

# Through The Antitrust Looking Glass—Twenty-First Annual Antitrust Review\*

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The title of this, my twenty-first annual antitrust review, is derived from Justice Stewart's mordant comment in his dissent in *Albrecht v. Herald Company*, that, "The Court today stands the Sherman Act on its head."<sup>1</sup> "The books," says Alice in her quaint description of the looking glass world, "are something like our books, only the words go the wrong way."<sup>2</sup> With a statute upside down and with words running the wrong way, the commentator must perforce resort to mirrors in the presentation of his analysis.

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### NEW CONCEPTS OF COMBINATION AND CONSPIRACY

The subject of intracorporate conspiracy is no stranger to these annual reviews. In 1951, when *Timken Roller Bearing Company v. United States*<sup>3</sup> and *Kiefer-Stewart Company v. Joseph E. Seagram & Sons, Incorporated*<sup>4</sup> were decided, I devoted most of my review to an analysis of that "weird" principle.<sup>5</sup> I returned to it from time to time,<sup>6</sup> most recently two years ago when I discussed the Federal Trade Commission's decision in *Schenley Industries, Incorporated*.<sup>7</sup> I then called attention to Assistant Attorney General Turner's policy statement that the Antitrust Division would "not . . . push the intracorporate conspiracy doctrine as far as a free-wheeling

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1. 390 U.S. 145, 170 (1968) (dissenting opinion).

2. L. CARROLL, *THROUGH THE LOOKING GLASS* 15-16 (Peter Pauper ed. 1967).

3. 341 U.S. 593 (1951).

4. 340 U.S. 211 (1951).

5. Handler, *Annual Antitrust Review* (unpublished lecture to the Association of the Bar of the City of New York, November 29, 1951; copy deposited in Columbia Law Library).

6. Handler, *Annual Review of Antitrust Developments*, 10 *RECORD OF N.Y.C.B.A.* 332, 342 (1955); Handler, *Some Misadventures in Antitrust Policymaking—Nineteenth Annual Review*, 76 *YALE L.J.* 92, 119 (1966).

7. *Schenley Indus. Inc.*, [1965-1967 Transfer Binder] *TRADE REG. REP.* ¶ 17,353 (FTC 1965); Handler, *Some Misadventures in Antitrust Policymaking—Nineteenth Annual Review*, 76 *YALE L.J.* 92, 119 (1966).

interpretation of the *Timken* case might suggest.”<sup>8</sup> And I pointed out that the Justice Department had, over a period of years, entered into a series of consent decrees excluding intraenterprise activities from their injunctive prohibitions.<sup>9</sup> Notwithstanding the Commission’s refusal in *Schenley* to modify its order forbidding an intracorporate arrangement, the antitrust bar was justified, in light of this history, in regarding *Kiefer-Stewart* and *Timken* as aberrational.

*Perma Life Mufflers, Incorporated v. International Parts Corporation*,<sup>10</sup> decided last Term, proves, however, that these earlier rulings, far from being aberrational, were prophetic and well within the mainstream of antitrust law. The “free-wheeling” interpretation which the enforcement authorities eschewed has been adopted by the judiciary. This is not, of course, the first time that the Supreme Court has taken the ball away from the Antitrust Division and run with it.<sup>11</sup> In Alice’s world, it is not uncommon for prosecutors to be timorous and judges bold.

*Perma Life* was a treble-damage action brought by several dealers and installers of automotive exhaust systems who had been franchised by Midas, Incorporated, to do business under the name of Midas Muffler Shops. The defendants were Midas, International Parts (Midas’ parent corporation), two other International subsidiaries, and six individuals who were officers or agents of the defendant corporations.<sup>12</sup> The franchise agreement obligated the dealer to purchase all of his mufflers and exhaust system parts from Midas, to honor the Midas guaranty on mufflers sold by any Midas dealer, to sell the mufflers at retail prices fixed by Midas, and to sell only at locations specified in the agreement.<sup>13</sup> The dealer was granted the exclusive right to sell Midas products within his defined territory and permission to use the registered trademark *Midas* and the service mark *Midas Muffler Shops*.<sup>14</sup>

The dealers’ complaint alleged a conspiracy in restraint of trade among all of the defendants, challenging as illegal the provisions of the franchise agreement barring them from purchasing from other

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8. Turner, *Address Before the American Bar Association*, 10 ANTITRUST BULL. 685, 687 (1965).

9. See Handler, *supra* note 7, at 119-20 n.207.

10. 392 U.S. 134 (1968).

11. See, e.g., *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967); *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966); *United States v. Von’s Grocery Co.*, 384 U.S. 270 (1966); *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964).

12. 392 U.S. at 135.

13. *Id.* at 136-37.

14. *Id.* at 137.

sources of supply, preventing them from selling outside their designated territory, tying the sale of mufflers to the sale of other products in the Midas line, and requiring them to sell at fixed retail prices.

The district court entered summary judgment for defendants<sup>15</sup> and the Seventh Circuit affirmed,<sup>16</sup> holding, *inter alia*, that the defendants were incapable of conspiracy as a matter of law because they were all part of a single business entity.<sup>17</sup> The Supreme Court reversed, in an opinion by Mr. Justice Black, without dissent on this issue.<sup>18</sup> The sum and substance of Justice Black's opinion is contained in one succinct sentence: "But since respondents Midas and International availed themselves of the privilege of doing business through separate corporations, the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities."<sup>19</sup>

The impact of this stark ruling can be assessed only in the context of the record on which it was reached. In support of their summary judgment motion in the district court, the defendants had submitted an affidavit<sup>20</sup> reciting that all the related companies were part of a family corporate venture wholly owned by a father and son. International, the parent company, was engaged in the sale of mufflers and other exhaust system parts, selling some of its products under the International trademark. It also sold Midas-branded products to the Midas franchised dealers. Midas, a subsidiary, was a mere shell; its sole role was to license dealers and administer the franchise agreements. The two other subsidiary defendants manufactured exhaust systems and handled sales, respectively.

The plaintiffs did not submit answering affidavits. In their briefs in the district court, the court of appeals, and the Supreme Court,<sup>21</sup>

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15. 1966 Trade Cas. ¶¶ 71,801-02 (N.D. Ill. 1966).

16. 376 F.2d 692 (7th Cir. 1967).

17. "The District Court further held as an alternative basis for the dismissal of count 1 of the complaint that no conspiracy existed as a matter of law. The Court found that the corporate and individual defendants were a single business entity through which a family business was operated. Based on this second premise, with which plaintiffs take no issue, the Court . . . held as a matter of law that no conspiracy as alleged in the complaint existed. . . .

"We agree with the reasoning and hold that count 1 was properly dismissed on this alternative basis." *Id.* at 699.

18. Justices White, Fortas, and Marshall each wrote separate concurring opinions on the *in pari delicto* issue, and Justices Harlan and Stewart joined in an opinion concurring in part and dissenting in part, also limited to that question. None of the separate opinions addressed itself to the question of intracorporate conspiracy.

19. 392 U.S. at 141-42.

20. Brief for Petitioner, Appendix at 64-72.

21. *See id.* at 38.

they asserted, without substantiating proof, that Midas (the subsidiary) sold the Midas products to the dealers, that International (the parent) sold a competitive line of exhaust systems under the International trademark, and that the two companies held themselves out as competitors.

This factual conflict was never resolved in any of the courts. Indeed, Justice Black's opinion takes no account of the parties' differing contentions as to the facts. But the resolution of this issue may well be crucial to the doctrinal significance of the *Perma Life* opinion. If the parent and the subsidiary in fact sold competing products and held themselves out to the public as competitors, the case may be nothing more than a reiteration of the *Kiefer-Stewart* ruling. There, you will recall, the Court held that two sales corporations, both direct or indirect subsidiaries of a common parent, were capable of conspiring to boycott a wholesaler who had refused to abide by maximum resale price ceilings. In so holding, Justice Black had placed great emphasis on the fact that the two affiliated companies held themselves out to be competitors.<sup>22</sup> If the same were true of International and Midas, *Kiefer-Stewart* would apply, since it should make no difference whether a subsidiary competes with its parent or a fellow subsidiary.

Granting that the *Kiefer-Stewart* rule presents serious conceptual difficulties, one can nevertheless understand a doctrine which imposes upon related companies choosing to enter the market place under the guise of competitors the obligation to behave like competitors. It was such reasoning which convinced Judge Pence, in his precedent-shattering *Hawaiian Oke & Liquors, Limited v. Joseph E. Seagram & Sons, Incorporated*<sup>23</sup> decision, to rule that even unincorporated divisions which are held out as competitors are capable of conspiring with one another.<sup>24</sup>

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22. "... common ownership and control does not liberate corporations from the impact of the antitrust laws. E.g. *United States v. Yellow Cab Co.*, 332 U.S. 218. The rule is especially applicable where, as here, respondents held themselves out as competitors." *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211, 215 (1951).

Other commentators have suggested that Justice Black's comment was inappropriate for the facts of the case since it appeared from the evidence that the defendants did not hide and the plaintiffs were fully aware of the fact that the two corporations were commonly owned and not competitors. See Willis & Pitofsky, *Antitrust Consequences of Using Corporate Subsidiaries*, 43 N.Y.U.L. REV. 20, 37 (1968); Note, 43 N.Y.U.L. REV. 172, 175 & n.29 (1968).

23. 272 F. Supp. 915 (D. Hawaii 1967).

24. *Id.* at 919-24. Judge Pence's reasoning in *Hawaiian Oke* bears a conceptual similarity to Justice Jackson's approach in his dissent in *United States v. Timken Roller Bearing Co.*, 341 U.S. 593, 666 (1951). To Justice Jackson, a holding that "what it would not be illegal for Timken to do alone may be illegal as a conspiracy when done by two legally separate persons

Justice Black, in *Perma Life*, makes no mention of the plaintiffs' contention that International and Midas were held out as competitors and accordingly should be required to act competitively. Indeed, he failed even to cite *Kiefer-Stewart*. His present rationale stresses the fact that the parent and subsidiary availed themselves of the privilege of doing business through separate corporations. That being so, they cannot avoid any of the obligations which antitrust imposes on separate companies.

It is the apparent breadth of Justice Black's rule which is disconcerting. If the intracorporate conspiracy doctrine indeed applies whenever there are separate legal entities, regardless of the circumstances, then virtually any action by a single seller which is presently permissible is capable of being converted into an unlawful conspiracy if, perchance, the company happens to have a parent, a subsidiary, or a sister company which can be alleged to be a co-conspirator. It will be rare that the conduct under attack was not the subject of some intracorporate conversation or discussion.

