the present antitrust thinking of our courts if I examine closely with you the judgment of Mr. Justice Stone in *United States v. Trenton Potteries*,³⁵ a case dealing with the legitimacy of price-fixing. The narrow issue in *Trenton Potteries* was whether the rule of reason sheltered a price-fixing agreement by a group controlling eighty-two percent of an industry where the prices fixed were reasonable. The intermediate appellate court had set aside a conviction, finding error in the trial court's

³² *Northern Pacific Ry. v. United States*, 356 U.S. 1 (1958), discussed in Handler, Recent Antitrust Developments, 13 *The Record* 417 (1958); *International Salt Co. v. United States*, 332 U.S. 392 (1947).

³³ *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 386 (1951); *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707, 721 (1944).

³⁴ See e.g., *Liggett Co. v. Lee*, 288 U.S. 517, 541 (1933) (dissenting opinion); *American Column & Lumber Co. v. United States*, 257 U.S. 377, 418-19 (1921) (dissenting opinion); and articles and addresses reprinted in Brandeis, *The Curse of Bigness*, pt. 3, and Brandeis, *Business—A Profession*. See Comment, *Mr. Justice Brandeis, Competition and Smallness: A Dilemma Re-examined*, 66 *Yale L.J.* 69 (1956).

³⁵ *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927).

refusal to submit the issue of reasonableness of the agreed prices to the jury. In reversing, Stone pointed out that "reasonableness is not a concept of definite and unchanging content. Our view of what is a reasonable restraint of commerce is controlled by the recognized purpose of the Sherman Law itself."³⁶ That purpose is to protect the public interest from the evils of monopoly and price control by the preservation of competition. "The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow."³⁷ It would be administratively unsound to place on the government "the burden of ascertaining from day to day whether [the fixed price] has become unreasonable through the mere variation of economic conditions."³⁸

It is clear upon reflection that agreements among trade rivals raising prices and limiting entry into their industry are tantamount to the imposition of a sales tax and the requirement of a license as a prerequisite of doing business. These sovereign powers of government should not be vested in private groups to be exercised for private purposes. They must remain with the state to be employed for public purposes only. And when so employed our private enterprise system is transmuted into a regimented economy. Those entrepreneurs who favor private price-fixing sound the death-knell of the business system as we know it. They force the state to assume a more active role in the conduct and control of business affairs.

Careful craftsman that he was, Stone phrased his formulation of the *Trenton Potteries* rule in terms of price agreements by a combine controlling the market. There was no occasion for him to pass upon the legality of price regulation by a minority group. In later decisions, however, it has become clear that price-fixing is unlawful regardless of the economic strength of the combine. The per se approach of *Trenton Potteries* as amplified by *Socony-Vacuum*,³⁹ which condemns any tampering with price structures, is the anchor point of modern antitrust.

³⁶ *Id.* at 397.

³⁷ *Ibid.*

³⁸ *Id.* at 398.

³⁹ *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940).

You might well inquire whether the rule of reason in its application to horizontal combinations among competitors has any practical significance in the law of today. What conduct does it shelter?

I put the matter in these terms in a lecture on the "Judicial Architects of the Rule of Reason," which I gave at the University of Buffalo:⁴⁰

[T]he rule of reason, despite its modest pretensions, is far from sterile. The actual and probable anticompetitive effects of a challenged arrangement are carefully measured to determine whether it will jeopardize the maintenance of healthy and vigorous competition in the market. Some restrictive agreements, though eliminating competition between the parties, may strengthen the forces of competition in the market place. Short-term diminution of competition may have salutary long-run consequences. The enforcement of a promise not to compete by the seller of a business or by an employee enables the purchaser or the employer, as the case may be, to compete more effectively with others. Exclusive dealing arrangements and mergers provide even more significant illustrations of business practices which may be used as a technique of waging competition, thus enhancing rather than impairing the vitality of the market. Statistical interchanges can fortify competition by substituting an underpinning of knowledge for ignorance. Concerted action to eliminate fraud, overreaching, and similar excesses can elevate the plane of competition. Temporary defensive measures against the encroachments of monopoly and the ravages of the business cycle, pending appropriate governmental action, may preserve the competitive system from extinction. The extent to which such arrangements are sustained will depend upon whether they, like the Sherman Act itself, postulate competition as the basic instrument of social control. The fact that they may operate in the public interest by promoting social values other than workable and effective competition will not justify the restraints.

In sum, the more pernicious arrangements are condemned as a matter of law, whereas novel restrictions outside the *per se* classification are carefully weighed to determine whether they will in the long run advance or retard the cause of competition. This introduces a needed flexibility into our antitrust laws, enabling them to

⁴⁰ Handler, *op. cit. supra* note 22 at 26-27 (1957).

be adapted to changing needs and endows the courts with the discretion that is an imperative if our law is to have the capacity for growth and development. Rigid rules applied as matter of rote lead only to a stunted and mechanical jurisprudence.

We not only in my country enforce competition, we regulate it as well. This we do primarily through the Federal Trade Commission, whose responsibility it is to elevate the plane of competition, to purge the competitive process of chicanery and deceit and to prohibit unfair methods of competition and deceptive acts and practices.⁴¹ It is also the principal agency enforcing the laws prohibiting price discrimination.⁴² An analysis and appraisal of the strenuous efforts of this arm of government and an exploration of the myriad details of the law of unfair competition are properly the subject of many other lectures.

I know you all appreciate that the body of law which I have endeavored to summarize is replete with interesting detail. Of necessity I have used broad strokes of the brush. My object has been to explain why antitrust is a vital aspect of our social and economic policy and to sketch and review for you its basic principles. Antitrust like all human institutions must face the competition of rival philosophies in the market place of ideas. As long as man cherishes freedom, we are confident it will meet this acid test.

⁴¹ Federal Trade Commission Act, 38 Stat. 719 (1914), as amended, 15 U.S.C. §45 (1958). See Handler, *op. cit. supra* note 4, at 1009-42.

⁴² Robinson-Patman Act, 49 Stat. 1526 (1936), 15 U.S.C. §13 (1958). Current enforcement of the Robinson-Patman Act by the Federal Trade Commission is discussed in Handler, *Recent Antitrust Developments*, 71 Yale L.J. 75, 98 (1961).