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Law and the Future: Trade Regulation (1956)

Aaron Director & Edward H. Levi with a Note by Keith Hylton

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A Note on Director & Levi (1956)

Keith Hylton

In their uninformatively titled article, "Law and the Future: Trade Regulation,"[1] Director and Levi set out a research agenda as well as some of the major propositions of what later came to be known as the Chicago School of antitrust. A better sense of its eventual importance to the antitrust literature would have been conveyed if the article had been titled "The Chicago School of Antitrust: A Manifesto." Of course, calling the article "The Chicago Manifesto" would have made the title more informative today, but less informative when it was written.

Therein lies the story of one of the most successful intellectual innovations of the legal academy. For when Director and Levi wrote "Law and the Future," the Chicago School of Antitrust was relatively unknown outside of the University of Chicago Law School, and even there, consisted of nothing more than critical discussion of antitrust cases in the classroom of one Aaron Director.

We are all familiar with the importance of those arguments today, primarily through the impression that they made on Director's students. The Chicago School of Antitrust has arguably become the core of serious antitrust analysis. "Law and the Future" is the only published article in which Director himself, rather than one of his students, sets forth the Chicago School arguments. The article discusses the economic analysis of market power, abuses of market power, and collusion.

1 Aaron Director & Edward Levi, *Law and the Future: Trade Regulation*, 51 Northwestern L. Rev. 281 (1956), *reprinted in* 3(2) Competition Pol'y Int'l 253 (2006).

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Of the major Chicago School arguments, the one that receives the most attention is the "single monopoly power" thesis, which holds that various leveraging strategies such as tying cannot expand the monopoly power of a firm because any attempt to impose additional restrictions on consumers, beyond the monopoly price and output combination, will require concessions from the monopolist. Director and Levi briefly note that the single-power proposition does not necessarily apply when the monopolist adopts constraints that burden rivals more than itself, a view later explored in the post-Chicago literature.

Law and the Future: Trade Regulation

Aaron Director and Edward H. Levi***

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In this note we do not attempt to predict the future of the anti-trust laws. Rather we wish to direct attention to certain problem areas for study. We assume for the purposes of this discussion that an over-riding belief in both free enterprise and in competition will prevail over future possible NRA attempts. We assume also that despite the extension of a government regulation of one form or another, there will still be a place for regulation by competition. The ability of the antitrust laws in weathering NRA and government regulation attempts in the past provides a basis for assuming the laws will continue. The durability of the antitrust laws is perhaps their main characteristic. In large measure, this is a common law durability, built on a case by case development, and exhibiting that flexibility is now limited by particularizing legislation enacted to accompany the Sherman Act. Throughout its history, indeed, the Sherman Act has exhibited the twin tendencies of flexibility and ambiguity, on the one hand, and a drive for certainty and automaticity, on the other. At the moment, the drive for certainty and automaticity seems paramount, but not without criticism and reaction. Much of this drive for certainty rests not so much on the concept of fair warning, which is inherent in any idea of the rule of law, but rather more on the belief that new and automatic applications of the laws will catch objectionable conduct and effects in their incipiency. The idea of incipiency seems to rest of economic doctrines, or, conclusions drawn from experience. Because of these doctrines or conclusions, certain types of conduct are deemed harmful in themselves, although the harm in the particular case may not be visible. Economic theory or experience thus substitutes for an observed effect.

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In no area, of course, is the law self-contained, that is, completely independent of the teachings of other disciplines or the assumptions, which may change, of underlying philosophy. The common law, itself, provides the mechanism for moving from doctrines outside the law into felt distinctions which make the law. As much as any field of law, however, and more than most, the antitrust laws in their evolution have exhibited an explicit interdependence with economic and political thought. Many of the cases, of course, reflect the law's skepticism for economists and economics.[1] But the antitrust laws have been greatly influenced by economic doctrine. At times the legal and economic theory have appeared to be the same. New problems for the antitrust laws are therefore created if it an be shown that, in term of present day situations, much of the reliance on economic doctrine if unjustified. Even if this can be shown, it is possible, perhaps probable, that the law will continue on its own, for the law is not economics. The main lines of the law, then, may remain the same, but the statement of reasons for the law may change, and this in itself should have an interstitial effect in the cases. Indeed, there is uncertainty whether the dominant theme of the antitrust laws is to be the evolution of laws of fair conduct, which may have nothing whatever to do with economics, or the evolution of minimal rules protecting competition or prohibiting monopoly or monopolizing in an economic sense. But this uncertainty only becomes meaningful as the issues concerning the underlying economic doctrines are sharpened.