It is possible that Justice Black, despite the absolute tenor of his words, did not intend to go as far as his language would suggest. Perhaps he silently accepted the plaintiffs' version of the facts and merely applied the *Kiefer-Stewart* principle to a vertical relationship where parent and subsidiary hold themselves out to be competitors. Perhaps the decision may go only a bit further than the earlier cases to permit a finding of illicit agreement between related companies engaged in the same business even if they do not hold themselves out as competitors. It may well be that the Court intends to condemn intracorporate conspiracy only when the challenged conduct is independently unlawful as a contract in restraint of trade. Since the opinion is virtually devoid of reasoned explication, one can only guess at what the Court had in mind.

But if we take the Court at its word, the prohibition seems to be absolute. "[C]ommon ownership," it asserts, "could not save them from any of the obligations that the law imposes on separate entities."<sup>25</sup> In other words, the price of separate incorporation is total antitrust exposure. Presumably if the management of a holding company, in considering entry into a new business, confers with

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. . . places too much weight on labels." 341 U.S. at 666-67. Of course, Justice Jackson concluded that the application of substance over form required that the conspiracy rules be applied neither to related corporations nor unincorporated divisions, while Judge Pence would apply them to both. But both jurists avoided the tyranny of labels and sought to deal with the substantive questions at hand.

25. 392 U.S. at 141-42.

operating personnel of two subsidiaries and decides that one, rather than the other, should enter the new field, it is guilty of an unlawful division of markets. Or if there is consultation with respect to pricing between top management and operating personnel in such a corporate structure, there is illicit price-fixing. And if all that is needed in making out a case of conspiracy is a plurality of actors, an unincorporated business with no more than one employee in addition to the proprietor could satisfy that requirement—an extreme position which has not yet been adopted by the Court.

One looks in vain in *Perma Life* or in any of the cases on which it relies for any policy justifying a doctrine which on its face is repugnant to common sense. Certainly the use of corporate subsidiaries offends no recognized antitrust policy.

Curiously enough, there was absolutely no need for the Court to invoke the intracorporate conspiracy doctrine in *Perma Life*. Section 1 of the Sherman Act prohibits contracts as well as conspiracies in restraint of trade,<sup>26</sup> and it was the provisions of their franchise agreements with Midas which the plaintiffs claimed were unlawful. All that the plaintiffs had to show in order to make out a substantive violation of law was that the defendants were parties to illegal contracts. Any reference to conspiracy was superfluous.

In *Albrecht*,<sup>27</sup> the Court stretches to the breaking point the combination concept and, in so doing, may well be reading conspiracy out of the statute. That case, in suggesting that it may no longer be necessary to prove a concert of action in regard to the external relations of a company, overshadows the practical and doctrinal significance of *Perma Life*'s application of conspiracy to internal corporate activities. Together, the two rulings can bring about a revolutionary transformation of section 1 of the Sherman Act from a law prohibiting joint action into one condemning individual conduct.

The facts of the *Albrecht* case were these: The defendant, the Herald Company, published a newspaper in St. Louis which it distributed through independent carriers, each of whom was assigned an exclusive territory.<sup>28</sup> A suggested retail price was advertised in the paper, and the carriers, of whom Albrecht was one, were informed that their exclusive franchises would be terminated if they charged more than the suggested maximum. Albrecht refused to abide by the Herald's suggestion. The defendant thereupon notified Albrecht's customers that they could thenceforth receive delivery directly from

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26. 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1964).

27. *Albrecht v. Herald Co.*, 390 U.S. 145 (1968).

28. *Id.* at 147.

the Herald at the lower price if they so desired. This announcement was made both by direct mail and telephone and, in addition, by house-to-house solicitation by an agent, Milne, hired by the Herald for that purpose. As a result of this campaign, some 300, or 25 per cent, of Albrecht's customers switched to direct delivery by the Herald. Thereafter, no longer wanting to engage in home delivery itself, the Herald awarded this new 300-customer route to another dealer, Kroner, on the condition that he would have to return it to Albrecht if the latter mended his ways and abided by the maximum price ceiling. At this point, Albrecht commenced the antitrust action and the paper responded by terminating his appointment as a carrier.

Albrecht charged a combination in restraint of trade between the Herald, Milne, and Kroner.<sup>29</sup> After trial, the jury found for the defendants. The plaintiff moved for judgment notwithstanding the verdict on the ground that the undisputed facts showed an illegal combination to fix resale prices under the doctrine of *United States v. Parke, Davis & Company*.<sup>30</sup> The motion was denied.<sup>31</sup> On appeal, the Eighth Circuit affirmed,<sup>32</sup> holding that the Herald's actions were wholly unilateral and that there was no restraint of trade.<sup>33</sup>

The Supreme Court, with Justices Harlan and Stewart dissenting, reversed in an opinion by Mr. Justice White. In his view, "[T]here can be no doubt that a combination arose between respondent, Milne [the solicitation agent], and Kroner [the new dealer] to force petitioner to conform to the advertised retail prices."<sup>34</sup> The opinion goes on to explain that both Milne and Kroner must have been aware that their efforts were being utilized by the Herald to compel the plaintiff to lower his prices.<sup>35</sup> Accordingly, a concert of action among them and the Herald to bring Albrecht to his knees could be implied as a matter of fact and, indeed, must be implied as a matter of law.<sup>36</sup>

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29. *Id.* at 148.

30. 362 U.S. 29 (1960).

31. *See* 390 U.S. at 146.

32. *Albrecht v. Herald Co.*, 367 F.2d 517 (8th Cir. 1966).

33. "Combination is usually defined as the union or association of two or more persons for the attainment of some common end. *Globe-Democrat* did not combine with anyone. Its action taken to provide competition to plaintiff was completely unilateral." *Id.* at 523 (citation omitted).

34. 390 U.S. at 149. Justice Douglas filed a separate concurrence.

35. "Milne's purpose was undoubtedly to earn its fee, but it was aware that the aim of the solicitation campaign was to force petitioner to lower his price. Kroner knew that respondent was giving him the customer list as part of a program to get petitioner to conform to advertised prices, and he knew that he might have to return the customers if petitioner ultimately complied with respondent's demands. He undertook to deliver papers at the suggested price and materially aided in the accomplishment of respondent's plan." *Id.* at 150.

36. *Id.*

Such a holding, bizarre though it may be on the facts, does no violence to basic antitrust principles. The ingredients of a conspiracy or combination are present when several persons act with a common purpose to impose an improper restraint upon another. The rub here is in finding a concert of action, particularly in the face of a contrary jury verdict. Certainly reasonable men could find that the solicitation agent and the new carrier did nothing more than to pursue their own independent business interests and did not act jointly with the Herald to injure Albrecht. Even if the proofs were sufficient to support an inference of concerted action, that conclusion was neither inevitable nor inexorable. Yet the Court apparently holds that these facts required the direction of a verdict for the plaintiff and could not be submitted to the jury.

However, Justice White was not content to predicate reversal on a disagreement with the jury's finding. In a significant footnote he states that, "Under *Parke, Davis* petitioner could have claimed a combination between respondent and himself, at least as of the day he unwillingly complied with respondent's advertised price. Likewise, he might successfully have claimed that respondent had combined with other carriers because the firmly enforced price policy applied to all carriers, most of whom acquiesced in it."<sup>37</sup> And in the next paragraph Justice White goes on to inform us that a claim of combination between the Herald and Albrecht's customers "was not . . . a frivolous contention."<sup>38</sup> It is these new twists of the combination concept that merit close and careful analysis, especially since they are echoed in *Perma Life*, where the Court states: "In any event each petitioner can clearly charge a combination between Midas and himself, as of the day he unwillingly complied with the restrictive franchise agreements . . . or between Midas and other franchise dealers, whose acquiescence in Midas' firmly enforced restraints was induced by 'the communicated danger of termination.'"<sup>39</sup>

A conspiracy, as the Court has repeatedly held, presupposes an agreement among the conspirators.<sup>40</sup> To combine is to conspire and there can be no combination or conspiracy without joint action. Action is joint only if it is the product of an underlying agreement or understanding, however attenuated may be the circumstantial evidence from which such agreement or understanding is inferred.

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37. *Id.* at 150 n.6. The opinion notes, however, that "[t]hese additional claims . . . appear to have been abandoned by petitioner when he amended his complaint in the trial court." *Id.*

38. *Id.*

39. 392 U.S. at 142.

40. *E.g.*, *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951).



Prior to *Parke, Davis*,<sup>41</sup> it had never been intimated, either at common law or under the statute, that there could be a contract, combination, or conspiracy without some consensual feature or element.<sup>42</sup> If Justice White is using combination in its traditional sense and not as a conclusory epithet, his approach, as Justice Harlan points out in a characteristically acute dissent, is "beset with pitfalls."<sup>43</sup>

To suggest that the Herald combined with the other dealers who observed the maximum price ceiling is to infer a vertical price agreement from a seller's announcement of his price policy followed by customer adherence—the very thing the Court specifically refused to do as recently as its *Parke, Davis* decision.<sup>44</sup> To go further and to hold that such a "combination" imposed a restraint of trade on Albrecht does violence to the facts as well as the law.<sup>45</sup> Justice White refrains from informing us what the common purpose of such a concert of action would have been. Certainly the other dealers, each of whom had an exclusive territory, had no interest in whether or not Albrecht was mulcting his own customers.<sup>46</sup> The record is barren of

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41. *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960).

42. "A combination is the union or association of two or more persons or parties for the attainment of some common end.

"The union or association of two or more persons or things, by set purpose or agreement, in order to effect some object by joint operation; as a combination of capital or of labor. It is declared, however, that 'combination is a word not yet possessed of an accurate legal meaning; its place in criminal law is, I believe, no older than this statute, of itself it means no more than cooperation—a union of effort.'" J. JOYCE, *MONOPOLIES AND UNLAWFUL COMBINATIONS* § 1 (1911).

"... I'm frank to say that I'm a little puzzled as to precisely what the Supreme Court has meant, both in the *Parke, Davis* case and in the more recent *Albrecht* case, when it says that the word combination is something different from conspiracy or contract and that, therefore, there's something that is neither a contract nor a conspiracy but can be a combination which will bring it within the scope of Section 1. The thing that I don't think the Court has made clear is whether they really mean, by saying that, that combination is something in which there is no element of consensuality at all, either tacit or expressed, that it's just a couple of people who happen in some way to work at some point in each other's mutual interest. So, it's very hard for me to answer because I don't know yet—and I would be surprised if anybody did—whether the Court is really reading any element of agreement out of the word combination or not. I do not read it that way. As I read those cases and the way the Court has used the word combination and in both those cases in sort of juxtaposition to the *Colgate* problem, I look at it still as covering only those situations in which it may be said: Here are two people mutually aware of what one or the other wants to do, and there is at least some acquiescence of cooperation of some kind. I'm just guessing but that's the way I would read it so far." An interview with the Honorable Donald F. Turner, 37 *ANTITRUST L.J.* 290, 300-01 (1968).

