ANTITRUST POLICY IN DISTRIBUTION

James A. Rahl †

The entire *Report of the Attorney General's National Committee To Study the Antitrust Laws* rests on the basic premise that "the general objective of the antitrust laws is promotion of competition in open markets."¹ Our collection of laws relating to distribution, however, suffer from two major ills—a confusion of the free competition ideal with other goals and a profusion of doctrinal uncertainties which greatly complicate the theoretical confusion. The Distribution Chapter of the *Report* is an exceptionally well-written blueprint for the more intelligent application of existing laws and constitutes a major achievement in an area which has robbed the most patient experts of their composure. It falls a little short of being a thoroughgoing treatment of policy, however, because it does not fully explore the deep conflict in underlying aims which vie for command of this field.

The following comments will be addressed first to a general view of the area in order to clarify what the Committee did on the "policy" level and what it did not do. Some of the more important detailed recommendations will then be discussed.

Any criticism of the *Report* which happens to emerge here must be presumed to be self-criticism, for the writer subscribed to a large measure of what was done in the Distribution Chapter. As an individual, he perhaps may not be blamed for wishing that the Committee had found it possible to do more.

OUR PRESENT DISTRIBUTION "POLICY"

There is, of course, no integrated law for distribution; all that we have is a collection of statutory provisions which in widely varying ways affect distribution activities. The Committee selected four main subjects for this classification: Refusals To Deal, Exclusive Dealing, Resale-Price Maintenance and "Fair Trade," and Price Discrimination. It could go without saying that this is not all there is to antitrust

† Professor of Law, Northwestern University. Member, Attorney General's National Committee To Study the Antitrust Laws. B.S., 1939, Northwestern University; J.D., 1942, Northwestern University Law School.

1. REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 1 (1955) (hereinafter cited as REPORT).

application to buyer-seller relations, but it is a satisfactory grouping of the most obvious statutory provisions and concepts.²

If having a lot of law means having a policy, distribution is well-provided for. The Distribution Chapter is the longest chapter in the whole *Report*, constituting almost one-fourth of the entire discussion. This fact is of more than statistical interest, for it demonstrates the fashion in which legal controls oriented around distribution activity have tended to command primary antitrust attention in recent years. This raises the further question of how much legal control we can have and still operate distribution on the free competition theory.

All of the laws with which we are concerned here have been legislatively promulgated in the name of protecting competition, yet unquestionably the pattern of legislation has actually produced a shift away from "free" competition. Prior to the 1930's, antitrust law was used to enforce free, individual decision-making in distribution and to encourage the development of new techniques. The Sherman and Federal Trade Commission Acts were applied to crush price-fixing, resale-price maintenance and allocation of customers.³ Deliberate efforts to monopolize distributive channels were attacked,⁴ and direct warfare by combinations of dealers seeking to stifle new methods were prosecuted.⁵ Price discrimination was regarded as an evil only in respect of its occasional use as a predatory weapon,⁶ and competitively induced price differentials were freely allowed and, on occasion, positively encouraged in the name of competitive flexibility.⁷ The era doubtless witnessed many violations of law which went unpunished as enforcement vigilance occasionally languished, but in general, "free competition" among dealers and "sturdy bargaining" ⁸ between dealers and suppliers certainly had the upper hand.

2. Monopolization of the buying or selling side of a market may have more drastic effects upon the course of distribution in that market than all of the above practices combined. A price-fixing conspiracy or an allocation of customers will have direct and powerful distribution consequences. See REPORT c. 1. Vertical integration from source of supply forward toward the consumer constitutes a major form of distribution itself. See REPORT c. 3. Other obvious distribution topics include exclusive territorial dealerships, REPORT at 27-29, and patent license restrictions on purchasers. REPORT at 240-41.

3. *E.g.*, *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927) (price-fixing); *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911) (resale price maintenance); *United States v. Addyston Pipe and Steel Co.*, 85 Fed. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899) (allocation of customers).

4. *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927).

5. *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600 (1914).

6. See REPORT at 155, 160.

7. See *Sugar Institute, Inc. v. United States*, 297 U.S. 553 (1936); REPORT at 21.

8. The phrase is the Supreme Court's, in *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 74 (1953).

But the Great Depression was too much for the ideal, and the chain store movement compounded the depression fear that free competition was not a very good thing.⁹ With the taste of NRA still fresh, Congress was induced to author a drastic alteration in national policy for distributors, and the Robinson-Patman Act¹⁰ and Miller-Tydings Amendment¹¹ were a dramatic shift from the pre-depression ideal. Cut broadly from the same cloth, both laws in different ways were designed directly to curb the growth of integrated and mass distributors and indirectly to mitigate “. . . the business hazards of aggressive competition. . . .”¹² Economic freedom for distributors thus gave ground to security, while at the same time government policy sought to restore free competition as the primary policy for manufacturers.

“Fair trade,” legalized by the Miller-Tydings Amendment, marks the outer boundary of the departure from free competition.¹³ Under it, dealer price competition in a branded article may be totally suppressed in the name of “fairness,” if the brand proprietor and a single dealer in each state agree, and the cumulative effect of a series of such agreements for competing commodities may immunize a large portion of a dealer’s stock in trade from ordinary competition. The system, however, is permissive, and as yet only a minority of commodities have come under its cloak.¹⁴

The Robinson-Patman approach is less rigid, but unlike “fair trade,” it governs the pricing of all entrepreneurs who distribute commodities in interstate commerce. Although there are qualifications, the upshot of its approach is to make all price differences between purchasers perilous. Though it talks in terms of protecting competition from injury, its real spirit is also “fairness”—that is, “equality of opportunity” for all dealers. Since it appeals to one’s sense of fair play in its opposition to what it calls “discrimination,” it is hard to argue against even in the name of free enterprise. Yet its curtailment of elementary economic freedom may be plainly seen in operation.¹⁵ It seeks to prevent buyers from bargaining for price advantage

9. REPORT at 129. See FTC, FINAL REPORT ON THE CHAIN STORE INVESTIGATION (1934).

10. 49 STAT. 1526 (1936), 15 U.S.C. § 13 (1952).

11. 50 STAT. 693 (1937), 15 U.S.C. § 1 (1952).

12. REPORT at 129.

13. See FTC, REPORT ON RESALE PRICE MAINTENANCE (1945); GREYER, PRICE CONTROL UNDER FAIR TRADE LEGISLATION (1939); Fulda, *Resale Price Maintenance*, 21 U. CHI. L. REV. 175 (1954).