We believe the conclusions of economics do not justify the application of the antitrust laws in many situations in which the laws are now being applied. We conclude, therefore, that there are new problems for the antitrust laws, and that the future perhaps will be occupied, at least in part, with their resolution. The new problems for the antitrust laws have to do with size, the concept of abuse, and with the application of the idea of collusion. They exist, therefore, in the central field of antitrust enforcement.

The problems are new. The earlier history of the Sherman Act involved its enforcement against units of great relative size which had acquired that position largely through mergers and acquisitions and which, in most cases, had engaged in conduct which was characterized as abusive. Under this analysis, there were three elements combined in the cases. First, there was great relative size. Since the relative size which was reached, although not always maintained, was sufficiently great, the firm could be characterized with some assurance as a monopoly, and its behavior in an important respect could be predicted. Second, this size was obtained through acquisitions. Great importance could be attached to this method of growth. A perennial fear in the application of the Sherman Act is that it will cut down units which have grown to great size only because of the economies of large scale, that is, in response to the demands for efficiency. But

1 See United States v. United States Steel Corp., 251 U.S. 417, 448 (1920). *Cf.* FTC vs. Cement Institute, 333 U.S. 683, 715 (1948).

during this earlier period, the means of growth used by monopolies in many industries were mergers or acquisitions. It could be argued, although not without some doubt, that, presumptively, growth because of the economies of large scale would not take the form of merger or acquisition in so many industries. The underlying rationale behind this presumption is that it would strain credulity to believe that in so many industries the ideal arrangement for one firm would be merely the collection into one ownership unit of factories which were originally justified as parts of separate forms. In the reasoning of the law, the method of growth through mergers or combination thus could be used as some evidence of intention to monopolize, and as an answer to the efficiency argument. Third, there was present also conduct frequently described as abusive. There were instances of price cutting, exclusive arrangements or tying clauses, the receipt of rebates, and full line forcing. Perhaps this conduct was important because it colored the origin of the monopoly. Perhaps it was important because it characterized the way the monopoly was used. But since the abuses accompanied great relative size acquired through combination, no really separate decision had to be made as to whether it was these abuses which caused illegality. The abuses might have been merely incidental features of monopolies which were illegal because they had arrived at such size without the justification of efficiency.

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The old *Standard Oil* case reflects this union of size, combination, and abuses. It was the "unification of power and control over petroleum and its products which was the inevitable result of the combining in the New Jersey corporation . . . aggregating so vast a capital" which gave rise "in the absence of countervailing circumstances, to say the least, to the *prima facie* presumption of intent and purpose to maintain the dominancy over the oil industry. . . ."[2] And this presumption was then made conclusive by considering conduct and results. This analysis left unanswered the question of the importance of the abuses in determining illegality. Specifically, it was not settled whether given sufficient size acquired through combination, an injury through abuses of that power would have to be shown to spell out a violation of the Sherman Act. As Judge Hand wrote in the *Corn Products* case, "perhaps it is yet an open question whether or not the test is to be found only in the combination of enough producing capacity to control supply and fix prices, or whether it must be shown that the combi-

2 Standard Oil of N.J. v. United States, 221 U.S. 1, 75 (1911).

nation had injured the public in the exercise of power."[3] But the combination of factors made it unnecessary to decide this question in *Corn Products*. There was also an open question as to the status of power less than monopoly but acquired through past abuses. This was the question which might have been reached in the *United States Steel Corporation* case[4] if past abuses had been found. But the *Steel Corporation* case, itself, marks a turning point. It is the beginning of the modern period for the Sherman Act when, with few exceptions, industrial combines are not monopolies. Some of the firms indeed might have been monopolies in the past, but there was little likelihood for most of them that such large relative size would be acquired again.

Today the industrial pattern is far different than it was at the beginning of the century. It is much less common than it was to have an industry in which one firm has seventy or more percent control over productive capacity or sales. There are likely to be at least three or four units of considerable relative size in an industry. The absolute size of these firms may be much greater than that once possessed by any single dominating firm. And large absolute size, of course, carries with it a power of its own. But it confuses concepts to call this monopoly power. And there is an additional change. The role of combination appears to be different. Whatever the ultimate conclusion may be, it has not yet been shown that such industrial concentration as exists is due in any widespread way to recent mergers and acquisitions. And this cannot be shown, of course, merely by counting the number of mergers and acquisitions which occur annually. The application of the antitrust laws to firms of less than monopoly size or to firms which acquired their size without combination presents new problems for the antitrust laws.