43. 390 U.S. at 160.

44. 362 U.S. at 42-43.

45. See 390 U.S. at 161 (Harlan, J., dissenting opinion).

46. "Hence the result of the Court's theory here would be to make what was done to this petitioner illegal because of the coincidental existence of unrelated similar agreements, and to

any indication that Albrecht's higher price could possibly affect them adversely. If we assume that each complying carrier was a participant in an unlawful vertical price agreement with the Herald, by what process of alchemy is the network of separate vertical contracts converted into a horizontal combination aimed at harming Albrecht, who is suing not as the Attorney General or as a vicarious avenger of a public wrong, but for injury to his own business and property? Under the Court's theory, all of the victims of unlawful vertical restraints are in effect members of the same combination and thus can sue each of the other victims for the damages resulting from the restriction on their own economic freedom. This is an antitrust wonderland with a vengeance.

The Court's other theory, that when Albrecht was coerced into compliance with the maximum price he joined the combination with his oppressor to impose the restraint upon himself, presents even greater difficulty, particularly since the damages Albrecht sought flowed primarily not from his acquiescence but from the termination of his dealership.<sup>47</sup> It is one thing to find a contract in restraint of trade in these circumstances but quite another to say that there is a combination directed against one of the contracting parties.

The acme of absurdity is reached when the Court intimates that the Herald unlawfully combined with Albrecht's customers to restrain Albrecht's trade with them and that they, together with the newspaper, are guilty of an antitrust infraction. Words have lost their meaning if we say that a customer in accepting a lower price from the manufacturer is combining with him against the gouging dealer.<sup>48</sup> By

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base petitioner's right to recover upon activities that are altogether irrelevant to whatever harm he has suffered." *Id.*

47. "Obviously it makes no sense to deny recovery to a pressured retailer who resists temptation to the last and grant it to one who momentarily yields but is restored to virtue by the vision of treble damages. It is not the momentary acquiescence but the punishment for refusing to acquiesce that does the damage on which recovery is based." *Id.* at 162.

48. It might be argued that the Court's suggestion of a combination between the defendant and Albrecht's customers stemmed from a quite different theory. The Court cites three cases: *F.T.C. v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922); *Girardi v. Gates Rubber Co. Sales Div.*, 325 F.2d 196 (9th Cir. 1963); *Graham v. Triangle Publications, Inc.*, 233 F. Supp. 825 (E.D. Pa. 1964), *aff'd per curiam*, 344 F.2d 775 (3d Cir. 1965). Each of these cases involved customers who had reported price cutters to the manufacturer, and only in *Graham* were these customers not themselves part of the manufacturer's chain of distribution. In *Graham*, as in *Albrecht*, the newspaper acted after it had received a number of complaints from customers. *Compare* *Graham v. Triangle Publications, Inc.*, 233 F. Supp. at 828, with Petitioner's Brief for Certiorari at 5, *Albrecht v. Herald Co.*, 390 U.S. 145 (1968). To say that a customer combines with a manufacturer when he reports a price booster to the manufacturer may be different from saying that the customer combines merely by accepting the manufacturer's lower price when offered.

a parity of reasoning, every buyer by the mere act of purchasing is combining with the seller against the latter's competitors.

The fact that these concepts of combination and conspiracy are new is no reason why they should not be adopted. It is equally true, however, that their novelty in itself provides no title deed to acceptance. Change is desirable when it serves some useful social purpose. It is pertinent, therefore, to ask how these new principles promote our antitrust goals.<sup>49</sup> To the extent that the conduct condemned in both cases constitutes a contract in restraint of trade, there manifestly was no occasion to create new theories of antitrust liability. Putting contract aside, why should the Court indulge in the fiction that individual action is the product of a combination or conspiracy when in fact there is no joint action of any kind?

It may be that the conspiracy models developed at common law and under the statute are inadequate to cope with some of the more sophisticated methods of throttling competition in the present world. As the statute now stands, the only unilateral conduct it reaches is monopolization and the attempt to monopolize. Section 1 does not presently forbid restraints of trade as such. Perhaps some individual practices, while not rising to the level of an attempt to monopolize, are sufficiently antisocial, as a matter of policy, to warrant condemnation.<sup>50</sup> If the coverage of the law is inadequate, is not the proper procedure in a democracy for it to be amended?<sup>51</sup> I am far from certain that this should be done. No persuasive case in my opinion has been made for the change.<sup>52</sup> Be that as it may, what I find intolerable is amendment in the guise of construction which transforms the meaning of words and has them say, as in Alice's world, what the speaker wants them to say.<sup>53</sup> This only compounds

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49. Compare the conflicting characterizations of antitrust goals in *Standard Oil Co. v. United States*, 337 U.S. 293, 315 (1949) (dissenting opinion of Justice Douglas) (protection of small businessmen is a goal of antitrust law), with *United States v. Von's Grocery Co.*, 384 U.S. 270, 281 (1965) (dissenting opinion of Justice Stewart) (main goal of antitrust law is efficient allocation of resources through competition).

50. See Willis and Pitofsky, *Antitrust Consequences of Using Corporate Subsidiaries*, 43 N.Y.U.L. Rev. 20 (1968).

51. An instructive precedent is found in the Wheeler-Lea amendment to the Federal Trade Commission Act, 52 Stat. 111 (1938), amending 38 Stat. 717 (1914), (now 15 U.S.C. §§ 14 44-45, 52-58 (1964)). The statute was passed to remedy the Court's restrictive interpretation of § 5 of the Act in *FTC v. Raladam Co.*, 283 U.S. 643 (1931). Interestingly, the amendatory law prohibits individual acts and practices.

52. See Handler, *Annual Review of Antitrust Developments*, 15 RECORD OF N.Y.C.B.A. 362, 363 (1960).

53. " 'When I use a word,' Humpty Dumpty said in a rather scornful tone, 'it means just what I choose it to mean—neither more nor less.' 'The question is,' said Alice, 'whether you *can* make words mean so many different things.' 'The question is,' said Humpty Dumpty, 'which is

the confusion that already exists in antitrust. I am at a loss to understand how one subject to the statute can comply with its requirements if it is not enough to abstain from contracts, combinations, or conspiracies in restraint of trade.

## II

### RULE OF REASON

There has not been a year since these Annual Reviews were inaugurated that I have not asked myself whether the rule of reason continues to play any significant role in current antitrust adjudication.<sup>54</sup> I suppose it is no more irreverent to question whether the rule is still alive than to inquire whether God is dead. As always, the opinions of the experts conflict. Justice Stewart, dissenting in *Albrecht*, intimates that the *Standard Oil Company of New Jersey v. United States* rule of reason has been eviscerated.<sup>55</sup> Justice Douglas, on the other hand, concurring in the same case, quotes once more Brandeis' celebrated recapitulation of the rule in *Chicago Board of Trade v. United States*—not, I might add, in the spirit of an antiquarian, but as an expositor of living doctrine.<sup>56</sup> Notwithstanding *United States v. Arnold, Schwinn and Company*,<sup>57</sup> in which he concurred, Justice Douglas adheres to his *White Motor Company v. United States*<sup>58</sup> analysis and asserts that the legality of exclusive territorial franchises in the newspaper distribution business would have to be tried as a factual issue and would depend on their actual impact on competition.<sup>59</sup>

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to be master—that's all.' " L. CARROLL, *THROUGH THE LOOKING GLASS* 106 (Peter Pauper ed. 1967).

54. E.g., Handler, *Twentieth Annual Antitrust Review*, 53 VA. L. REV. 1667, 1680-89 (1967); Handler, *Some Misadventures in Antitrust Policymaking—Nineteenth Annual Review*, 76 YALE L.J. 92, 123-25 (1966).

55. See Justice Stewart's comment on *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911), in his dissenting opinion in *Albrecht v. Herald Co.*, 390 U.S. 145, 170 (1968).

56. See Justice Douglas' discussion of *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918), in his concurring opinion in *Albrecht v. Herald Co.*, 390 U.S. at 155 n.\*.

57. 388 U.S. 365 (1967).

58. 372 U.S. 253 (1963).

59. It may be that Justice Douglas is drawing a distinction between territorial restraints on the buyer and exclusive franchises restricting the seller. It is noteworthy that he apparently would subject seller restrictions to a more stringent rule of reason than that applied in *Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F.2d 418 (D.C. Cir. 1957), *cert. denied*, 355 U.S. 822 (1957) or under the common law. See Handler, *Recent Antitrust Developments*, 13 RECORD OF N.Y.C.B.A. 417, 433 (1958). See also Handler, *Annual Antitrust Review*, 11 RECORD OF N.Y.C.B.A. 367, 368-70 (1956); Robinson, *Restraints on Trade and the Orderly Marketing of Goods*, 45 CORNELL L.Q. 254, 255 (1960). *Schwinn* itself approved of exclusive selling agreements. See Handler, *Twentieth Annual Antitrust Review*, 53 VA. L. REV. 1667, 1688 (1967).

Interestingly, while Justice Douglas catalogs *Albrecht* as a rule of reason case,<sup>60</sup> one can read the Court's opinion right side up, upside down, left to right, or right to left, without finding any rule of reason inquiry or any factual analysis of the effect of the assailed conduct on competition at any level in the newspaper business. For the Court, it is enough that the price ceiling imposed by the Herald crippled the freedom of the carriers and prevented them from selling in accordance with their own judgment.

I believe it is important to note that the Court goes beyond a pure per se approach. As in *United Mine Workers v. Pennington*<sup>61</sup> and *Federal Trade Commission v. Brown Shoe Company*,<sup>62</sup> the test of legality is not so much whether there was technically an unreasonable restraint of trade as whether the complainant, by entering into a contract or as a result of a putative combination, has surrendered his economic freedom or has had it impaired by the acts of others. I have no conceptual difficulty in equating the loss of economic freedom through the conspiratorial acts of third parties with a restraint of trade. I have, however, serious difficulty in denominating as a restraint any contractual obligation by which the economic freedom of the contracting parties "to act according to their own choice and discretion"<sup>63</sup> is affected. Everyone who enters into a contract of necessity gives up some of his freedom as the consideration for the promise or performance of the other party. There is no room in this new theory of antitrust liability for any rule of reason, just as there is no place for the standard of reason when a territorial restriction on a buyer is condemned as a restraint on alienation.<sup>64</sup> Manifestly, if the controlling criterion is the impairment of the freedom of a contracting party, the impact of the arrangement on competition becomes irrelevant. Seemingly, it makes no difference whether competition is reduced or increased, weakened or strengthened, or indeed whether there is any resulting ripple in competitive waters.

I find it hard to conceive of a stronger case for the application of the rule of reason than *Albrecht*, taking the case on its own facts

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60. 390 U.S. at 154.