14. See FTC, REPORT ON RESALE PRICE MAINTENANCE (1945).

15. There is a staggering amount of literature on the act and its consequences. See, among others, addresses by Levi, O’Brien & Austin, in Symposium, *The Robinson-Patman Act—Is It in the Public Interest?*, A.B.A. SECTION OF ANTITRUST LAW

and from obtaining compensation for efficiencies;¹⁶ its primary purpose was to penalize integrated buyers. To implement this primary aim, it seeks to prevent sellers from yielding to bargaining and from competing freely in price by making it legally inadvisable for a seller to reduce his price to individual buyers to whatever point is necessary to obtain business.¹⁷ Ironically, the act has not succeeded in its primary goal; integrated distributors have thrived. But it has enjoyed marked success in what was only its secondary aim—it has gone far to eliminate price competition among sellers.

It is not suggested that the result has been to destroy free enterprise for sellers and buyers, or that legal control of distribution is comprehensive. Insofar as antitrust law is concerned, people are still free to enter or leave business, to decide what commodities shall be bought and sold, and to select suppliers and customers. These are basic freedoms. But freedom to bargain and to price are the translation of these basic freedoms into competitive action. By moving price freedom from the market-place to the courthouse, the new laws tend to deprive competition of its most valuable instrumentality and the economy of its "central nervous system."¹⁸

It must be concluded that our "antitrust policy for distribution" is an enigmatic mixture of pro- and anti-competitive measures. Superficially, this is not necessarily bad policy, for American trade regulation has traditionally embraced the rationale that prohibition of reprehensibly "unfair" methods of competition is quite consistent with protection of free competition, much as laws on defamation are consistent with free speech. And even if a fully satisfactory rationale were not forthcoming, in antitrust—of all things—we have learned by now not to look for perfect symmetry.

60 *et seq.* (1952); COUNCIL OF ECONOMIC ADVISERS ANN. REP. 15 (1948): The act "prohibits price-making policies previously accepted as legitimate features of hard rivalry for business . . ."; see Adelman, *Effective Competition and the Antitrust Laws*, 61 HARV. L. REV. 1289, 1334 (1948); Oppenheim, *Federal Antitrust Legislation: Guideposts to a Revised Antitrust Policy*, 50 MICH. L. REV. 1139, 1200 (1952); Rowe, *Price Discrimination, Competition and Confusion: Another Look at Robinson-Patman*, 60 YALE L.J. 929 (1951); Comment, *The "Injury" Requirement of the Robinson-Patman Act*, 49 NW. U.L. REV. 197 (1954).

16. Adelman, *The Consistency of the Robinson-Patman Act*, 6 STAN. L. REV. 3 (1953): ". . . the Act permits price discrimination against the buyer who is served at lower cost. . . . But in practice, . . . the Act not only permits but in fact requires such discrimination." *Id.* at 8.

17. *Id.* at 14-20. Levi, in Symposium, *The Robinson-Patman Act—Is It in the Public Interest?*, A.B.A. SECTION OF ANTITRUST LAW 60 (1952). See the fundamental objection to the act made by Hale & Hale, *Monopoly in Motion: Dynamic Economics in Antitrust Enforcement*, 41 VA. L. REV. 431 (1955): ". . . price discrimination may be an important means of fostering economic progress. As a result, dynamic economic theory furnishes additional reasons for the repeal of the Robinson-Patman Act." *Id.* at 472-73.

18. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 n.59 (1940).

There is, however, something more than lack of symmetry in a "policy" which guarantees competitive freedom in most of its forms but seeks to halt it at the threshold of its material realization, and there is downright frightening mystery in a "policy" which, at the same time, (1) attaches criminal penalties to price fixing; (2) exempts a very common form of price fixing; and (3) legislates against price competition. The American distribution system in operation has performed miracles in bringing the products of industry to the consumer. The magnitude of these accomplishments can hardly be appreciated without examining the legal structure within which they have been achieved.

THE COMMITTEE'S APPROACH

The enormous inconsistencies in this collection of distribution laws were of course obvious to the Committee. At the outset, the chapter observes that ". . . statutes woven from such diverse historical fabric soon revealed incongruities."¹⁹ No time is wasted in identifying the sources of incongruity; the "fair trade" exemptions have "provoked discord" and "most conspicuous . . . are the collisions between the Robinson-Patman Act and the philosophy underlying the Sherman and Clayton Acts."^{19a} The *Report* quotes the Supreme Court's warning that the Robinson-Patman Act may foster "price uniformity and rigidity in open conflict with the purposes of other antitrust legislation" and notes the same Court's observation of the difficulty in reconciling that Act's "economic theory" with that of the Sherman and Clayton Acts.²⁰

The *Report* does not halt with these expressions of difficulty but lays down categorically the basic standard which it believes should govern antitrust law for distribution. Consistent with the theme of the whole *Report*, this is that doubts should be resolved ". . . in favor of the Sherman Act's basic antitrust directives. . . . We agree that the 'heart of our national economic policy has long been faith in the value of competition.'"²¹

An over-all tally of the Committee's recommendations plainly shows that it believed that we have had a little too much distribution law for the good of the competitive policy, although the Committee did not express itself in such quantitative terms. It is, in fact, exceedingly dangerous to talk this way, since critics of the Committee

19 *REPORT* at 130.

19a. *Id.* at 131.

20. *Ibid.*

21. *Id.* at 131-32.

charge that avowal of belief in the Sherman Act while asserting that the new laws are inconsistent with that act is a current "divide and conquer" strategy designed to get rid of the new laws with confidence that the old will not be strictly enforced.²² But whether the Sherman Act is strictly enforced or not (and the *Report* certainly emphasizes that it should be), it does not follow that disappearance of "fair trade" and Robinson-Patman would mean less antitrust law. It would instead mean more, if the basic goal of antitrust is really "promotion of competition in open markets."

Although the Committee's recommendations undoubtedly all stem from the general free competition thesis, they are not fully grounded in a detailed elaboration of that thesis, and this is the point at which some difficulty arises. The *Report* does not undertake any examination of the actual operation of existing laws and of their market effects. This it could not do because the Committee was not constituted as an investigative or fact-finding body. Yet final judgment on these laws should come in the context of careful, objective appraisal of their real impact. This lack of a factual investigation put the Committee in the uncomfortable position of having to pass judgment on a largely theoretical basis underpinned by the practical experience of its members. The Committee understandably hesitated to carry its theoretical premises to too many logical conclusions without the support of empirical data, and this seems to have resulted in the suppression of some theoretical observations that might have been made and in the failure of some of the conclusions to come out where the major premises would dictate.