The *Aluminum Co.* case[5] hits one of these problems head on. The big step taken in *Alcoa* was to find illegality, perhaps without abuses, but in any event without recent combination. This finding of monopolizing without combination raises a serious question as to the application of the antitrust laws to monopolies born solely out of efficiency. The presence of combinations in the older cases was supposed to provide the necessary presumption that the growth in the form taken was not due to the drive towards efficiency and appropriate scale. Mergers thus appeared to minimize the point raised in *Alcoa* that monopoly may "have been thrust upon" the firm, and thus to satisfy, as Judge Hand indicates, the older cases on the question of "natural" or "normal" conduct, or on the question of intent.[6]

3 United States v. Corn Products Refining Co., 234 Fed. 964, 1011 (S.D.N.Y. 1916). "If, however, it shall be eventually decided that it is the exercise of the power . . . and not the power alone, which is illegal, the case at bar is in the end no different. Under that theory the injuries to the public are shown by the means which the combination has employed in its efforts either to gain or to maintain its position" *Id*. at 1012.

4 United States v. United States Steel Corp., 251 U.S. 417 (1920).

5 United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

6 *Id.* at 429.

Absent combination and abuses, it is possible to decide, as *Alcoa* appears to do, that monopoly as such is illegal as monopolizing. This means that the law has decided the monopoly behavior is not dependant on the circumstances which gave rise to the monopoly, and that perhaps even with access to an industry open, and without collusion, monopoly is not sufficiently self correcting. If stated without qualification, this would mean that a firm which grew to monopoly size because of the economies of large scale nevertheless would be illegal. The consequences of the law would be a less efficient system of production. This would not necessarily be a decisive criticism of the law, for, as Hand tells us, the Sherman Act has other objectives. The Congress which passed the statute, he reminds us, "was not necessarily actuated by economic motives alone. It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few.[7] And this maintenance of an organization of industry in small units was to be "in spite of possible cost."[8] Yet despite this language, the *Alcoa* opinion attempts to carve out a place for the argument of efficiency as a defense.

The *Alcoa* position on efficiency as a defense is somewhat complicated. The "successful competitor," we are told, "having been urged to compete, must not be turned upon when he wins."[9] The opinion draws a distinction between monopoly which has been "achieved" and monopoly which was been "thrust upon" the firm.[10] Persons "may unwittingly find themselves in possession of a monopoly, automatically, so to say; that is without having intended either to put an end to existing competition, or to prevent competition from arising when none had existed; they may become monopolists by force of accident."[11] Three illustrations are given:

> "A market may, for example, be so limited that it is impossible, to produce at all and meet the cost of production except by a plant large enough to supply the whole demand. Or there may be changes in taste or in cost which drive out all but one purveyor. A single producer, merely by virtue of his superior skill, foresight and industry."

7 *Id.* at 427.

8 *Id.* at 429.

9 *Id.* at 430.

10 *Id.* at 429.

11 *Id.* at 429-30.

The language appears to give full consideration to the requirements of efficiency. But there is balancing language on the other side. The issue for Alcoa is posed in this fashion: "The only question is whether it falls within the exception established in favor of those who do not seek, but cannot avoid, the control of a market."[12] On this issue, Judge Hand writes:

> "It was not inevitable that [Alcoa] should always anticipate increases in the demand for ingot and be prepared to supply them. Nothing compelled it to keep doubling and redoubling its capacity before others entered the field. It insists that it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connection, and the elite of personnel. Only in case we interpret 'exclusion' as limited to maneuvers not honestly industrial, but actuated solely by a desire to prevent competition, can such a course, indefatigably pursued be deemed not 'exclusionary.'"

Perhaps, then the successful competitor can be turned open when he wins, because he has been told not to compete.

Judge Wyzanski, in his opinion in the *United Shoe Machinery* case, describes the doctrine announced by Judge Hand in *Alcoa* as determining that "one who has acquired an overwhelming share of the market 'monopolizes' whenever he does business . . . apparently even if there is no showing that his business involves any exclusionary practice."[13] "But," Judge Wyzanski's opinion continues, "it will also be recalled that this doctrine is softened by Judge Hand's suggestion that the defendant may escape statutory liability if it bears the burden of proving that it owes its monopoly solely to superior skill, superior products, natural advantages (including accessibility to raw materials or markets), economic or technological efficiency (including scientific research), low margins of profit maintained permanently and without discrimination, or licenses conferred by, and used within, the limits of law (including patents on one's own inventions, or franchises granted directly to the enterprise by a public authority)." Perhaps, then, so far as efficiency is concerned, *Alcoa* only shifts the burden to the firm to justify its growth. It seems clear that *Alcoa*, in any event, has not settled the question of the weight to be given to the requirements of efficiency. In the enforcement of a regulatory

12 *Id.* at 431.