61. 381 U.S. 657, 668 (1965). See Handler, *Recent Antitrust Developments 1965*, 40 N.Y.U.L. REV. 823, 834 (1965).

62. 384 U.S. 316, 321 (1966). See Handler, *Some Misadventures in Antitrust Policymaking—Nineteenth Annual Review*, 76 YALE L.J. 92, 93-95 (1966).

63. *United Mine Workers v. Pennington*, 381 U.S. 657, 668 (1965).

64. *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967). *Schwinn* adopts its restraint of alienation doctrine as an absolute and not as a prohibition only of unreasonable restrictions on alienation. See Handler, *Twentieth Annual Antitrust Review*, 53 VA. L. REV. 1667, 1683-84 (1967).

rather than the facts of cases not before the Court. Each carrier was the sole distributor of the Herald newspapers within his defined territory. He was not faced with any competing dealers handling the same paper. Any member of the public in Albrecht's territory who wanted the paper delivered to his home either dealt with Albrecht or obtained no delivery. What the Herald did was to prevent Albrecht from gouging his customers. Its policy was not to cut off the recalcitrant dealer. Rather it competed with him by delivering its paper directly to the public. This was done through agents, independent contractors, and by the creation of a new route to be handled by another carrier.

Instead of considering whether the maximum price restriction adversely affected competition in the case at bar, the Court parades a variety of situations in which maximum price-fixing could have a devalizing effect.<sup>65</sup> But as Justice Harlan points out in his cogent dissent: "The question in this case is not whether dictation of maximum prices is *ever* illegal but whether it is *always* illegal."<sup>66</sup>

The Court rejects the ground on which the court of appeals found no antitrust violation. That court reasoned "that since respondent granted exclusive territories, a price ceiling was necessary to protect the public from price gouging by dealers who had monopoly power in their own territories."<sup>67</sup> Justice White replies: "The assertion that illegal price-fixing is justified because it blunts the pernicious consequences of another distribution practice is unpersuasive. If, as the Court of Appeals said, the economic impact of territorial exclusivity was such that the public could be protected only by otherwise illegal price-fixing, itself injurious to the public, the entire scheme may fall under Section 1 of the Sherman Act."<sup>68</sup> Again, I find

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65. "[S]chemes to fix maximum prices, by substituting the perhaps erroneous judgment of a seller for the forces of the competitive market, may severely intrude upon the ability of buyers to compete and survive in that market. Competition, even in a single product, is not cast in a single mold. Maximum prices may be fixed too low for the dealer to furnish services essential to the value which goods have for the consumer or to furnish services and conveniences which consumers desire and for which they are willing to pay. Maximum price fixing may channel distribution through a few large or specifically advantaged dealers who otherwise would be subject to significant nonprice competition. Moreover, if the actual price charged under a maximum price scheme is nearly always the fixed maximum price, which is increasingly likely as the maximum price approaches the actual cost of the dealer, the scheme tends to acquire all the attributes of an arrangement fixing minimum prices. It is our view, therefore, that the combination formed by the respondent in this case to force petitioner to maintain specified prices for the resale of the newspapers which he had purchased from respondent constituted, without more, an illegal restraint of trade under § 1 of the Sherman Act." 390 U.S. at 152-53.

66. 390 U.S. at 165.

67. *Id.* at 153.

68. *Id.* at 154.

Justice Stewart's response unanswerable. "I fail to understand," writes the Justice, "how the illegality of the petitioner's exclusive territory could conceivably help his case. The petitioner enjoyed the benefits of his exclusive territory subject to the condition that he keep his price below a stated maximum. When he did charge more, the respondent took steps to force the petitioner's price down by introducing competition into his territory. If it was illegal in the first place for the petitioner to enjoy a *conditional monopoly*, I am at a loss to understand how the respondent can be liable to the petitioner for not permitting him a *complete monopoly*."<sup>69</sup>

I must confess that I am unable to comprehend why, if it is in the public interest for the executive branch of the government to combat inflation by entreaty and pressure on business to hold the price line, it should be unreasonable per se for a seller to set a maximum resale price at a level which provides the dealer with adequate profit and is no lower than that which would be set by the market in the absence of the dealer's monopoly position. I should have thought that one of the purposes of the antitrust laws was to protect the ultimate consumer from being overcharged and that a seller who acts unilaterally, without conspiracy or combination with others, would be permitted to combat monopoly pricing by agreement or refusal to deal.<sup>70</sup> What the Herald did, in my view, was "an ease to the people."<sup>71</sup> This is not to say that it is irrelevant to consider whether the freedom of traders was crippled or that we should swing from one extreme to another and uphold maximum price-fixing under any or all circumstances. Nevertheless, there are circumstances where a contract between a seller and a buyer setting maximum resale prices can be justified, because, in the classic words of Justice Brandeis, the true test of illegality is not whether an agreement restricts the economic freedom of the parties but "whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."<sup>72</sup> That is the question that must be faced in every case, and yet it is the question which *Albrecht* fails to consider.

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69. *Id.* at 169-70 (dissenting opinion).

70. See Handler, *Annual Review of Antitrust Developments*, 15 RECORD OF N.Y.C.B.A. 362, 363-71 (1960).

71. The Schoolmaster Case, Y.B. 11 Hen. IV, f. 47, pl. 21 (Common Pleas Hilary Term, 1410), reprinted in M. HANDLER, CASES AND MATERIALS ON TRADE REGULATION 143 (4th ed. 1967).

72. *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918).

## III

## IN PARI DELICTO

Even though the ultimate doctrinal importance of *Perma Life Mufflers* may well rest on its reaffirmation of the intraenterprise conspiracy doctrine, the various opinions focused their attention principally on quite a different question—the availability of the *in pari delicto* defense in treble-damage litigation. The issue before the Court was whether the voluntary acceptance of their franchise agreements barred the Midas franchisees from recovering for the injury resulting from the exclusive dealing, tie-in, territorial restriction, and resale price maintenance provisions of the contracts. In a statement as broad and absolute as any to be found in the United States Reports, Mr. Justice Black, speaking for himself and four other Justices, holds that, “[T]he doctrine of *in pari delicto*, with its complex scope, concepts, and effects is not to be recognized as a defense to an antitrust action.”<sup>73</sup> If this unqualified language is to be taken at face value, any participant in an unlawful contract, combination, or conspiracy can sue his partners in crime whatever the nature of their joint conduct or the surrounding circumstances. Such a result would not only mark a sharp departure from the prior law,<sup>74</sup> but might well spur an avalanche of private antitrust actions before which even the massive electrical equipment litigations would pale.

The law has long recognized a clear distinction between two types of unlawful behavior on the part of an antitrust plaintiff. On the one hand stands the situation in which the plaintiff, though victimized by the defendant's illegal conduct, has himself violated the antitrust laws in an unrelated manner—the so-called unclean hands doctrine developed by courts of conscience.<sup>75</sup> The classic example is to be found in *Kiefer-Stewart*.<sup>76</sup> There, the defendants, faced with a charge of price-fixing at the manufacturers' level, asserted in defense that the plaintiff could hardly be permitted to recover for their infraction since he, too, was guilty of price-fixing at the wholesaler level. Proverbially speaking, the defendants claimed that a black pot could not be permitted to sue a black kettle. The fortuitous circumstance that the plaintiff may be guilty of an antitrust violation extrinsic to the defendants' conduct complained of is no reason to deny recovery, as

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73. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 140 (1968).

74. See generally Note, *In Pari Delicto and Consent as Defenses in Private Antitrust Suits*, 78 HARV. L. REV. 1241 (1965).

75. See 2 N.J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE §§ 397-98 (5th ed. 1941).

76. *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951).



the Court properly held. The proper course is for both wrongdoers to be punished, not for both to escape unchastened. As Justice Harlan pithily puts it, "Our law frowns on vigilante justice."<sup>77</sup> Ever since *Kiefer-Stewart* the courts have almost universally held that unclean hands—independent illegality on the part of the plaintiff—is not a defense to an antitrust action.<sup>78</sup>

The other polar situation in which the traditional *in pari delicto* doctrine has been applied is concerned with the case, for example, where two sellers unlawfully conspire to divide the market between them and one claims that, absent the agreement, he would have obtained a greater share of the business and thus was injured. To permit such suit would only encourage illegal agreements since, if they turn out to be profitable, the participants would adhere to them, while, if the results are not as anticipated, the disgruntled conspirator would go to court.<sup>79</sup> Public policy requires that the *in pari delicto* defense be applied to deny recovery to one who made an improvident illegal bargain. The Court, writes Justice Harlan, "should decline to sanction a kind of antitrust enforcement that rests upon a principle of well-compensated dishonor among thieves."<sup>80</sup>

There are, however, intermediate situations which are less clear. Take the case where the plaintiff and the defendant are parties to a contract containing unlawful restrictions. Suppose the defendant—such as a franchisor—possesses monopoly power and drafts a totally one-sided agreement which the plaintiff is compelled to accept. Or suppose the defendant-seller, although not a monopolist, presents the plaintiff-buyer with an agreement on a take-it-or-leave-it

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77. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 154 (1968) (concurring opinion).

78. *See, e.g., Trebuhs Realty Co. v. News Syndicate Co.*, 107 F. Supp. 595 (S.D.N.Y. 1952).

79. "... I cannot agree that the public interest requires that a plaintiff who has actively sought to bring about illegal restraints on competition for his own benefit be permitted to demand redress—in the form of treble damages—from a partner who is no more responsible for the existence of the illegality than the plaintiff.

"The possible added deterrence to violations of the antitrust laws that would be produced by the Court's holding may well be equaled, if not surpassed, by the new incentive it will create to commit such violations, for a potential violator will have less to lose if he can attempt to recover his losses from his partner should the scheme not work out to his benefit." *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 151 (1968) (concurring opinion of Justice Marshall).

"When a person suffers losses as a result of activities the law forbade *him* to engage in, I see no reason why the law should award him treble damages from his fellow offenders. It seems to me a bizarre way to 'further the overriding public policy in favor of competition' [citing majority opinion] to pay violators three times their losses in doing what public policy seeks to deter them from doing." *Id.* at 154 (concurring and dissenting opinion of Justice Harlan).

80. *Id.* at 154 (concurring and dissenting opinion of Justice Harlan).

basis. If the plaintiff wants to do business, it must be on these terms. Coercion, in a meaningful economic or legal sense, may not be present, but it would nonetheless be unfair to saddle the plaintiff with responsibility for such an agreement and bar him from any redress if its provisions are unlawful and cause him damage. Neither coercion nor consent should, without more, stand in the way of the maintenance of a private antitrust suit.

There is yet another possibility. The contract between the parties may have emerged from hard bargaining in which one set of restrictions was traded off for another. In such a case, it is at least arguably unfair to permit one party who becomes disenchanted with his bargain to charge the other with antitrust illegality.