Consequently, in the treatment of the four different areas of distribution law, widely varying stages of evaluation are reached. On the subject of refusals to deal, the Committee had no difficulty in pronouncing the present legal situation to be entirely consistent with basic antitrust aims; it was treating here an elementary and integral subject of Sherman Act coverage, uncomplicated with subsequent legislative encrustation. In exclusive dealing, however, the Committee was confronted with a special enactment of ancient antitrust origin but beset with ambiguities and current controversy. Though the Committee accepts section 3 of the Clayton Act with tacit approval, it does not

22. See testimony of Rep. Patman in *Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary*, 84th Cong., 1st Sess. 100 (transcript 1955); cf. the statement of Professor Schwartz in his dissent: "If the Majority had made realistic proposals for decartelizing the American economy, I could readily have agreed to retreat in price discrimination. But when they combine a *status quo* position on Bigness with an attack on the Robinson-Patman Act, I see only a strengthening of the power of the already-powerful." *The Schwartz Dissent*, 1 ANTITRUST BULL. 37, 59 (1955).

explore either its merits or its faults, and we have no Committee expression on why exclusive dealing should continue to rate specialized legislative attention. In contrast, the *Report's* treatment of "fair trade" is entirely in terms of what ought or ought not to be, and no attention is paid to doctrinal problems of existing law. Evaluation was easy here; "fair trade" is a very uncomplicated matter—it is simply out-and-out direct price-fixing, and the Committee's basic premises left no room for any other conclusion than outright repeal.

But with respect to the Robinson-Patman Act, although the chapter's opening points to "collisions," "incongruities" and potentially irreconcilable "economic theory,"²³ the hinted promise to evaluate is not performed and the discussion contains not a word for, nor a word against, the act. Robinson-Patman is simply accepted as if it were inevitable. Yet had the Committee followed its major premises to the bitter end, it must have come at least to the threshold of a recommendation for repeal,²⁴ for like "fair trade," the anti-price discrimination act is basically designed to deter price competition, although unlike "fair trade," it is a very complicated matter.

This is not to say that the *Report* does not seek an adjustment between the act and the basic goals of antitrust, for the Committee proceeds throughout its interpretation of the act with the *Automatic Canteen* formula that construction of the act must be "reconciled" with "broader antitrust policies."²⁵ But retaining the act's inherent structure (and the Committee makes no recommendations for major overhaul), and given the enduring "faith in the value of competition," is it not possible that the Committee sought to reconcile the irreconcilable?

It may be suggested that if reconciliation is possible, it must be on other premises. The Robinson-Patman Act, despite the selfish and negative circumstances of its birth, has acquired some powerful intellectual support which is not at all countered by recital of the virtues of free competition. One contention is that price differentiation, though the product of the exercise of freedom by the seller, is not a valuable form of price competition.²⁶ The *Report*, it must be noted, contains no discussion of the competitive advantages or disadvantages of legal price discrimination, though the Economic Chapter of the *Report* con-

23. REPORT at 130-31.

24. Cf. Austern, *Tabula in Naufragio—Administrative Style; Some Observations on the Robinson-Patman Act*, CCH ANTITRUST LAW SYMPOSIUM 105 (1953): ". . . so far as I am aware no legal commentator over the past sixteen years . . . has advocated the outright repeal of the Robinson-Patman Act." *Id.* at 106.

25. REPORT at 132; *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 63, 73-74 (1953).

26. See comment by Professor Kahn. REPORT at 185-86.

tains a good commentary on the quite different economic price discrimination which the act compels rather than deters.²⁷ Another contention admits that the act squelches some price competition, but urges that this is an essential regulation of concentrated industrial sellers because the latter have achieved semi-monopolistic positions through failure to enforce the Sherman Act.²⁸ This is an unmistakable "public utility" rationale which, of course, the Committee could not accept because of its belief that the antitrust laws have maintained a "healthy process of growth" and have been one of the "most important" factors in "our creative American economy."²⁹

A final and appealing contention is that, whatever good the anti-trust approach may have accomplished economically, it has fallen short of promoting the most desirable social and political goals. It has seemed to make a sacrificial lamb of the small, independent merchant, and the threatened extinction of these symbols of social individuality and political independence poses a problem of far greater importance than the extinction of price competition.³⁰ Robinson-Patman helps keep small businessmen in business by relieving them of some of the worst risks of competition, and this may be bad economics but it is arguably good policy.

The Committee's recommendations for modified interpretation of the Robinson-Patman Act have been violently attacked as a sly maneuver to scuttle the statute by indirection.³¹ This is not only unfair to the committee members, but it entirely misconceives what was done,

27. *Id.* at 333-36.

28. Dissent by Professor Schwartz: "The Robinson-Patman Act is an unhappy necessity. It tends to encourage price rigidity inconsistent with Sherman Act objectives; but on the other hand it curbs the power of corporate giants who would otherwise be relatively free to undermine their own smaller competitors by price discrimination, or to raise havoc with competition among their customers. So long as we permit unregulated industry to amalgamate into units of monopolistic power, it will be necessary to restrain their freedom in pricing, just as Sections 2, 3 and 4 of the Interstate Commerce Act are required to prevent discriminatory practices by railroads which enjoy legal protection from competition." *The Schwartz Dissent*, 1 ANTITRUST BULL. 37, 59 (1955). See also dissent by Professor Adams, REPORT at 185. Chairman Celler, of the Antitrust Subcommittee observed: "In principle . . . it is putting a crutch under certain activities. In principle, it does violate the concept, the general broad concept of antitrust law, but I think it is necessary." *Hearings*, *supra* note 22, at 1510 (transcript).

29. REPORT at 2-3.

30. See dissent by Mr. Montague, REPORT at 220. Cf. the comment of Judge Learned Hand on the purposes of the Sherman Act itself: ". . . [Congress] was not necessarily actuated by economic motives alone. It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few." *United States v. Aluminum Co. of America*, 148 F.2d 416, 427 (2d Cir. 1945).

31. See testimony of various witnesses before Antitrust Subcommittee of the House Judiciary Committee in May, June and July, 1955, especially that of Senator Kefauver, *Hearings*, *supra* note 22, at 33 *et seq.* (transcript); Senator Sparkman, *id.* at 140 *et seq.* (transcript); Rep. Patman, *id.* at 100 *et seq.* (transcript).

for the Committee left the basic structure of the act unimpaired. Had the Committee wished to gut the statute, it would have said so; it had no hesitancy in saying so on the equally explosive issue of "fair trade." The Committee's failure to account for the non-competitive goals of the act and its discussion entirely in terms of the competitive philosophy, however, quite naturally have misfired somewhat with both the ardent supporters and the hard-headed critics of the act. It is the writer's guess that the single-minded competitive overlay of the chapter really conceals something of a belief in the need for legislative balance between big industry and dispersed dealers, and for some form of protection for small businessmen from economic life's hazards. It might have been a greater contribution to policy analysis, if not to solution, if the Committee had brought some of these divergent aims to the surface. This could have led to a recommendation for repeal of Robinson-Patman, coupled with suggestions for a program which would give aid to small business without boring a hole through the heart of antitrust.