13 United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 342 (D. Mass. 1953).

statute, this issue might be less troublesome, but it is different for a statute intended to remove restraints to enterprise as a means of fostering competition. For the artificial limitation on the growth of a firm is of as much concern as the artificial growth through combination in order to monopolize. This is a major unsolved problem in the field of antitrust.

Whatever difficulties the doctrine of *Alcoa* may have with the application of the law to growth because of efficiency, the case, since it deals with undoubted monopoly size, has a strong underlying basis for its assumption that this size carries with it the power to fix prices. In the case of the assured monopoly, one may predict a restriction on production because this restriction will be sensible from the standpoint of the firm. To be sure, even then the firm will wish to take into account problems of good will and the threat of governmental intervention. This restriction on production may provide adequate justification for a law which carries the burden of limiting economic expansion. But the application of the monopolizing concept of the law to units of lesser relative size raises special difficulties. For with units of lesser relative size, it cannot be said that there will be inevitably a restriction in production. If it is granted that there will be more competition if additional units are fashioned in the industry, this may not be an adequate basis to justify the application of the law. This is particularly true in terms of both the state of economics and of the history of the Sherman Act. For the Sherman Act, as has often been said, is directed against restraints and monopoly or monopolizing. It was not intended to compel all possible competition. The act arose out of an antipathy towards monopoly, and those restraints which were thought to have the consequences of monopoly. And it is in the identification and the prediction of the consequences of monopoly that economics has been the most to contribute. There is much greater uncertainty about the consequences of imperfect competition. The application of the monopoly concept to industries with three or four large units leads to curious anomalies. Thus what is deemed adequate relief for one industry, as, for example, the three firms in aluminum,[14] may be the starting point for bringing a case against another industry, such as tobacco.[15] It is in connection, with the application of the antitrust laws to firms of less than clear monopoly size, that the concepts of collusion and abuses have been expanded.

THE APPLICATION OF THE MONOPOLY CONCEPT TO INDUSTRIES WITH THREE OR FOUR LARGE UNITS LEADS TO CURIOUS ANOMALIES. THUS WHAT IS DEEMED ADEQUATE RELIEF FOR ONE INDUSTRY MAY BE THE STARTING POINT FOR BRINGING A CASE AGAINST ANOTHER INDUSTRY.

14 United States v. Aluminum Co. of America, 91 F. Supp. 333 (S.D.N.Y. 1950).

15 American Tobacco Co. v. United States, 328 U.S. 781 (1946).

Perhaps it can be said that what is emerging is a law limiting the uses of size. As Justice Holmes wrote in his dissent in *Northern Securities*, "it has occurred to me that it might be that when a combination reached a certain size it might have attributed to it more of the character of a monopoly merely by virtue of its size than would be attributed to a smaller one."[16] But since the units themselves do not have that position which would justify condemning them as monopolies, instead the law has developed to prohibit for them certain types of conduct deemed collusive or abusive. Thus without a finding of monopoly, collaborative efforts accompanied by the exclusion of others for competitive reasons are deemed unlawful in the *Associated Press* case;[17] vertical integration becomes unlawful in the motion picture industry,[18] although vertical integration per se is not illegal; tying arrangements are found illegal when based upon what is called a monopoly or dominant position, although the position in itself may be deemed lawful.[19] This places the concepts of collusion and abuses in a new light.

The concept of abuses is illustrated in Justice Douglas' opinion in *United States v. Griffith*.[20] The *Griffith* case is one of a sequence of antitrust cases dealing with the motion picture industry. In *Griffith*, affiliated exhibitors used a common agent or agents to negotiate with distributors. The exhibitors therefore "were concededly using their circuit buying power to obtain films." Moreover, "their closed towns were linked with their competitive towns." These practices apparently were decisive in finding a conspiracy in violation of both section one and section two of the Sherman Act. Justice Douglas explains that "anyone who owns and operates the single theatre in a town, or who acquires the exclusive right to exhibit a film, has a monopoly in the popular sense," although it is not necessarily illegal. Then, "if he uses that strategic position to acquire exclusive privileges in a city where he has competitors, he is employing his monopoly power as a trade weapon against his competitors. It may be a feeble, ineffective weapon where he has only one closed or monopoly town. But as those towns increase in number throughout a region, his monopoly power in them may be used with crushing effect on competitors in other places. . . . When the buying power of the entire circuit is used to negotiate films for his competitive as well as his closed towns, he is using monopoly power to expand his empire." This is "a misuse of monopoly power under the Sherman Act. If monopoly power can be used to beget monopoly, the Act becomes a feeble instrument indeed." There

16 Northern Securities Co. v. United States, 193 U.S. 197, 407 (1904) (dissenting opinion).

17 Associated Press v. United States, 326 U.S. 1 (1945).

18 United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948).

19 See Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953).

20 334 U.S. 100 (1948).