It is plain that each of these situations raises different issues, and that a black-letter expulsion of *in pari delicto* from our antitrust jurisprudence cannot possibly suffice to do justice in all cases. The Black opinion is most revealing of the Justice's juristic philosophy and methodology. He writes:

The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition. A more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement. And permitting the plaintiff to recover a windfall gain does not encourage continued violations by those in his position since they remain fully subject to civil and criminal penalties for their own illegal conduct."<sup>81</sup>

As in *Sears, Roebuck & Company v. Stiffel Company*<sup>82</sup> and *Compco Corporation v. Day-Brite Lighting, Incorporated*,<sup>83</sup> the interest in competition is placed above business morality in the Justice's scale of social values. He makes no attempt to balance one against the other and thereby achieve a compromise which accords due weight to both of these competing considerations. To him it is all or nothing.

For years most other members of the Court, in case after case, have gone along with Justice Black and given their approval to his absolutist views. But in *Perma Life* they were apparently unwilling to do so. To them, a court should have "a fastidious regard for the moral worth of the parties."<sup>84</sup> They are not prepared to sanction a

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81. *Id.* at 139 (opinion of the Court).

82. 376 U.S. 225 (1964).

83. *Id.* at 234.

84. 392 U.S. at 154 (concurring and dissenting opinion of Justice Harlan).

"windfall gain"<sup>85</sup> to the plaintiff or to flood the already overburdened courts with reciprocal civil actions addressed to the plaintiff's wrongdoing.<sup>86</sup> Only three other Justices were totally satisfied with his opinion.<sup>87</sup> Each of the separate opinions goes to great lengths to deal with the variety of fact situations I have outlined and to demonstrate that, at least in certain circumstances, a plaintiff who is equally responsible for an unlawful agreement ought not be permitted to sue.<sup>88</sup>

Justice Marshall, like the other concurring Justices, would permit recovery where there is coercion, duress, a disparity of bargaining power, or indeed in any situation in which the plaintiff has no alternative but to accept the restriction in question. But he would disallow suit not only when there is direct participation in the wrongdoing but also when one set of restrictions has been "traded off" for another.<sup>89</sup> Such a rationale would properly weigh the need for effective private antitrust enforcement against the equally important need for discouraging unnecessary and inherently pointless litigation between business entities dissatisfied with the contracts they have voluntarily entered into.

Perhaps even more noteworthy than the Court's refusal to accept Justice Black's absolute language is the fact that the Black opinion itself does not, upon examination, appear to go as far as its one-sentence holding would indicate. Justice Black commences his discussion by stating that, "[A]lthough *in pari delicto* literally means

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85. *Id.* at 139 (opinion of the Court).

86. Justice Black states that plaintiffs who have themselves violated the law "remain fully subject to civil and criminal penalties for their own illegal conduct." *Id.* He goes on to suggest that the "possible beneficial by products of a restriction from a plaintiff's point of view can of course be taken into consideration in computing damages. . . ." *Id.* at 140. Justice Marshall's reply to this suggestion is that "such an offset approach . . . hardly seems an adequate means of preventing unjust enrichment," because it disregards the plaintiff's participation in the scheme and adds an unnecessary element of speculation to an already speculative factual inquiry. *Id.* at 152.

87. Justice Black wrote for himself, the Chief Justice, and Justices Douglas and Brennan.

88. The four separate opinions appear to take much the same view although their verbalizations differ. Justice White, viewing the question as essentially a problem of proximate causation, would deny recovery "where plaintiff and defendant bear substantially equal responsibility for injury resulting to one of them but permit recovery in favor of the one less responsible where one is more responsible than the other." 392 U.S. at 146. Justice Fortas formulation is similar. "If the fault of the parties is reasonably within the same scale—if the '*delicto*' is approximately '*pari*'—then the doctrine should bar recovery." *Id.* at 147. And he would make a separate inquiry with respect to each illegal restriction. *Id.* at 148. Justice Marshall "would hold that where a defendant in a private antitrust suit can show that the plaintiff actively participated in the formation and implementation of an illegal scheme, and is substantially equally at fault, the plaintiff should be barred from imposing liability on the defendant." *Id.* at 149. Justices Harlan and Stewart would permit the defense when the plaintiff is "substantially as much responsible, and as much legally liable" as the defendant. *Id.* at 156.

89. *Id.* at 150.

'of equal fault,' the doctrine has been applied, correctly or incorrectly, in a wide variety of situations in which a plaintiff seeking damages or equitable relief is himself involved in some of the same sort of wrongdoing."<sup>90</sup> Noting that antitrust policy requires that the threat of a damage action be ever-present "to deter anyone contemplating business behavior in violation of the antitrust laws,"<sup>91</sup> the opinion goes on to state that recovery should not be denied "merely because [the plaintiffs] have participated to the extent of utilizing illegal arrangements formulated and carried out by others."<sup>92</sup> Moreover, the opinion continues, the franchisees' participation "was not voluntary in any meaningful sense" because, although they enthusiastically sought the franchises as a whole, they "did not actively seek each and every clause,"<sup>93</sup> some of which were detrimental to their interests and were continuously objected to. Even though some of the other restraints may have been affirmatively sought by the franchisees, "[T]hey cannot be blamed for seeking to minimize the disadvantages of the agreement once they had been forced to accept its more onerous terms as a condition of doing business."<sup>94</sup> He likewise notes that, "[T]he plaintiff did not aggressively support and further the monopolistic scheme" of the defendants.<sup>95</sup>

In light of the opinion's stress on the fact that many of the challenged restraints were contrary to the plaintiffs' interests, and the finding that the dealers had been "forced" to accept these terms as a condition of doing business, it may be that Justice Black would not bar the defense when confronted with a different state of facts. In other words, he might not be averse to drawing the various distinctions advocated by the concurring justices. This language seems to indicate that even Justice Black may not be convinced by his own absolute affirmation. If that be so, we would be warranted in treating his broad statement of the rule as mere dictum and the opinion itself as at least a partial retreat from an absolutism which serves only to rigidify antitrust law without providing a just solution to its many perplexities.

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90. *Id.* at 138.

91. *Id.* at 139.

92. *Id.*

93. *Id.*

94. *Id.* at 140.

95. *Id.*

## IV

## LAW BY PRESUMPTION

In discussing *FTC v. Procter & Company*<sup>96</sup> last year, I adverted to the Court's predilection for resolving antitrust problems by economic theory and assumption rather than by proof. This tendency was underscored during the 1967 Term in two unrelated yet perhaps most significant developments—a little noted per curiam decision in *Burke v. Ford*<sup>97</sup> and the brief filed by the Government in its second appeal in *United States v. Penn-Olin Chemical Company*.<sup>98</sup>

*Burke v. Ford* was a private action brought by a group of Oklahoma liquor retailers seeking to enjoin an alleged antitrust infraction by the defendant wholesalers. The complaint charged the defendants with a market-sharing agreement under which the state was divided by territories and by brands, with each wholesaler restricted to specific brands for resale to retailers in specified areas.

The district judge, sitting without a jury, found after trial that the alleged division of markets had been proved.<sup>99</sup> However, he ruled for the defendants on the ground, *inter alia*, that the jurisdictional element of interstate commerce—that the restraint was either *in* commerce or *affected* commerce—had not been established.<sup>100</sup> The Tenth Circuit affirmed.<sup>101</sup> The plaintiffs thereupon sought certiorari, relying in their petition primarily on the argument that the alleged conspiracy was *in* commerce.<sup>102</sup> The brief in opposition was also directed primarily to that question.<sup>103</sup> Acting on these papers alone, without the benefit of oral argument or full-scale briefs on the merits, a unanimous Supreme Court reversed with a one page per curiam opinion.

The Court accepted arguendo the lower courts' findings that no liquor is distilled in Oklahoma; that the liquor shipped into the state comes to rest and is inventoried in the wholesalers' warehouses; that it

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96. 386 U.S. 568 (1967); Handler, *Twentieth Annual Antitrust Review*, 53 VA. L. REV. 1667, 1668 (1967).

97. 389 U.S. 320 (1967).

98. Brief for the Petitioner, *United States v. Penn-Olin Chemical Co.*, 389 U.S. 308 (1967).

99. *Burke v. Ford*, 246 F. Supp. 403, 404 (N.D. Okla. 1965). See also the Court's oral opinion reported at 1965 Trade Cas. ¶ 71,560, at 81,557-58 (N.D. Okla. 1965).

100. 246 F. Supp. at 404.

101. *Burke v. Ford*, 377 F.2d 901 (10th Cir. 1967).

102. The only mention of the "effect" on commerce in petitioner's papers was a one-sentence reiteration of the Court of Appeals' conclusion that no such effect was shown. Petitioners' Supplemental Brief in Support of Petition for Certiorari at 2.

103. The Brief in Opposition made two oblique references to the affect on commerce issue. See Respondents' Brief in Opposition to Petition for Certiorari at 7, 10.

remains there until purchased by retailers; and that the market division was accordingly not *in* commerce.<sup>104</sup> Nevertheless, it went on to rule that it affected commerce as a matter of law on the following reasoning:

Since horizontal territorial divisions “almost invariably reduce competition among the participants,”<sup>105</sup> prices will increase, thereby reducing unit sales. Thus, the wholesalers’ market division “almost surely resulted in fewer sales to retailers”<sup>106</sup> and “hence fewer purchases from out-of-state distillers.”<sup>107</sup> Moreover, the division of brands necessarily reduced the number of Oklahoma wholesale outlets available to any out-of-state distiller. Thus, the Court concluded, “the state-wide wholesalers’ market division inevitably affected interstate commerce.”<sup>108</sup>

The Court’s disposition is troublesome in several respects. To begin with, its conclusion is premised entirely on a priori reasoning; there was not a shred of evidence in the record to support it. The plaintiffs did not prove that, as a result of the market division, liquor prices in Oklahoma had in fact increased. There was no evidence that unit sales had in fact decreased. Indeed, as the court of appeals pointed out,<sup>109</sup> sales had actually increased during the period of the violation, contrary to the Supreme Court’s assumption. The Supreme Court’s answer was simply that the increase would “presumably” have been even greater absent a violation. Here the Court relies on a rise of personal income in Oklahoma in the year in question proportionately greater than the increase in sales, but there is no showing that liquor sales rise or fall in harmony with changes in income. Nor was there any evidence that any reduction in the number of wholesale outlets available to any distiller necessarily resulted in a smaller amount of liquor purchases from outside the state. There just isn’t any logical relationship between the number of wholesalers and the amount they purchase; a smaller number could just as easily purchase greater quantities as otherwise.