That the Committee did not do this is perfectly understandable. That it must somehow be done before our "antitrust policy in distribution" will become fully understandable seems evident.

The following commentary on the *Report's* detailed recommendations does not purport to be comprehensive; the chapter is almost 100 pages long. An effort is simply made to highlight the more significant proposals and to invite attention to a few problems of policy which were not considered.

REFUSALS TO DEAL

The law on refusals to deal has developed a sharp dichotomy. A refusal by an individual not acting in concert with others is "generally safe from antitrust."³² It is not within section 1 of the Sherman Act because it lacks the required element of joint action, although it may fall under section 2 when used as an instrumentality of monopolization. In contrast, combinations to boycott or coerce have uniformly been condemned under section 1 and are often characterized as per se offenses.³³ External coercion by a combination is as abhorrent to antitrust policy as is conspiratorial self-restraint such as price-fixing; the concept of "restraint of trade" encompasses both.

There are difficulties in managing such an extensive concept, however. A mere self-restraint such as price-fixing would normally be meaningless without combination. But an individual refusal to deal

32. REPORT at 134.

33. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 625 (1953); *United States v. Columbia Steel Co.*, 334 U.S. 495, 522-23 (1948).

may be as harmful as a combination boycott; it all depends upon the power of the person or persons applying the coercion. Consequently, it is difficult to explain why combination should make such an important doctrinal difference, and there will always be pressure to extend coverage to those individual refusals which fail to qualify as section 2 violations but which nevertheless cause harm of a sort with which antitrust policy is concerned. One manifestation of this pressure has been in the erection of the artificial "intra-enterprise" conspiracy doctrine to get at the coercive acts of single enterprises which happen to have multi-corporate form.³⁴ By and large, however, such pressure has been resisted not only because of the conspiracy requirement but because of the principle that an individual's right to select those with whom he will deal is an elementary right which should not be lightly infringed.³⁵ Only a moment's reflection is required to demonstrate that neither economic freedom nor competition could survive a rule requiring traders to deal with all comers.³⁶

The Committee strongly endorses the law's condemnation of combination boycotts and equally strongly approves the law's protection of the individual privilege. At the same time, the Committee painstakingly catalogues the qualifications which warn that mere assertion of the individual privilege will not immunize conduct which is an integral part of a larger and independent violation of law. The resulting balance of privilege and qualification is termed ". . . an appropriate balance between preserving the individual's freedom to deal and the protection from undue trade restraints."³⁷ Here organic antitrust law has functioned well in handling an extremely delicate matter without unduly abusing essential freedom or neglecting public protection, and this is the genius of antitrust at its best.

There may be a moral in this. Individual refusals may cause great harm to individual businessmen and may seriously affect the ability of some to keep pace with rivals. In the name of "equality of

34. See REPORT at 30-36 for discussion of the doctrine of "intra-enterprise" conspiracy. The Committee majority approves use of the doctrine where corporate families coerce or unreasonably restrain outsiders, but disapproves its use in instances of mere self-limitation within the family, thus offering a distinction which has been consistently rejected in cases of true individual refusals to deal. The *Report* does not explain how this distinction can be satisfactorily administered.

35. "In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. . . ." *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). See also *FTC v. Raymond Bros.-Clark Co.*, 263 U.S. 565 (1924).

36. See Barber, *Refusals To Deal Under the Federal Anti-trust Laws*, 103 U. PA. L. REV. 847 (1955): "A refusal to deal, like the making of a contract, is in itself an ordinary commercial act."

37. REPORT at 137.

opportunity," an appealing case could be made for some sort of requirement of "nondiscriminatory" dealing. What would be the harm in passing a "fair dealing" law on the Clayton Act model, making refusals unlawful "where the effect may be substantially to lessen competition"? Such a law, it could be argued, would spread business opportunity and security while comporting with antitrust policy through the "effect" test. Only "incipient" trade restraints would be nipped; other refusals would be vindicated upon failure to show the requisite effect, or upon demonstration of some affirmative justification such as undue costs, bad credit or impossibility.

The obvious vice in singling out individual refusals for special legislative treatment would be that the very act of singling them out would make them, all at once, legally suspect. No amount of qualification with tests of "reasonable probability of adverse effect on competition" would alter the fact that emphasis would shift from an atmosphere of freedom to one of suspicion and regulated dealing; and a change in emphasis is all that is needed to destroy a "balance" which the Committee finds to have been nicely achieved. (Yet this is precisely the approach which has been adopted for price discrimination and for exclusive dealing.)

To return to present law, there are of course some doctrinal problems. One is that, while everyone abhors a boycott, easy definitions of what a boycott is have not been forthcoming. The *Report* usually speaks of "group action to coerce" or uses similar language meaning action taken to force unwanted changes in the outsider's business policies or conduct.³⁸ This meaning does not account for all forms of "combined refusal to deal" by any means. Traders may agree among themselves to deal in a certain way or on certain terms, *i.e.*, not to deal except on those terms, without intending to force outsiders into an unfavorable change of position. Intention to harm or to coerce is absent, but combined refusal to deal may be present. One author has recently drawn a sharp distinction between coercive refusals and those involving mere limitations upon the freedom of group members, with the observation that the latter kind of concerted refusal should not at all necessarily be regarded as unlawful.³⁹ As he points out, the *Fashion Guild* case⁴⁰ was a real coercion case, but the Supreme Court in the *Associated Press* case,⁴¹ which was merely a self-limitation case, seemingly obliterated any such distinction, and dicta in other cases

38. *Id.* at 133, 137.

39. Barber, *supra* note 36, at 876.

40. *Fashion Originators' Guild v. FTC*, 312 U.S. 457 (1941); see Barber, *supra* note 36, at 874.

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

have served further to suggest that any group refusal to deal, whatever its purpose or primary impact, is per se unreasonable.⁴² If this loose approach were carried to a logical end, it would tend to engulf almost all section 1 combination cases, since most internal or self-limitation combinations contain the implication of refusal to do business except on the agreed terms. The *Report* does not discuss this problem of definition, although it intuitively leaves room for some flexibility by avoiding the outright characterization of group refusals as per se offenses.

A related problem of definition involves cases which are on the frontiers of antitrust coverage. The boycott rule is, of course, concerned with commercial affairs, but the line of demarcation between non-commercial goals outside the Sherman Act and those within is very fuzzy, as a comparison of the *Apex Hosiery*,⁴³ *Allen-Bradley*⁴⁴ and *American Medical Association*⁴⁵ opinions will demonstrate. The *Report* is not especially helpful with respect to the question of how far the boycott rule (and the Sherman Act itself) will reach.