could be no doubt that the monopoly power of the circuit "had some effect on their competitors and on the growth" of the circuit.[21]

The doctrine of abuses sees them as exclusionary devices useful for getting a monopoly, or expanding it, or for moving from one monopoly to the creation of another. Thus when vertical integration is concerned, the inquiry is often as to the "leverage" of the device. When a tying clause is annexed to a patent, the courts regard this as an attempt to expand the scope of the patent, or as an attempt to create a new monopoly using the leverage of the patent monopoly. So in the *Griffith* case, buying power which joins the competitive with the closed towns, is a use of monopoly power to beget monopoly. It is natural that as the antitrust laws are applied to firms with less than assured monopoly size, new emphasis should be placed upon these exclusionary devices or abuses. Since the firms have not achieved positions which are regarded as illegal in themselves, it becomes important to see if their conduct threatens to bring to them greater monopoly power. The rule of *Griffith*, then, in contrast to *Alcoa* which dealt with assured monopoly size, emphasizes these exclusionary practices which are viewed as the means of achieving greater monopoly power and therefore as an illicit use of the power already possessed.[22] New importance therefore must be attached to the concept of abuses. In addition, the history of related legislation since the Sherman Act is to give independent status to these abuses. The abuses represent conduct which is thought to create monopoly and these are the practices to be caught under the Robinson-Patman Act, under section three and, to some extent, seven of the Clayton Act, and under section five of the Federal Trade Commission Act. The practices are to be caught in order to prevent monopoly in its incipiency.

We are not sure of the basis or the justification for the concept of abuses. Insofar as the practices involved are covered in special legislation, perhaps it may be suggested that all that is involved is a legislative determination that conduct should be banned. These enactments have introduced a certain automaticity into the law; to some extent they preclude or make unnecessary separate inquiry in each of the cases as to the effects, advantages, or disadvantages of the banned practices. But even so the enactments must be supposed to rest upon conclusions drawn from experience and supportable in general, even though they may not be true of an exceptional case. Moreover the interrelationship between the Sherman Act and the amendatory acts suggests that none of the special statutes is completely insulated from a pervasive concern with the doctrines of economics in the field of competition and monopoly. Indeed the attempt to apply the legislative standard with strictness has provoked criticism. The report of the

21 *Id.* at 107-8, 109.

22 See Judge Wyzanski's discussion of the *Griffith* case in United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 342 (D. Mass. 1953).

Attorney General's Committee on section three of the Clayton Act, relating to exclusive dealing, for example, seems to prefer "full factual analysis of significant market data,"[23] and here as elsewhere it appears to favor incorporation of advances in economic teaching into the case law.[24] We may conclude that to an undefined extent it is of interest to the law to know whether the abuses in fact do create monopoly.

The economic teaching gives little support to the idea that the abuses create or extend monopoly. Firms that are competitive cannot impose coercive restrictions on their suppliers or their customers as a means of obtaining a monopoly. They lack the power to do this effectively. Firms which have some monopoly power over prices and output can impose coercive restrictions on suppliers and customers. In the normal case, however, they will lose revenue if they do impose such restrictions, and this casts some doubt on how prevalent or continued the practice would be. Such firms would lose revenue because they cannot both obtain the advantage of the original power and impose additional coercive restrictions so as to increase their monopoly power. The coercive restrictions on customers are possible only if the price which would be charged without the restriction is reduced. The restrictions therefore would not be sensible except as a means of price discrimination. If used as a means of price discrimination, the restrictions might be considered more an enjoyment of the original power than an extension of it. In point of fact even a firm with complete monopoly power over prices and output cannot both get the advantage of such power and impose additional coercive restrictions on suppliers and customers. At most such a firm, and of course one with only some monopoly power, can decide to impose additional costs upon itself for the sake of a restriction. Such a restriction might be valuable if the effect of it would be to impose greater costs on possible competitors. But except for this special case, there is no clearly apparent advantage to a firm with monopoly power as against one without such power.

In point of fact even a firm with complete monopoly power over prices and output cannot both get the advantage of such power and impose additional coercive restrictions on suppliers and customers.

We realize that it is sometimes said that the restrictive practices support or extend monopolies because they can impose large capital requirements on existing or potential competitors. But this argument seems to require clarification and study. It is not evident whether the argument is based on an imperfection in the

23 Report of the Attorney General's National Committee to Study the Antitrust Laws 143 (1955). The phrase is used in describing the Commission's handling of the Anchor Serum Co., F.T.C. Dkt. No. 5965 (Feb. 16, 1954), *aff'd*, 217 F.2d 867 (7th Cir. 1954), and Harley-Davidson Motor Co., F.T.C. Dkt. No. 5698 (July 7, 1954).