In short, the Court reached its conclusion that the jurisdictional requirements of the statute had been met solely on the basis of a dubious logic. If it had said that all other things being equal a market division would likely result in higher prices and declining sales, its

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104. *Burke v. Ford*, 389 U.S. 320, 321 (1967).

105. *Id.*

106. *Id.* at 322.

107. *Id.*

108. *Id.*

109. 377 F.2d at 907-08.

hypothesis would find support in economic theory. But tendencies are not facts, and theories are not proof. There is no warrant in either theory or experience for assuming that sales inevitably decrease whenever trade is restrained by a combination. It is only by making such an ironclad assumption that the Court is able to dispense with the necessity for proof.

The available published statistics relevant to an assessment of the factual validity of the Court's assumptions are inconclusive. Some figures appear to contradict the Court's conclusions and others to support them.<sup>110</sup> But it is precisely when the proofs are in this posture than an adversary hearing becomes vital. Does it comport with elementary conceptions of due process for the Court to decide a case on the merits without affording the parties an opportunity to be heard, especially when the Court's consistent policy has been to discourage litigants from exploring the merits on certiorari applications?<sup>111</sup> Is it permissible for the decision to rest on assumptions instead of facts when the facts are available and indeed were part of the plaintiffs' burden of proof? Should not the case at the very least have been remanded for a further evidentiary hearing on these controlling issues? It is no answer to say that, had the issue been further litigated, the facts might have supported the Court's conclusion. It is not only important that the Court's decisions be correct but that they be arrived at by methods which are impeccable. The means must be worthy of the end.

The reasoning in the brief filed on behalf of the Government in the second *Penn-Olin* appeal<sup>112</sup> provides another example of the substitution of assumption for proof. Perhaps the contents of the least successful government Supreme Court brief<sup>113</sup> in the history of amended Section 7<sup>114</sup> shouldn't concern us, but we certainly have a deep concern with an approach which could reduce an antitrust trial to a meaningless exercise.

The case concerned the legality of a joint venture between Olin and Pennsalt to produce sodium chlorate in the Southeast. The

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110. See, e.g., INTERNAL REVENUE SERVICE, U.S. TREASURY DEP'T, ALCOHOL AND TOBACCO SUMMARY STATISTICS, FISCAL YEARS 1960, 1963 and 1964, Table 1, at 2; DISTILLED SPIRITS INSTITUTE, ANNUAL STATISTICAL REVIEW OF THE DISTILLED SPIRITS INDUSTRY, 1962-1965, Table 48.

111. See R.L. STERN and E. GROSSMAN, SUPREME COURT PRACTICE 253-57 (3d ed. 1962); *Darr v. Burford*, 339 U.S. 200, 226-28 (1950); *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923).

112. Brief for Petitioner, *United States v. Penn-Olin Chemical Co.*, 389 U.S. 308 (1967).

113. *Penn-Olin* is the first decision of the Supreme Court under amended section 7 not invalidating the challenged acquisition.

114. 15 U.S.C. § 18 (1965).

district court, at the first trial, had proceeded on the premise that unless both companies would have entered the market independently, the joint venture could not have eliminated potential competition between them.<sup>115</sup> This premise was held to be erroneous by the Supreme Court.<sup>116</sup> The Court recognized that if neither company would have entered alone, illegality could not be established, but it went on to rule that if one would have gone in with the other remaining "at the edge of the market continually threatening to enter,"<sup>117</sup> potential competition might have been foreclosed. Accordingly, the case was remanded to the district court for findings on two crucial issues: The existence of potential competition between these companies and, in the event such potential competition was found to have been present, the reasonable likelihood of an adverse competitive effect resulting from the combination. On the first of these questions, the scope of the remand was most explicit. In Justice Clark's words, the lower court was to make a finding "as to the reasonable probability that either one of the corporations would have entered the market by building a plant, while the other would have remained a significant potential competitor."<sup>118</sup> The remand on the second issue was equally plain. If one of the companies indeed would have entered on its own, the district court was to examine all of the relevant facts and determine whether a consequent substantial lessening of competition was likely. In fact, Justice Clark listed 15 separate factors which the lower court was to consider in making this determination.<sup>119</sup>

The district court held a hearing at which the Government chose to rest solely on the record at the first trial and introduced no new evidence.<sup>120</sup> Relying on the testimony and contemporaneous documentary evidence that neither Pennsalt nor Olin actually intended

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115. *United States v. Penn-Olin Chemical Co.*, 217 F. Supp. 110 (D. Del. 1963).

116. 378 U.S. 158 (1964).

117. *Id.* at 173.

118. *Id.* at 175-76.

119. "[1] the number and power of the competitors in the relevant market; [2] the background of their growth; [3] the power of the joint venturers; [4] the relationship of their lines of commerce; [5] the competition existing between them and [6] the power of each in dealing with the competitors of the other; [7] the setting in which the joint venture was created; [8] the reasons and necessities for its existence; [9] the joint venture's line of commerce and [10] the relationship thereof to that of its parents; [11] the adaptability of its line of commerce to noncompetitive practices; [12] the potential power of the joint venture in the relevant market; [13] an appraisal of what the competition in the relevant market would have been if one of the joint venturers had entered it alone instead of through Penn-Olin; [14] the effect, in the event of this occurrence, of the other joint venturer's potential competition; and [15] such other factors as might indicate potential risk to competition in the relevant market." *Id.* at 177.

120. 246 F. Supp. 917, 919 (D. Del. 1965).



to enter the market absent the venture, the court found that, as a matter of reasonable probability, neither would have done so.<sup>121</sup> Having so found, it was unnecessary for the court to decide the second remanded question.

In its brief on appeal the Government challenged the district court's reliance on the record evidence in reaching its conclusion. According to the Antitrust Division, "evidence which shows that [the defendants] expressly rejected the alternative of independent entry—is far less probative than objective economic evidence relating primarily to the co-venturers' capability and incentive to enter the relevant market on their own."<sup>122</sup> And the Solicitor General was candid in admitting that his premise was based solely on assumption. "[I]t is reasonable to assume that management—whatever its disclaimers—will not persist in a cause that is contrary to the objective economic evidence of the company's needs and opportunities."<sup>123</sup> In short, the Government would have the Court presume that business decisions will be made in accordance with the expectations of economic theory. To quote from the brief:

Our fundamental premise . . . is that businessmen by and large act rationally—that is, in accordance with the relevant economic conditions. Thus, we assume that if the facts, viewed objectively, indicate that it is in the best interest of Company A to enter Market X, the company will, in all probability, enter the market, even if company officials initially advise against such a course. If not immediately, then in the foreseeable future, the objective realities of the situation should persuade management to follow the course that will promote the prosperity and growth of their firm.<sup>124</sup>

The Government's position on the other issue on remand, the competitive effect, was that "the elimination of important potential competition in a highly concentrated market meets the standard of adverse competitive effect proscribed by Section 7."<sup>125</sup> In other words, once it is assumed that one or both companies would have entered the market independently, substantial lessening of competition is automatically to be inferred without any consideration of the factors which the Court had held were relevant and should be explored at the new trial.

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121. *Id.* at 928, 934.

122. Brief for United States at 29-30, *United States v. Penn-Olin Chemical Co.*, 389 U.S. 308 (1967).

123. *Id.* at 36.

124. *Id.* at 35.

125. *Id.* at 55.

It is one thing, as the Court did in *Procter & Gamble*, to assume that, given certain economic circumstances, businessmen will act in strict accordance with models formulated by economic theorists. But to take the next step and eliminate any inquiry whatsoever as to whether in fact they have so acted is quite another matter.

If the thrust of the Government's appeal was that the judge's finding was clearly erroneous, its task was to marshal all of the record proofs to establish the trial court's error, and the objective as well as subjective evidence clearly should have been taken into account. No one could quarrel with a contention that the trier of the facts should disbelieve testimony contrary to the witness' economic interests. But I would take exception to an advocacy which purports to sweep aside the facts of record and indulges in economic assumption to buttress a conclusion which the evidence does not support. This is the impression the brief conveys to me. It is, of course, possible that the Government wanted the Court to alter the definition of potential competition adopted in its first opinion.

Per se rules can properly be applied only when the basic jurisdictional and substantive facts have been proved. If jurisdictional facts are assumed when they have not been established; if verdicts are to be directed when unproved combinations are claimed or conspiracies are to be created out of whole cloth by invoking an intra-enterprise concept; if we blindly accept economic theory even when contradicted by the evidence, are we not taking giant strides towards the Wonderland concept of verdict first and trial thereafter? I devoutly hope I am wrong in discerning these trends in the ease law, but I nonetheless deem it my duty to register my protest against a jurisprudence that does not comport with fundamental conceptions of procedural due process.<sup>126</sup>

#### THE PASS-ON DEFENSE

In recent years, one of the burning questions in treble-damage litigation has been whether there can be a recovery by one overcharged as the result of an antitrust violation where the increased costs have been passed on to his customers. Recovery in that situation was upheld this year by the Supreme Court in *Hanover Shoe, Incorporated v. United Shoe Machinery Corporation*.<sup>127</sup> Hanover, a

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126. While I have been critical of the Court's technique in antitrust cases, I want to make clear that I disassociate myself from the current shameful and know-nothing attack upon the Court, whose tremendous contribution to the protection of our basic human rights and civil liberties merits enthusiastic applause and not bitter censure.

127. 392 U.S. 481 (1968).

show manufacturer, sued United, which in an earlier government litigation had been found to have monopolized the market for shoe manufacturing machinery.<sup>128</sup> The action was based upon United's historic refusal to sell its major machines and its pursuit of a lease-only policy.<sup>129</sup> Hanover claimed damages measured by the difference between the rental it actually paid for the leased machinery and the price it would have paid had the machines been available for purchase. The defendant raised the pass-on defense, urging that Hanover had suffered no injury because it recouped the illegal overcharge in the higher prices it charged for shoes; in other words, United argued that if there had been no overcharge and Hanover had paid lower prices for machinery, its shoe prices would have been lower as well, and it would thus have earned no greater profit.<sup>130</sup>

The district court, in a comprehensive opinion by Judge Goodrich,<sup>131</sup> rejected the defense at a preliminary hearing and the Third Circuit affirmed per curiam.<sup>132</sup> After trial on the merits, treble damages were awarded<sup>133</sup> and that judgment was affirmed.<sup>134</sup> In the Supreme Court, Justice White, speaking for seven other Justices,<sup>135</sup> affirmed the rejection of the defense below, stating: "We think it sound to hold that when a buyer shows that the price paid by him for materials purchased for use in his business is illegally high and also shows the amount of the overcharge, he has made out a prima facie case of injury and damage."<sup>136</sup>

Virtually every one of the principles on which Justice White relies in reaching this conclusion may be found in two opinions, written by Justice Holmes in the early years of this century. *Chattanooga Foundry & Pipe Works v. City of Atlanta*,<sup>137</sup> decided in 1906, was a suit by the city of Atlanta for overcharges incurred in the purchase of pipe for the city's waterworks as a result of the price-fixing conspiracy found unlawful in *United States v. Addyston Pipe & Steel Company*.<sup>138</sup> Affirming a judgment for the plaintiff measured by the

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128. *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

129. *See id.* at 323-25.