The *Report* is perhaps a little vague with regard to the important matter of application of the Federal Trade Commission Act to individual refusals, and this is characteristic of the entire *Report's* failure to spell out a general theory for antitrust application of that act. Until of late, the Commission seemed largely to confine itself to importation of Sherman and Clayton Act doctrine, but recent cases have underscored the fact that the Federal Trade Commission Act contains no such limitation.⁴⁶ A misguided commission decision could readily undermine the nice balance now existing.

EXCLUSIVE DEALING

The chapter's treatment of exclusive dealing is largely confined to discussion of section 3 of the Clayton Act. Fashioned in legislative compromise and born of the fear that the Sherman Act was in-

42. See note 33 *supra*.

43. *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940) (sit-down strike not restraint of trade within Sherman Act).

44. *Allen-Bradley Co. v. Local 3, International Brotherhood of Electrical Workers, AFL*, 325 U.S. 797 (1945) (union-management combination within Sherman Act).

45. *American Medical Ass'n v. United States*, 317 U.S. 519 (1943) (coercion of group health organization by medical organization within Sherman Act; question left open as to applicability of act to medical practice itself); *cf. Report* at 62-63.

46. See *FTC v. Motion Picture Advertising Service Co.*, 344 U.S. 392 (1953). "It is also clear that the Federal Trade Commission Act was designed to supplement and bolster the Sherman Act and the Clayton Act . . . to stop in their incipency acts and practices, which, when full-blown, would violate those acts. . . ." *Id.* at 394-95. See also *FTC v. Cement Institute*, 333 U.S. 683, 691 (1948); *Triangle Conduit & Cable Co. v. FTC*, 168 F.2d 175 (7th Cir. 1948).

capable of coping with dangerous tying practices, section 3 is now over 40 years old.⁴⁷ It is interesting to note that it has become such a part of our habits of antitrust thought that there is no inclination to question its continued necessity or desirability; the Committee takes the section for granted and concerns itself only with interpretation.

That section 3 is no longer vitally necessary would seem beyond question in view of the ready applicability of both the Sherman and Federal Trade Commission Acts to exclusive dealing practices.⁴⁸ It may nevertheless have some special kind of value, and a direct discussion of this might have contributed something to our understanding of antitrust technique. The Committee can hardly be blamed for not doing this, of course, for even the most polite questioning of this ancient and honorable antitrust appendage would quickly have been misinterpreted.

Section 3 does two things that are special. One, it singles a particular type of practice out of the multitude of commercial methods and makes it legally suspect. Two, it qualifies illegality with a unique test of ascertaining what the "effect may be"—that is, it asks whether injury to competition is "reasonably probable."⁴⁹ The value in singling out exclusive dealing is historically demonstrable, but presently questionable. A catalogue of the practices which have posed the danger of restraint of trade or monopoly would run many pages. Refusals to deal, price-fixing and the other per se Sherman Act sins, patent abuses, selling below cost and a host of predatory or unfair competitive methods have turned up in the campaign platform of the monopolist as often as exclusive dealing and tying arrangements.

But it can be replied that there is no harm done and undoubtedly some good in special treatment of a practice which is admittedly potentially dangerous. This is doubtless a good practical answer, and it may be said that the "effect" test keeps the treatment geared to antitrust standards, so that we have simply moved from the general to the specific without any real change in direction. The danger in this

47. For discussion of legislative history and policy, see McAllister, *Where the Effect May Be To Substantially Lessen Competition or Tend To Create a Monopoly*, A.B.A. SECTION OF ANTITRUST LAW 124 (1953); Schwartz, *Potential Impairment of Competition—The Impact of Standard Oil Co. of California v. United States on the Standard of Legality under the Clayton Act*, 98 U. PA. L. REV. 10 (1949); McLaren, *Related Problems of "Requirements" Contracts and Acquisitions in Vertical Integration under the Antitrust Laws*, 45 ILL. L. REV. 141 (1950); Lockhart & Sacks, *The Relevance of Economic Factors in Determining Whether Exclusive Arrangements Violate Section 3 of the Clayton Act*, 65 HARV. L. REV. 913 (1952).

48. See *FTC v. Motion Picture Advertising Service Co.*, 344 U.S. 392 (1953) (FTC Act); *International Salt Co. v. United States*, 332 U.S. 392 (1947) (Sherman Act).

49. See *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346, 357 (1922).

reasoning is that it tends to promote the assumption that specific legal controls can be accommodated to antitrust aims merely by leaving room for an inquiry into competitive effect. The outstanding example of the intellectual confusion and the antitrust damage which extension of this idea can produce is the Robinson-Patman Act, where much price competition is made illegal on the ground that it injures competition. Section 3 has probably promoted more competition than it has injured, but as an antitrust technique, it should be kept under close scrutiny.

There is more to the technique. Section 3 does not attempt a mere specification of Sherman Act doctrine, but is supposed to act as an advance patrol to catch competitive damage in its "incipiency" without waiting for a Sherman Act engagement to develop. Irrespective of the high merit in what portions of the Clayton Act have accomplished, this test of "where the effect may be . . ." must certainly rank as one of the legislative curiosities of all time. Its inscrutable meaning has delivered up diametrically opposite Supreme Court interpretations.⁵⁰ There is persistent confusion as to whether it merely prescribes a different standard of proof or whether it prescribes a different substantive standard.⁵¹ And whichever it is, there must always be some question as to the propriety of an antitrust statute which condemns conduct which only "may be" offensive to the public interest. Deeply imbedded in the "incipiency" concept of course is the sound idea of preventive action; only the short-sighted wait for smallpox to appear before calling the doctor when a vaccine can be had. But a vaccine stops nothing that is useful. Some exclusive dealing arrangements are not only useful but under the right circumstances are positively beneficial to competition, as both the Committee majority and the dissenters would apparently agree.⁵² These, nevertheless, are all placed under a cloud of legal suspicion. How much harm is done no one can say. The harm becomes plain, however, when the courts in the face of the administrative tortures involved in qualitatively applying the test yield to the almost irresistible temptation to reduce it

50. Compare *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346 (1922), with *Standard Oil Co. of California v. United States*, 337 U.S. 293 (1949), and *International Salt Co. v. United States*, 332 U.S. 392 (1947).

51. Compare *Adelman, Acquire the Whole or Any Part of the Stock or Assets of Another Corporation*, A.B.A. SECTION OF ANTITRUST LAW 111, 118 (1953) ("... the essential difference seems to me simply that the Clayton Act requires a lower standard of proof of the same kind of facts"), with REPORT at 147-48 ("The law was clearly intended to strike before real injury was done.")