24 See Report of the Attorney General's National Committee to Study the Antitrust Laws 132 (1955).

capital market, on the reluctance to assume the consequent risks, on the economies associated with raising large amounts of capital, or on the less efficient scale imposed on rival firms.

To a certain extent the economic analysis of the effect of the abuses may be relevant only to an interpretation of the meaning of the language of the law. We have suggested that in most instances the supposed abuses neither support nor enlarge monopoly power. Yet we realize that in the typical patent tying clause case, for example, the courts speak of the device as an attempt to expand the patent monopoly. In the *Carbice* case,[25] for example, where the patent was "for a particular kind of package employing solid carbon dioxide in a new combination," but not on the package nor on the dry-ice, the use of the patented combination was tied to the purchase of dry-ice. Justice Brandeis stated that "relief is denied because the Dry Ice Corporation is attempting, without sanction of law, to employ the patent to secure a limited monopoly of unpatented material used in applying the invention." This was beyond the "scope of the patentee's monopoly." In the *Mercoid* case, [26] the use of a combination patent on a heating system was tied to the purchase of stoker switches used in the combination. Justice Douglas stated that the case was "a graphic illustration of the evils of an expansion of the patent monopoly by private engagements." The practice in both of these cases could be described as an administrative device for collecting revenue from patents assumed to be valid.

The *Carbice* and *Mercoid* cases are perhaps exceptional in the tying clause field because they involve combination patents. The usual reference in this area would be to the practices as portrayed in the *Dick*,[27] International Business Machines Corporation,[28] *and the block booking portions of the motion picture cases*.[29] In the *Dick* case the use of the mimeograph machine was tied to the purchase of the supplies for it. The restriction was impliedly upheld, but Chief Justice White in dissenting wrote, "I have already indicated how, since the decision in the Button Fastener Case, the attempt to increase the scope of the monopoly granted by a patent has become common by resorting to the devices of license restrictions manifested in various forms, all of which tend to increase monopoly and to burden the public in the exercise of their common rights. My mind cannot shake off the dread of the vast extension of such practices which must come from the

25 Carbice Corp. v. American Patents Development Corp., 283 U.S. 27, 30, 33 (1931).

26 Mercoid Corp. v. Mid-Continent Inv. Co. 320 U.S. 661, 666 (1944).

27 Henry v. Dick Co., 224 U.S. 1 (1911).

28 International Business Mach. Corp. v. United States, 298 U.S. 131 (1936).

29 United States v. Paramount Pictures, Inc., 334 U.S. 131, 156 (1948).

decision of the court now rendered."[30] In the *International Business Machines* case, the use of the machines was tied to the cards utilized with it. Justice Stone characterized the effect of the condition as one "whose substantial benefit to the lessor is the elimination of business competition and the creation of monopoly. . . ."[31] Block booking is described in the *Paramount* case as the "practice of licensing, or offering for license, one feature or group of features on condition that the exhibitor will also license another feature or group of features released by the distributors during a given period."[32] The result was said "to add to the monopoly of the copyright in violation of the principle of the patent cases involving tying clauses." Nevertheless, we believe that the practices in each of the three cases can be explained best as methods of charging different prices to different customers and not as extensions of monopoly to other areas.

THE PRACTICES IN EACH OF THE THREE CASES CAN BE EXPLAINED BEST AS METHODS OF CHARGING DIFFERENT PRICES TO DIFFERENT CUSTOMERS AND NOT AS EXTENSIONS OF MONOPOLY TO OTHER AREAS.

There are three remaining types of restrictive practices to which reference is frequently made. They are: (1) joint buying power linking open and closed situations as in the *Griffith* case; (2) exclusive arrangements as in the *Standard Fashion*[33] *or* Standard Oil of California *cases;*[34] and, (3) vertical integration. The joint buying power arrangement assumed to exist in *Griffith* includes within that power the strength of the monopoly of the theatres in the closed towns. This monopoly by itself is assumed to be lawful. If it is a monopoly, the owner will be enabled to obtain better prices from the suppliers than could be obtained by each of several independent exhibitors in that market. As we have suggested, it would seem that in order to impose additional coercive restrictions on the suppliers, as, for example, on the supplies for competitive markets, the monopoly owner would have to pay the suppliers for these additional restrictions. Nor would it seem to be in the interest of the suppliers to encourage the growth of monopoly among the exhibitors. Perhaps it could be argued and shown that monopoly of the theatres confers larger resources upon the owner, but otherwise the monopolist has no obvious advantage for competitive areas over any other competitor who sets out to establish a monopoly. It would seem therefore that

30 224 U.S. 1, 70 (1912).