130. Brief for Petitioner at 61-62, *Hanover Shoe Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968).

131. 185 F. Supp. 826 (M.D. Pa. 1960).

132. 281 F.2d 481 (3d Cir.), *cert. denied*, 364 U.S. 901 (1960).

133. 245 F. Supp. 258 (M.D. Pa. 1965).

134. 377 F.2d 776 (3d Cir. 1967).

135. Justice Stewart dissented on the ground that the district court's opinion did not hold United's lease-only practice to be unlawful. *See* 392 U.S. at 510.

136. *Id.* at 489.

137. 203 U.S. 390 (1906).

138. 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

amount of the overcharge, Justice Holmes held that Atlanta "was injured in its property, at least, if not in its business of furnishing water, by being led to pay more than the worth of the pipe. A person whose property is diminished by a payment of money wrongfully induced," he wrote, "is injured in his property."<sup>139</sup>

Holmes expanded his analysis twelve years later in *Southern Pacific Company v. Darnell-Taenzer Lumber Company*,<sup>140</sup> an action by shippers against a railroad for damages incurred by reason of the exaction of a rate higher than that permitted by the Interstate Commerce Commission. That suit was brought under section 8<sup>141</sup> of the Interstate Commerce Act which, like section 4 of the Clayton Act,<sup>142</sup> provided for the recovery of damages sustained as the result of violation of the statute. The defendant raised a pass-on defense, claiming that the shippers had recovered the full amount of the overcharge in the prices charged their customers. Holmes held that such a pass-on did not defeat recovery, because, "The general tendency of the law, in regard to damages at least, is not to go beyond the first step. . . . The plaintiffs suffered losses to the amount of the verdict when they paid. Their claim accrued at once in the theory of the law and it does not inquire into later events."<sup>143</sup>

Coalescing the *Chattanooga* and *Darnell-Taenzer* holdings, Justice Holmes' rule boiled down to this: The exaction of an illegal overcharge ipso facto injures the purchaser whose costs have been increased, and such inflated costs constitute injury to property within the meaning of the Clayton Act without regard to whether the purchaser's ultimate profits were concomitantly reduced. This reasoning was reaffirmed by the Supreme Court in several later decisions under the Interstate Commerce Act.<sup>144</sup> But later lower court rulings, commencing with the so-called oil jobber cases<sup>145</sup> in the early

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139. 203 U.S. at 396.

140. 245 U.S. 531 (1918).

141. 24 Stat. 382 (1887), as amended 49 U.S.C. § 8 (1964): "In case any common carrier . . . shall do, cause to be done, or permit to be done any act, matter or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained."

142. 15 U.S.C. § 15 (1964): "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee."

143. 245 U.S. at 533-34.

144. *Louisville & N.R.R. v. Sloss-Sheffield Co.*, 261 U.S. 217, 235 (1925); compare *Pennsylvania R.R. v. International Coal Mining Co.*, 230 U.S. 184, 206 (1913), with *Davis v. Portland Seed Co.*, 264 U.S. 403 (1924). See also *Adams v. Mills*, 286 U.S. 397 (1932).

145. E.g., *Northwestern Oil Co. v. Socony-Vacuum Oil Co.*, 138 F.2d 967 (7th Cir. 1943), cert. denied, 321 U.S. 792 (1944); *Twin Ports Oil Co. v. Pure Oil Co.*, 119 F.2d 747 (8th Cir.), cert.

1940's disregarded these principles and applied the pass-on defense by requiring, in effect, that a treble-damage plaintiff establish a loss of profit before he could recover. Each of the courts which have upheld the defense,<sup>146</sup> as well as the many commentators who have approved its rationale,<sup>147</sup> has assumed, despite the contrary authority of *Chattanooga* and *Darnell-Taenzer*, that lost profits alone constitutes the gist of antitrust injury. But such reasoning overlooks the fundamental principle that, in an overcharge case, the tort complained of is the illegal exaction and that the payment of an unlawfully high price can itself be actionable injury within the meaning of the statute.

Another illustration of a form of injury which does not consist of lost profits is found in the case where the value of property is diminished as the result of conspiratorial action to drive a competitor out of business.<sup>148</sup> But while lost profits are not the sole type of injury for which antitrust provides redress, because of the nature of the violation, they frequently represent the only damage that is recoverable. Take the case of the victim of an unlawful price discrimination who sues his seller because a competitor has received a lower price on like goods in violation of the Robinson-Patman Act. There the illegality stems from the difference in price paid by the two purchasers. Since all the law requires of the seller is a parity in pricing, the plaintiff would not be in a position to complain had both he and the favored purchaser paid the higher price, just as he cannot complain if the lower price had been available to him.<sup>149</sup> In other words, plaintiff's injury must stem from the undercharge to his competitor and not the overcharge to him since he was not entitled to the better price. Justice Cardozo, with characteristic clarity, put it this way: "The question is not how much better off the complainant would be today if it had paid a lower rate. The question is how much worse off it is because others have paid less."<sup>150</sup>

A victim of discrimination can show damage only if the favored competitor, by virtue of his lower cost, lowered his price so that the plaintiff either lost sales volume (if he didn't meet the competition) or

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*denied*, 314 U.S. 644 (1941); *Clark Oil Co. v. Phillips Petroleum Co.*, 56 F. Supp. 569 (D. Minn. 1944), *aff'd*, 148 F.2d 580 (8th Cir.), *cert. denied*, 362 U.S. 734 (1945); *Leonard v. Socony-Vacuum Oil Co.*, 138 F.2d 967 (7th Cir. 1943), *cert. denied*, 321 U.S. 792 (1944).

146. See *Wolfe v. National Lead Co.*, 225 F.2d 427 (9th Cir.), *cert. denied*, 350 U.S. 915 (1955); cases cited note 145 *supra*.

147. Perhaps the most incisive formulation of this position is contained in Pollock, *Standing to Sue, Remoteness of Injury, and the Passing-On Doctrine*, 32 A.B.A. ANTITRUST L.J. 5 (1966).

148. See *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931).

149. See, e.g., *Enterprise Indus. Inc. v. Texas Co.*, 240 F.2d 457 (2d Cir.), *cert. denied*, 353 U.S. 965 (1957).

150. *ICC v. United States*, 289 U.S. 385, 390 (1933).

lost profits (if he came down to match the lower resale price).<sup>151</sup> The nature of the violation explains why in the price-discrimination area only lost profits provides a proper damage measure.

Justice White, in *Hanover Shoe*, though quoting at length from the Holmes opinions,<sup>152</sup> goes further and holds that, with the possible exception of cost-plus contracts,<sup>153</sup> buyers who are overcharged necessarily suffer lost profits. Consequently, even if a diminution of profit were a prerequisite to recovery, no pass-on defense should be permitted in overcharge cases. The Court's reasoning derives from the premise that the market in which the purchaser resells is a free one, untainted by illegality. Accordingly, it can be assumed that since he was able to raise his resale price to absorb his higher costs, he could have obtained the higher price just as readily had there been no overcharge at all. Hence, in Justice White's language, "At whatever price the buyer sells, the price he pays the seller remains illegally high, and his profits would be greater were his costs lower."<sup>154</sup> "[T]he fact that he was earlier not enjoying the benefits of the higher [resale] price should not permit the supplier who charges an unlawful price to take those benefits from him without being liable for damages."<sup>155</sup>

This rationale not only provides an alternative ground for permitting the overcharged purchaser to recover regardless of any pass-on, but also essentially disposes of a related problem—that of potential multiple liability for a single overcharge.<sup>156</sup> Assume that a price-fixer overcharges a wholesaler 10 dollars on an article; that the wholesaler's price to his retailer-customer is likewise increased in that amount; and that the retailer in turn raises his price to the consumer by the same 10 dollars. While it is appropriate to require the defendant to make reparation for the unlawful exaction, fairness would dictate that he not be compelled to pay treble damages to each successive link in the chain of distribution. Justice White, by postulating a preovercharge resale market price for the first purchaser equal to the "pass-on" price, has effectively eliminated any possibility

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151. See *Enterprise Indus. Inc. v. Texas Co.*, 240 F.2d 457 (2d Cir.), *cert. denied*, 353 U.S. 965 (1957).

152. 392 U.S. at 490 & n.8.

153. See *id.* at 494.

154. *Id.* at 489.

155. *Id.* at 493 n.9.

156. Judge Feinberg in *Atlantic City Elec. Co. v. General Elec. Co.*, 226 F. Supp. 59 (S.D.N.Y.), *appeal denied*, 337 F.2d 844 (2d Cir. 1964), focused on this problem. "It is not necessary to deal here with the unusual situation in which an antitrust violator may be threatened with multiple liability in a succession of suits (e.g., by immediate purchaser, by the purchaser's customers, etc.)." 226 F. Supp. at 71 n.42. See also *Clark Oil Co. v. Phillips Petroleum Co.*, 148 F.2d 580, 582-83 (8th Cir.), *cert. denied*, 326 U.S. 734 (1945).

of multiple recovery. Stating the rule in terms of proximate causation, the prices paid by anyone else farther down the line are not, as a matter of law, the result of the wrongdoer's illegal exaction but rather of his victim's independent pricing decisions.

In the final analysis, the proper determination of the pass-on issue turns on considerations of policy. Logic alone will not suffice. In light of the marked difficulties of tracing an overcharge through several levels of a distribution network,<sup>157</sup> the impropriety of permitting the wrongdoer to retain the fruits of his wrongdoing,<sup>158</sup> and the unfairness of imposing an infinity of multiple recoveries for a single wrong on a defendant, the Court in *Hanover* chose to vest the right of action in the first purchaser who recovers the full amount of the illegal exaction. In short, the Court today, as did Holmes a half-century ago, rests the decision on practical grounds which will facilitate the administration of the antitrust laws by permitting the most likely suitor to recover damages from the wrongdoer.

## VI

### ROBINSON-PATMAN

In *FTC v. Fred Meyer, Incorporated*,<sup>159</sup> the Supreme Court was faced with the difficult task of applying the infelicitous language of the promotional allowance provisions of the Robinson-Patman Act<sup>160</sup> to the situation where the seller is a dual distributor selling both to retailers and to wholesalers whose customers compete with the direct-buying retailers. The facts of the case were fairly simple. Fred Meyer, Incorporated, which operates a chain of supermarkets in Portland, Oregon, has for a number of years conducted an annual coupon book promotion for which it solicited advertising from its major suppliers. Two of the participating suppliers, Tri-Valley Packing<sup>161</sup> and Idaho Canning, were dual distributors who sold not only to supermarkets such as Meyer but also to wholesalers whose grocery store customers competed with Meyer. While Meyer received 350 dollars in promotional payments from each of these suppliers, their wholesalers received nothing.