52. See REPORT at 145: "... exclusive arrangements may in fact promote vigorous competition and need not signal coercive market power in the seller." Professor Schwartz and others would apparently resort to a strict condemnation of exclusive arrangements only when used by "dominant" companies. REPORT at 149.

to a mechanical nonentity, as the Supreme Court did in the *Standard Stations* case.⁵³

The *Report* treats exclusive dealing contracts and tying arrangements differently. On exclusive dealing contracts, typified by the requirements arrangement, the *Standard Stations* case, of course, becomes the focal point of discussion of the statute's standards. The discussion and the dissents reveal more plainly than anything else could how very difficult it is even to verbalize, let alone apply, a satisfactory Clayton Act test. The *Report* states that *Standard Stations* gave us a ". . . perplexing opinion whose rationale is not clear."⁵⁴ The Court held that exclusive arrangements violate section 3 when they ". . . foreclose[d] competition in a substantial share of the line of commerce affected."⁵⁵ But it did not define what it meant by "foreclosure," and it made it seem that any system of exclusive contracts which covered a "substantial portion of commerce" would be illegal, or borrowing the district judge's interesting contribution to antitrust vocabulary, "quantitative substantiality" of the commerce covered would be enough.

No word like "foreclosure" appears in the statute, and, in all probability, the Court merely used the expression as synonymous with the statute's "condition, agreement or understanding that the . . . purchaser . . . shall not use or deal in the goods . . . of a competitor or competitors of the seller." Thus interpreted, the opinion meant that an exclusive dealing agreement ("foreclosure") which covers a substantial amount of business ("quantitative substantiality") will as a matter of law have a "reasonable probability" of lessening competition or tending to monopoly.

But this would have the effect of condemning virtually all exclusive dealing arrangements. On the face of the statute, on the legislative history, and above all on the assumption that antitrust policy is not well-served by such unequivocal condemnation of an equivocal practice, the Committee could not accept this result. Naturally anxious to avoid a recommendation for overruling a Supreme Court decision and noting signs that the courts and the Commission have recently shied away from this strict approach,⁵⁶ the Committee adopts the "foreclosure" language but seeks to give it a substance which will separate those arrangements which "clog competition in the channels of distribution" from those which do not. "The central inquiry . . . is whether a system of challenged exclusive arrangements in fact 'fore-

53. *Standard Oil Co. of California v. United States*, 337 U.S. 293 (1949).

54. *REPORT* at 141.

55. *Standard Oil Co. of California v. United States*, 337 U.S. 293, 314 (1949).

56. "Sequels to *Standard Stations* have, however, retreated from any 'quantitative substantiality' criterion." *REPORT* at 142.

closes' competitors from a substantial market." Determination of actual foreclosure requires an inquiry as to whether, in the "context and actual practices of the particular industry," rival suppliers "can practically secure consumer access in alternative ways."⁵⁷

Far from invalidating all exclusive contracts, this approach would examine each arrangement in its market setting to see whether it really precludes competitors from reasonable opportunity to market their products. Tying up a substantial number of wholesalers may still leave adequate opportunity for rival suppliers if other good wholesalers are available. Tying up a substantial number of retailers likewise may not necessarily hamper competitors, depending upon the nature of the product and customary methods of handling it. On the other hand, market facts may demonstrate that exclusion from even a low percentage of available outlets may hamper rivals' access to consumers, in which case sufficient "foreclosure" is present. Evaluation would involve many things including the nature of the product and its markets, the size of the supplier,⁵⁸ the terms of the agreements, their duration and other factors. A short-term, or readily cancellable arrangement, for example, may not foreclose at all.

Having found foreclosure, the Committee would end the inquiry without requiring further economic evidence designed to prove the actual diminution in or "tangible damage" to the body of competition in the market.⁵⁹ This accords full play to the "reasonable probability" concept by stopping the investigation at the point at which the first real showing of a substantial danger to "competition" has been made. Free of the section's language, we might want to condemn more or less, but it is hard to see how a more faithful effort for carrying out the mysterious mandate of the statute could be made. Criticism that

57. *Id.* at 146-47.

58. Disagreement between the majority and dissenting members seemingly centers around what to do with the "dominant" company. See *Report* at 146: "... a long-term exclusive arrangement exacted by a dominant supplier of an industrial raw material would in fact foreclose competitors to a degree where economic harm would be reasonably probable. . . ." Professor Schwartz stated: "Where a dominant company begins to require its distributors to deal exclusively with it, I would strike the practice down without waiting for the company to sign up so many distributors that competitors experience difficulty reaching the consumer market." *The Schwartz Dissent*, 1 *ANTITRUST BULL.* 37, 57 (1955). It is unclear as to what either means by a "dominant" company. See Adelman, *General Comment on the Schwartz Dissent*, 1 *ANTITRUST BULL.* 71, 78 (1955).

59. One author has pointed out that the *Report* does not make clear whether this proposal means that a finding of foreclosure would be conclusive on illegality or whether it would merely make a *prima facie* case, entitling the defendant to rebut by producing evidence, if he can, that despite apparent "foreclosure," competition has not been and will not be lessened. The defendant should certainly be allowed such a showing. See McLaren, *Exclusive Dealing*, in *Nw. Univ. L. School & Chi.B.A. Cong. on Antitrust Laws & Att'y Gen's Comm. Rep't* (May 10, 11, 1955) (hereinafter cited as *Conference*). These proceedings will be published later as a symposium by Federal Legal Pub., Inc.

this is an approach which is ". . . 'inconsistent with the Clayton Act conception of stopping restrictive practices before they do demonstrable harm,'" ⁶⁰ would seem to disregard the "effect" test which the statute prescribes, for though it does not require "demonstrated" harm, it does require that harm which could be "demonstrated" is probable. Criticism that the approach is a reversion to Sherman Act standards may or may not be correct, depending upon what one conceives Sherman Act standards for this area to be.

The *Report's* treatment of "tying" arrangements evidences the antipathy to these practices which decades of judicial expressions have exhibited. The Court's off-hand dictum in the *Standard Stations* opinion is typical: "Tying agreements serve hardly any purpose beyond the suppression of competition." ⁶¹ The Committee agrees and apparently endorses the *International Salt* ⁶² proposition that tying arrangements which restrain a substantial volume of commerce are illegal under section 3.

