

Law Quadrangle (formerly Law Quad Notes)

Volume 26 | Number 2

Article 17

Winter 1982

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Recommended Citation

Sallyanne Payton, *Commenting on Thomas E. Kauper's "Antitrust: Economic Regulation or Deregulator?"*, 26 *Law Quadrangle (formerly Law Quad Notes)* - (1982).

Available at: <https://repository.law.umich.edu/lqnotes/vol26/iss2/17>

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Comment:

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Commenting on Thomas E. Kauper's "Antitrust: Economic Regulation or Deregulator?"

Professor Payton proposed to comment on both Professor Steiner's and Professor Kauper's papers since both addressed the "current crisis of regulatory legitimacy and competence." Steiner's theory that this current controversy arose from irritation generated by "social," as distinct from economic, regulation first received Payton's attention.

Like Steiner, Payton questioned why economic regulation has taken the forms it has and why we have recently become dissatisfied with them. Law incorporates a society's fundamental understanding of what constitutes right conduct, giving some values priority through protection and enforcement. It does this negatively, legislating against evil rather than in favor of good.

"Passing regulatory statutes in legislatures generally requires, therefore, the identification of a bad," Payton said. "We love to regulate the devil," said Payton, but it is the devil without. Outcry against regulation arises when the general rules we create to restrict 'them' turn out to apply to ourselves as well.

Antiregulatory sentiment also arises from the realization that 'we' pay the price even of regulation directed at corporations. That the economic consequences of regulation would provoke reaction, particularly in a stagnant economy, could have been predicted.

Yet if antiregulatory sentiment was easy to anticipate, how can we explain the proliferation of regulation from the late 1960s to the mid 1970s? The shortcomings of a legal education which implies that law can solve most problems was in part at fault.

The institutional autonomy of law was also a factor. "Lawyers create their own precedents. . . . What is most striking about regulation is how imitative it is." Legislators draw on a model, thoughtlessly treating as analogous conditions which differ greatly in significance and cost.

Political forces conjoining the previously unorganized interests of environmentalists or consumers also account for the spread of social regulation. To say that is to demonstrate that what is at issue when we discuss legalization is really control.

"In this society," Payton emphasized, "we control through law." Because we cherish private freedom, we use government only sparingly and in accordance with standards of due process. Land, capital, and industrial facilities are in private, not government, hands. Regulation, designed to control the power of these private agents to injure others, is also subject to procedural and substantive restrictions protecting the regulated. Reform in the name of streamlining which reduces these protections "will produce regulation without law, which has always been thought to be a dangerous thing."

"'Legalization' is an undesirable byproduct," Payton said, "of social control by rules." Our faith in law prompts us to seek to control through legislation and to seek redress through the courts. Citizens become increasingly dependent on lawyers to define rights and responsibilities, and minimum legal acceptability becomes the standard for action.

Yet we would not want to control these undesirable consequences by "asking individuals to forego their right to petition their government to act," or to sue, Payton noted. Like any other externality, legalization must be controlled by government.

The first step, Payton said, is for government to restrain itself. Cost-benefit analyses and regulatory budgets can make government anticipate the consequences of its decisions.

Deregulatory pressure has shifted the burden of proof onto those who desire more regulation. Until recently, the costs and burdens of regulations were irrelevant to the evaluation of a regulatory agency's performance. Even those who believe that the past century's regulation has indeed given us a healthier, cleaner, and more nearly just society should welcome attitudes which will impede the enactment of ill-conceived and frivolous restrictions.

Payton's view that good regulation is that which represents public consensus led her to explore a central conceptual question raised by Kauper's discussion of antitrust: "Should we be using the common law courts to develop any economic regulatory policy?"

An advantage lies in these courts' reliance on a standard of reasonableness and broad principles applied by generalist judges. Antitrust litigation has allowed us to scrutinize and deregulate industries which have enjoyed close and cordial relations with their regulators.

Problems arise, however, because antitrust is unlike other common law litigation in that its standards are not



grounded in internalized community values. Economic reality and real business behavior are not the subjects of such populist standards, Payton argued. In absence of this traditional basis of common law decision making, even judges are at sea in deciding antitrust cases.

Business's demand for clear articulation of obligations is then readily understandable, particularly in the light of the treble damages remedy. The degree of risk involved in antitrust, combined with the unusual pervasiveness of potential enforcement by private litigation, makes every business fearful and attentive to the risk-averse advice of counsel.

Because antitrust law has largely eliminated the ultimate reality check of a jury trial, it has lost some of the advantages of common law litigation. Like economic regulation, then, antitrust becomes intellectually insulated. Lawyers become more oracular and inscrutable as antitrust is taken over by the arid, static models of economists.

Although Payton thus demonstrated that antitrust may resemble economic regulation, she also concurred with Kauper's characterization of it as paradoxical, noting that antitrust can also be a tremendous deregulator. The value of antitrust is that it offers a fall-back position, Payton argued. It enables us to break the closed circle of regulator and regulatee and to remove the mantle of uniqueness from an industry without turning it loose from all regulation.

Nevertheless, in its own functioning, antitrust turns out to be regulation. "I tend to agree with Professor Kauper," Payton closed, "that it is regulation of a sort that is in some intellectual trouble at the moment."