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157. See *Atlantic City Elec. Co. v. General Elec. Co.*, 226 F. Supp. 59, 69 (S.D.N.Y.), *appeal denied*, 337 F.2d 844 (2d Cir. 1964).

158. See *id.* at 70.

159. 390 U.S. 341 (1968).

160. 38 Stat. 730 (1914), *as amended*, 15 U.S.C. § 13(d) (1964).

161. Tri-Valley itself was charged with violation of section 2(d) of the Robinson-Patman Act based on the same conduct. *Tri-Valley Packing Ass'n*, 60 F.T.C. 1134 (1962), *rev'd & remanded*, 329 F.2d 694 (9th Cir. 1964), *opinion on remand*, [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,657 (FTC 1966).

Invoking the doctrine of *Grand Union Company v. FTC*,<sup>162</sup> the Federal Trade Commission charged Meyer with having violated section 5 of the Federal Trade Commission Act<sup>163</sup> by inducing the payment of a nonproportional allowance. The Commission found that the statute had been violated.<sup>164</sup> In so holding, the Commission majority concluded that a seller must treat everyone buying from it on proportionally equal terms—wholesalers along with direct-buying retailers. The Commission reasoned that where the wholesalers' customers competed with the direct-buying retailers, it was incumbent on the seller to make allowances available to the wholesalers since they were "customers" who competed in the distribution of the seller's products.<sup>165</sup> In a separate concurrence, Commissioner Elman suggested a different rule. He said that, after all, it was the customers of the wholesalers who were hurt head-on when the suppliers gave allowances to the Fred Meyer supermarkets. Therefore, he would have required any supplier who offered promotional allowances to direct-buying stores to bypass the wholesalers and include their customers in any such plan.<sup>166</sup>

On appeal, the Ninth Circuit reversed.<sup>167</sup> It held that section 2(d) requires a seller who wishes to provide promotional allowances to some of his customers to do so on proportionally equal terms "to all other customers competing in the distribution" of his products, and that the statutory language could not be bent to label wholesalers as competitors of retailers.<sup>168</sup> In the Supreme Court, the Solicitor General supported the Commission's view;<sup>169</sup> Fred Meyer argued to sustain the Ninth Circuit;<sup>170</sup> no one urged Commissioner Elman's theory.

Nevertheless, Chief Justice Warren, writing for a six-member majority, embraced the Elman view. The Court's holding is stated precisely and in black letter terms: "[W]hen a supplier gives allowances to a direct buying retailer, he must also make them available on comparable terms to those who buy his products through wholesalers and compete with the direct buyer in resales."<sup>171</sup>

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162. 300 F.2d 92 (2d Cir. 1962). See generally Handler, *Recent Antitrust Developments*, 71 YALE L.J. 75, 90 (1961).

163. 15 U.S.C. § 45 (1964).

164. Fred Meyer Inc., [1961-63 Transfer Binder] TRADE REG. REP. ¶ 16,368 (FTC 1963).

165. *Id.* at ¶ 21214-16.

166. *Id.* at 21231-32.

167. Fred Meyer Inc. v. FTC, 359 F.2d 351 (9th Cir. 1966).

168. See *id.* at 362-63.

169. See Brief for the Petitioner at 11, *FTC v. Fred Meyer, Inc.*, 390 U.S. 341 (1968).

170. See Brief for Respondent at 8, *FTC v. Fred Meyer, Inc.*, 390 U.S. 341 (1968).

171. 390 U.S. at 358.



The Chief Justice candidly notes that it is difficult to square this conclusion with the statutory language, conceding that the legislative history did not, in so many words, define "customer" to include retail buyers from wholesale accounts.<sup>172</sup> The rationale is simply that any other interpretation "would frustrate the purpose of section 2(d)."<sup>173</sup>

Had the Court required allowances to be paid to the wholesaler whose customers competed with Meyer, it would not have lacked supporting precedent. In *FTC v. Morton Salt Company*,<sup>174</sup> the Court 20 years ago had held that it was a violation of section 2(a) to charge a higher price to a wholesaler than to a direct-buying retailer who competed with the wholesaler's retailer customers. It would hardly have been startling to reach a parallel result under section 2(d), and that is what the majority of the Commission did.<sup>175</sup> In going further, the Court does more than stretch the statutory language to the breaking point. It imposes a requirement which the Commission itself, in its expert judgment, characterized as "impracticable."<sup>176</sup> Without repeating the usual Robinson-Patman logomachy, I propose to deal with the practical problems besetting any company engaging in dual distribution which wishes to utilize a promotional allowance program.

Section 2(d) requires that all competing customers be affirmatively notified of the availability of a promotional allowance plan.<sup>177</sup> How is a supplier to provide such notice to those who are not his customers? To be sure, he can always ask his wholesalers for their customer lists. But are wholesalers likely to provide such information to a supplier who is selling directly and thus might skim the cream of the wholesalers' business? Moreover, is not the likelihood of cooperation reduced when the plan bases the allowance upon the volume of purchases? What wholesaler would want his competitor to have the names of his best and largest customers?

Notice in a trade paper might do the trick of advising the wholesalers' customers of the plan; but it will often be difficult to establish that such a method of notification will be effective in bringing home to every customer the availability of the plan. While the Commission, with its 30 years of experience in administering cooperative advertising plans, might eventually tolerate all "good faith" efforts to comply, it is certainly questionable what position the courts might take in treble-damage litigation.

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172. *Id.* at 352.

173. *See id.*

174. 334 U.S. 37 (1948).

175. [1961-1963 Transfer Binder] TRADE REG. REP. ¶ 16,368, at 21,215-16 (FTC 1963).

176. 390 U.S. at 358.

177. *See Vanity Fair Paper Mills, Inc. v. FTC*, 311 F.2d 480, 484-85 (2d Cir. 1962).

The seller's problems aren't over when he has provided adequate notice. How is he to compute the amount of the allowance to retailers with whom he does not deal directly? The payments must be made on proportionally equal terms and, as the Commission's Guides properly point out, "[g]enerally, this can best be done by basing the payments made or the services furnished on the dollar volume or on the quantity of goods purchased during a specified period."<sup>178</sup> If the basis is dollar volume, is it the amount paid by the wholesaler to the manufacturer, or the higher sum he receives from his customers? Where the indirect retailer is charged more by the wholesaler than the direct buying retailer pays the manufacturer, is the store buying from the wholesaler to receive a higher cooperative payment? And what about policing? Must the seller police the plan to assure that the retailers to whom he does not sell utilize the allowances in a proper manner?

Finally, how does the manufacturer pay the indirect retailers who participate? He could do it directly, but that might offend the wholesaler and present an administrative burden of untoward proportions. If the money is given to the wholesaler on the condition that it be passed on, may there not be serious Sherman Act problems? The wholesaler might be appointed as an agent to transmit the payment for the manufacturer to the retailer. I would think that such a procedure would be beyond reproach. But, then again, after *Simpson v. Union Oil Company*,<sup>179</sup> how can one be sure?

There is yet another danger inherent in any good faith effort to comply with *Fred Meyer*. What if a manufacturer provides each retail customer of his wholesalers with a full promotional allowance proportionally equal to that received by direct buying retailers? Assuming that section 2(d)'s requirements have been fully met, what about section 2(a) of the Robinson-Patman Act? Has the indirect customer doctrine, in that event, come into play so that the manufacturer is now required to equalize the *price* paid by the indirect retailer with that paid by the direct buying retailer?<sup>180</sup> If so, what happens to the wholesaler?

In conjuring up these difficulties, it is important that we not go overboard and ascribe to *Fred Meyer* a broader scope than the Court itself intended. The Chief Justice explicitly cautions "that it would be

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178. 16 C.F.R. § 240.7.

179. 377 U.S. 13 (1964). See Handler, *Recent Antitrust Developments*—1964, 63 MICH. L. REV. 59 (1964).

180. See generally F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 57 (1962, 1964 Supp.).

both inappropriate and unwise to attempt to formulate an all-embracing rule applying the elusive language of [section 2(d)] to every system of distribution a supplier might devise for getting his product to the consumer."<sup>181</sup> Only the "concrete facts . . . presented"<sup>182</sup> were adjudicated.

Reading between the lines, it appears that the Court is not very happy about the surgery it felt it had to perform on section 2(d) in order to reach a result it thought dictated by elementary conceptions of fairness. The limitations on the judicial process do not permit the treatment of the practical problems lying in the wake of any piece of creative lawmaking. But there is no such limitation on the legislative process. Is it not time, therefore, for Congress to heed the implicit call of Justice Harlan, echoing sentiments frequently expressed at the bar, that we "encourage the Congress to give this notoriously amorphous statute the thorough overhauling that has long been due."<sup>183</sup>

#### CONCLUSION

It has always seemed to me that if we are to achieve substantial justice in antitrust we must strive for a better sense of balance. The scales in the hand of the goddess have been well said to represent the "imaginary balance by which Fortune determines the uncertain fates of man."<sup>184</sup> Along the same lines, Aristotle defined virtue as the mean between the two extremes of excess and deficiency. "We often say of good works of art," he writes, "that it is not possible either to take away or to add anything, implying that excess and defect destroy the goodness of works of art, while the mean preserves it."<sup>185</sup> A good legal principle cannot only be analogized to a work of art—in a sense, it is a work of art. However broad or narrow it may be in its origin, when it achieves its maturity it neither includes nor excludes too much. It strikes the right balance. That is why a good principle, like Aristotle's concept of virtue, is as rare as it is laudable and noble. Law being the creature of experience as well as logic, the acid test of any rule is whether it works well—whether it is an efficient instrument for the attainment of its professed objective. The common law tradition has always stressed the middle road—what Aristotle calls the intermediate or the mean. I am not suggesting that truth and justice reside always at the middle. In the arduous journey toward its ideal,

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181. 390 U.S. at 357.

182. *Id.*

183. *Id.* at 362 (concurring opinion).

184. WEBSTER'S INTERNATIONAL DICTIONARY 172.

185. ARISTOTLE, *NICHOMACHEAN ETHICS*, BOOK II, 1106 (Oxford ed. 1962).

the law must at times veer toward either extreme in accommodating itself to the felt necessities of the times. But in the long run it will achieve equipoise, stability, and fairness by taking the middle course. That was the essential message of Holmes, Brandeis, Cardozo, Stone, Hand, and Hughes. And that is what I find lacking in our current antitrust jurisprudence.