The Committee here seems to be in the position of espousing a "quantitative substantiality" rule for one practice under section 3 and disavowing it for another. This tough attitude toward tying may be quite sensible, depending upon how tying is defined. The *Report* several times characterizes the "tying" it is talking about as involving the "wielding of monopolistic leverage." ⁶³ Perhaps the clearest statement of the definition, and the rule occurs in a footnote:

"Obviously not every business transaction which conditions the sale of one 'item' on the purchase of another can be condemned as a 'tying' arrangement or 'monopolistic' practice to which serious legal risks should attach. Rather, a genuine 'tying' clause—properly subject to strict antitrust controls—presupposes a distinct and 'dominant' product conferring some substantial economic power on the seller enabling him to coerce buyers of a different commodity in which he otherwise enjoys no competitive advantage." ⁶⁴

60. See dissent by Professor Schwartz "and a few others." *REPORT* at 149. *Cf.* statement of retiring Federal Trade Commissioner Mead (press release Sept. 23, 1955) that the "*per se* doctrine does not apply and should not be applied" to Clayton Act cases. On this issue, the economic approach taken by the Commission in the *Maico* case, F.T.C. Dkt. 5822 (Dec. 2, 1953), is in sharp contrast to the argument of Commission counsel before the court of appeals in the *Dictograph* case, and to the decision of the court. *Dictograph Products, Inc. v. FTC*, 217 F.2d 821 (2d Cir. 1954), *cert. denied*, 349 U.S. 940 (1955).

61. *Standard Oil Co. of California v. United States*, 337 U.S. 293, 305 (1949).

62. *International Salt Co. v. United States*, 332 U.S. 392 (1947).

63. *REPORT* at 140, 144, 145. The phrase is from *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 611 (1953).

64. *REPORT* at 144 n.60.

If the seller enjoys a "dominant" position in the "tying" product, then his use of this leverage as a competitive weapon in the field of the "tied" product may well look sufficiently dangerous in itself that the inquiry into probable effect on competition in the field of the "tied" product should end. It could be argued, however, that even in such cases, a further look should be taken to see where the impact of the tying occurs. In most of the decided cases, the impact was upon the ultimate consumer of the "tied" product to whom a machine, the "tying" device, had been leased.⁶⁵ Where a substantial number of consumers are thus foreclosed to competitors, the test of "actual foreclosure from a substantial market" is met, just as it would be met if ordinary requirements contracts were executed with a substantial number of consumers. But suppose the "tie" is imposed only upon an intermediate distributor and not upon consumers? Actual foreclosure may not really occur, and a hasty leap to presumed guilt may ignore market reality.⁶⁶ Nevertheless there may still be merit in the presumption that no one with a "dominant" position imposes a "tie" unless he is doing it for monopolistic reasons. This may be a practical rule founded upon sufficient experience to merit its use as a doctrine, although the contrary has been forcefully and ably argued.⁶⁷

But suppose there is no "dominant" power in the "tying" product. The above-quoted definition would indicate that this would not be genuine "tying" in the antitrust sense. The *Report*, however, seemingly approves the *International Salt* case, which involved patent control over the machine but no demonstrated dominance, and cites three cases in which illegality without dominance was found.⁶⁸ The possibility is present here that dominance is being inferred from the mere fact that a tying contract is successfully imposed. But the *Report's* above-quoted definition in effect repudiates such an inference. We find,

65. All the following cases involved leases of machinery to industrial consumers of the tied in supplies: *International Salt Co. v. United States*, 332 U.S. 392 (1947); *International Business Machines Corp. v. United States*, 298 U.S. 131 (1936); *United States v. United Shoe Machinery Co.*, 258 U.S. 451 (1922); *Thomson Mfg. Co. v. FTC*, 150 F.2d 952 (1st Cir. 1945); *Signode Steel Strapping Co. v. FTC*, 132 F.2d 48 (4th Cir. 1942); *Oxford Varnish Corp. v. Ault & Wiborg Corp.*, 83 F.2d 764 (6th Cir. 1936).

66. In *FTC v. Sinclair Refining Co.*, 261 U.S. 463 (1923), the leasing of gasoline pumps with the restriction that only the lessor's gasoline be dispensed therefrom was upheld under §3; the decision of the Court was grounded on the conclusion that oil company competitors were not really foreclosed from access to the lessees. The Court in the *International Business Machines* case distinguished the *Sinclair* case not only on the above ground but apparently also on the ground that there was no foreclosure from consumers of gasoline, for the Court stated that "... the only use made of the gasoline was to sell it." *International Business Machines Corp. v. United States*, 298 U.S. 131, 135 (1936).

67. Stevens, *Tying Arrangements*, in *Conference*, *supra* note 59.

68. *REPORT* at 140 & n.40.

therefore, sufficient difficulty with managing a special "tying" rule that it might be well to consider whether a different approach would not work.

It would seem that the *Report's* "actual foreclosure" test for exclusive dealing arrangements ought to work quite well for tying arrangements. If "dominance" exists and is proved, not presumed, at least a prima facie case of probable effect could be found, although there ought to be some room for a defense showing that the character of the "tie" was not in fact one which produced foreclosure. If "dominance" is proved not to exist, the case is like any other exclusive dealing case. The Committee's "foreclosure" rule could seemingly handle a lot more territory than the Committee itself suggested.

A further word about "ties" may be pertinent, however. Conditioning the sale of a given quantity of one product upon the purchase of a given quantity of another may not be within the scope of section 3 at all. In the machine cases, where the lease was conditioned upon purchase of materials for that machine, the courts have been satisfied by evidence that the "practical effect" under the circumstances was to preclude purchasing from a competitor.⁶⁹ This result was clearly consonant with the legislative intent. But mere quantity purchase agreements are not treated as exclusive dealing arrangements, and many apparent "ties" of a given quantity may be no different from quantity purchase agreements involving only a single commodity. The issue is not whether a "tie" is present, but whether anything is present which section 3's language will reach. This is a largely unexplored frontier of the field of exclusive dealing.

RESALE PRICE MAINTENANCE AND "FAIR TRADE"

The "fair trade" system achieves resale price maintenance and dealer price-fixing by means of state laws providing "non-signer" control and federal laws providing antitrust exemption. The first federal exemption, the Miller-Tydings Amendment to the Sherman Act in 1937, failed expressly to mention non-signer control, and the Supreme Court seized this loophole to scuttle the system in the *Schwegmann* case.⁷⁰ Congress almost immediately passed the McGuire Amendment in 1952 to restore the system, this time attaching the exemption to the Federal Trade Commission Act and leaving the totally eclipsed Miller-Tydings Amendment still on the books.

69. See *International Business Machines Corp. v. United States*, 298 U.S. 131, 135 (1936); *Judson L. Thomson Mfg. Co. v. FTC*, 150 F.2d 952, 958 (1st Cir. 1945).

70. *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951); see 61 *YALE L.J.* 381 (1952), 46 *ILL. L. REV.* 349 (1951).