31 298 U.S. 131, 140 (1936).

32 334 U.S. 131, 156, 158 (1948).

33 Standard Fashion Co. v. Magrabe-Houston Co., 258 U.S. 346 (1922).

34 Standard Oil of Calif. v. United States, 337 U.S. 293 (1949).

the method of buying supplies for a monopoly and a competitive market through a single course cannot be assumed to be effective as a means for extending a monopoly without additional evidence. There is no necessary effect on competitors. The case is not necessarily different from where the single source buys for many competitive theatres.

In the exclusive arrangement cases, the firm which is assumed to have some monopoly power imposes a cost upon itself in order to obtain the restriction forbidding its customer from handling the goods of others. There is an obvious monopoly problem if control over all the possible outlets were thus obtained, but most of the cases do not involve such control, nor would it be clear that firm with a monopoly over the supply would wish to obtain a monopoly over the outlets. Its monopoly over the supplies is not increased through its monopoly over the outlets, unless it can be said that the restrictions on the outlets impose greater costs on potential competitors than they do on the monopoly company itself. This may have been the situation in the *Standard Fashion* case. There a firm with widespread control over a variety of patterns for garments entered into exclusive arrangements with a multitude of outlets. A competitor with less control over the variety of patterns might, through this arrangement, have a greater cost imposes upon it to secure outlets. The reason for this is that there may well be economies for an outlet in handling a variety of patterns. But the *Standard Oil of California* case seems less justified on this basis. In that case no one firm had such a dominion over the products, and a single outlet handling the gasoline of a competitor would appear to have the same economies open to it as were open to Standard's stations. The vertical integration cases appear similar to the exclusive arrangement situations. Vertical integration, however, often appears explainable as a method of price discrimination. It will be said that vertical integration like exclusive arrangements and tying clauses increases a competitor's capital requirements, and so places him at a disadvantage. We have already indicated our belief in the need for further exploration and clarification of that line of argument.

If, then, there is doubt as to the economic support for the conclusions of law with respect to the effect of abuses, this does not mean the law will change. When the courts speak of expanding a monopoly, or of attempting to secure a monopoly through various exclusionary means, the language used may point to matters about which economics has little to say. For example, the scope of the monopoly conferred by a patent is a matter of law. Perhaps a combination patent cannot be enjoyed if the only means of collecting for its use is through the sale of one of the parts. Perhaps, also, the enjoyment of a patent is to be cut short to prevent price discrimination through the use of a tying device. Having conferred a monopoly in one area, the courts may feel that the incidents of that monopoly must be confined. Thus a restriction imposed on the use of products with a patented machine would have an effect upon the producers of the products. Moreover, even if the restriction does not bring a new monopoly into existence,

it can be regarded as a restraint. The important point, however, is that the restrictions or abuses will not in most cases carry with them the normal incidents of monopoly. They will not in the normal case carry with them any decrease in production, nor, except for price discrimination, any increase in revenue, nor any increase in price. They may in fact, in some cases of price discrimination, result in an increase in production. In the language of the Robinson-Patman Act and of the Clayton Act, the abuses do not in most cases either tend to substantially lessen competition or tend to create a monopoly. If this were agreed upon, the law might not change, but its objectives would be clarified. The law would be seen as having less to do with competition and monopoly and more to do with merely a set of rules of fair conduct, perhaps emphasizing the protection of smaller firms. Clarification of the economic basis thus presents the opportunity of choice for the law.

THE RESTRICTIONS OR ABUSES WILL NOT IN MOST CASES CARRY WITH THEM THE NORMAL INCIDENTS OF MONOPOLY. THEY WILL NOT IN THE NORMAL CASE CARRY WITH THEM ANY DECREASE IN PRODUCTION, NOR, EXCEPT FOR PRICE DISCRIMINATION, ANY INCREASE IN REVENUE, NOR ANY INCREASE IN PRICE.

The problem of collusion has always been central to the antitrust laws. Price-fixing agreements operate to affect the market price when they result in restriction in output which affect the market supply. It is difficult to provide an economic basis for a law against price-fixing agreements when the market price is unaffected. Moreover, price-fixing agreements, when adherence to them cannot be compelled through coercion or penalties, might be self-correcting either through the defection of members, which would be rewarding to the individual firm, or through the advent of new firms. But if a price-fixing agreement occurs between members of an industry controlling a substantial share of the market, then, when seen as in reality an agreement to control output, the consequences of this behavior may be predicted with some certainty. It becomes unnecessary to examine the consequences in the individual case in order to determine whether the resulting prices are different than competitive. Adopting the standard of competition, it becomes unnecessary to embark on what Judge Taft called a sea of doubt where reasonableness of the prices is in issue.[35] Accordingly, there is an economic foundation for the illegality of price fixing in itself when market price is affected. There is less foundation when it cannot be shown that the members of the arrangement control a substantial share of the market. And despite the repetition of the slogan that price fixing is illegal per se, the cases as yet do not hold, save possibly for resale price control, that price-fixing agreements without

35 United States v. Addyston Pipe and Steel Co., 85 Fed. 271, 284 (6th Cir. 1898).

power to affect the market price are illegal.[36] The clarification which economics can contribute at this point is to emphasize the importance of examining the effect of the agreement on production and the market supply. Yet surely the law may conclude on its own that if the participants believe the arrangement to be worthwhile for them, then there is sufficient likelihood market supply is affected so that a general prohibition is justified. The extension of the Sherman Act into the remoter nooks and crannies of commerce, because of the broadened view of commerce among the states, however, may be thought to raise some question as to the worthwhileness of a prohibition of all forms of price fixing regardless of market effect.

> DESPITE THE REPETITION OF THE SLOGAN THAT PRICE FIXING IS ILLEGAL PER SE, THE CASES AS YET DO NOT HOLD, SAVE POSSIBLY FOR RESALE PRICE CONTROL, THAT PRICE-FIXING AGREEMENTS WITHOUT POWER TO AFFECT THE MARKET PRICE ARE ILLEGAL.

But the serious problem of collusion is to determine what conduct is to be characterized as the equivalent of an agreement to control output.[37] A facet of this problem concerns allowable trade association activities and the proper scope to be permitted to the uses of knowledge. The relative merits of knowledge and ignorance are not well defined in legal or economic doctrine. The counterpart of efficient scale in the size problem is the improvement of the market where collusion is concerned. Behavior designed to achieve these improvements cannot be readily isolated from behavior which can be interpreted as characterizing monopoly or effective agreements to control output. For example, dissemination of real or assumed knowledge as to pending market changes can bring about a restriction in output in the industry. The magnitude of the change for the individual firm, however, must be based on a prediction by that firm of the behavior of other firms in the industry. It would appear to be extremely difficult and unwise for the law to assume that action taken on general knowledge implies a concert of action

36 The opinion in United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940), whittles away at the notion that a price-fixing agreement is illegal only if the group in it has the power to affect the market price. In the famous footnote 59 of that opinion Justice Douglas reminds us that "a person 'may be guilty of conspiring, although incapable of committing the objectionable offense'." The thrust of footnote 59 is not entirely clear, for in part it reads as though *control* of the market price, which is not required, were being distinguished from an *influence* upon it of advantage to the members of the combination. In this respect the footnote echoes the language of the body of the opinion that it was immaterial "that other factors also may have contributed to that rise and stability of the markets." *Id.* at 219. We have Judge Hand's interpretation of the footnote to the effect that the plan would be unlawful "even if the parties did not have the power to fix prices, provided that they intended to do so." United States v. Aluminum Co. of America, 148 F.2d 416, 432 (1945). But footnote 59 is dictum, for in the actual case "proof that prices in the Mid-Western area were raised as a result of the activities of the combination was essential . . . in order to establish jurisdiction in the Western District of Wisconsin. 310 U.S. 150 at 224.

37 As, for example, in American Tobacco Co. v. United States, 328 U.S. 781 (1946); FTC v. Cement Institute, 333 U.S. 683 (1948); Theatre Enterprises, Inc. v. Paramount Film Distributing Co., 346 U.S. 537 (1954).

equivalent to collusion, conspiracy or agreement, and yet the result may be the same as that which follows from an agreement. It seems unworkable to suggest that illegality in such cases should be reserved for those instances where the restriction in individual output goes beyond the point justified by a common reaction and reaches that further restriction of output characteristic of a monopoly. This problem concerns also the application of the law to industries with several large firms when the attempt is made to deal with them as jointly monopolizing because of common patterns of behavior. Here it cannot be said that economic doctrine indicates with certainty that there will be collusion among the firms; it cannot be said that there will be inevitably a restriction in production.

The central problems in the field of antitrust as yet unsettled and pressing for solution concern size, abuses and collusion. We do not mean to suggest that there are simple economic or legal answers. The problems are difficult, and the law is not likely to meet them directly. Nor do we mean to suggest that the law must of necessity conform to the prescriptions of economic theory, let alone move within the confines of changing fashions in such theory. The law indeed can have a life of its own. But in this field of law more than any other, the general presumptions are of such a character that they cannot be readily isolated from the corresponding presumptions that in the future there may well be a recognition of the instability of the assumed foundation for some major antitrust doctrines. And this may lead to a re-evaluation of the scope and function of the antitrust laws.