It has always been urged that these federal laws are mere "enabling" acts designed to allow the states to carry out policy unhampered by federal interference. In fact, however, the laws are king-pins of the system, are diametrically opposed to historic antitrust policy⁷¹ and are representative of a definite congressional policy to permit dealers to avoid the rigors of price competition.⁷² In addition, the laws serve the purpose of giving manufacturers of advertised merchandise a means of preventing "loss leader" sales which are thought to impair the goodwill associated with the product name. This second reason, which was probably the original reason for the development of resale price maintenance, important though it may be to some manufacturers, would never rally enough support to produce the vast federal and state legislative program which we now have in the "fair trade" system. The desire of various dealer groups to obtain relief from price competition has undoubtedly furnished the major support for the laws.

There may be great social merit in the aims of this legislation in giving small retailers some measure of economic security, and there may be some competitive merit in providing a means of "loss leader" control. But the system, as the Committee found, is an inappropriate method of "loss leader" control because it kills all price competition in the process of halting this "evil." As a security measure for dealers, the Committee had to condemn it, not because of lack of sympathy for dealers, but because the system involves such a bold and obvious flouting of the simplest antitrust principles that it cannot be tolerated by any group which accepts antitrust as an article of faith.

Thus, the *Report* states that "fair trade" is ". . . at odds with the most elementary principles of a dynamic free enterprise system." It is "an unwarranted compromise," its inevitable concomitant is "throttling of price competition," and it ". . . not only symbolizes a radical departure from National antitrust policy without commensurate gains, but extends an invitation for further encroachment on the free-market philosophy that the antitrust laws subserve."⁷³ A few members expressed doubts and a few dissented.

One dissenting member objected that the Committee's conclusion stemmed largely from logic, whereas experience has demonstrated that these laws (and the Robinson-Patman Act) are important to the economic welfare of thousands of local businessmen.⁷⁴ The *Report*

71. *REPORT* at 150-54.

72. President Truman signed the McGuire Act with the observation that ". . . it does have value in eliminating certain unfair competitive practices, and thereby will help small businessmen to stay in business—which I believe is a healthy thing for our economy and our society." 1 CCH TRADE REG. REP. (10th ed.) ¶ 3040.10.

73. *REPORT* at 154.

74. *Id.* at 220.

is probably deficient in not undertaking some demonstration that experience with the laws has also been detrimental to the "economic welfare" of thousands of consumers. But it would seem that a contest of welfares is beside the point anyway, for despite the importance of the teachings of experience, a "policy" surely must have at least a little logic, and with "fair trade" in the United States Code, our present antitrust policy is in danger of being thought to possess no logic at all.

The *Report* is probably deficient in not fully accounting for the other methods of resale price maintenance.⁷⁵ Refusal to deal with price-cutting retailers along the *Colgate*⁷⁶ route is one method, but this is comprehensively covered in the "refusal to deal" section.⁷⁷ A second method is the "agency" system, reliant upon consignment sales for escape from the implications of conspiracy. The goods belong to the manufacturer in the dealer's hands, and the former is therefore privileged to set the selling price, provided the agency is bona fide.⁷⁸ The *Report* is remiss in not analyzing this method, although it is so cumbersome and expensive that it is unattractive to most manufacturers. Its antitrust incidents are complicated by the fact that consignment selling is a perfectly normal and legitimate commercial device in and of itself. Consequently, no per se rule could be applied without at the same time invalidating many innocuous consignments. If, however, this system should appear to be used as a subterfuge for illegal price-fixing, antitrust should certainly be capable of dealing with the situation, and the *General Electric*⁷⁹ doctrine could well be modified to permit an inquiry into the reasonableness of the practice in light of the particular circumstances.

Agency selling is a tiny manifestation of vertical integration. Full integration forward to retail channels of course gives power to dictate retail prices, and the Committee has been criticized for not treating vertical integration as a problem of resale price maintenance.⁸⁰ To regard vertical integration as a method of price maintenance is like

75. The *Report* is criticized for this omission in Adams, *Resale Price Maintenance; Fact and Fancy*, 64 YALE L.J. 967 (1955); testimony of Senator Sparkman before Antitrust Subcommittee of House Judiciary Committee. *Hearings, supra* note 22, at 144-47 (transcript).

76. *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

77. *REPORT* at 132-37.

78. *United States v. General Electric Co.*, 272 U.S. 476 (1926); cf. *FTC v. Motion Picture Advertising Service Co.*, 344 U.S. 392 (1953) (agency no escape from exclusive dealing contract under § 5 of the FTC Act; "the crucial fact is the impact of the particular practice on competition, not the label that it carries." *Id.* at 397).

79. *United States v. General Electric Co.*, *supra* note 78.

80. Testimony of Senator Sparkman. *Hearings, supra* note 22, at 144-47 (transcript).

regarding the firing of an engine's boiler as a means of keeping the engineer warm. The *Report* fully treats integration in its proper setting under section 7 of the Clayton Act and under the Sherman Act.⁸¹

It has also been suggested that there is a basic inconsistency in the *Report's* approval of patent license price-fixing under the *General Electric* rule⁸² and its disapproval of resale price maintenance. The two things are not the same, and, in fact, the Patent Chapter of the *Report* recognizes the illegality of *resale* price-fixing under the guise of patent control.⁸³ Nevertheless, the objection to price-fixing and all its works certainly encompasses use of a patent to fix a competitor's selling price, and the majority's approval of the *General Electric* rule is a bow to the patent system and not to the antitrust laws. It may be observed, however, that the legal hazards in which such price-fixing have been enveloped by decisional law make its use extremely unsafe.

Congress is not likely to convene a special session to consider repeal of a law which it passed in 1952 by a plurality resembling those rolled up in declarations of war. It is probable that the "fair trade" system will collapse on its home ground long before it suffers legislative demise. In some areas there is currently widespread disregard of "fair trade" prices as competition in a buyer's market keeps bursting through.⁸⁴ An additional hazard has developed in the state courts, with "fair trade," or at least non-signer control, being found unconstitutional in several states in recent years.⁸⁵ If many state courts follow the present trend, it is possible that the next step will be a proposal for a positive federal "fair trade" law to supplant state laws. Perhaps the *Report* may at least serve to bolster congressional opposition to such a move.

"Fair trade" is not without its doctrinal problems. There is the federal constitutional question, recently avoided by the Supreme Court by its refusal of certiorari in the *Eli Lilly* case.⁸⁶ A big problem exists in the issue of whether a vertically-integrated manufacturer may set

81. REPORT cc. 1 & 3.

82. Testimony of Professor Schwartz before Antitrust Subcommittee of House Judiciary Committee. *Hearings*, *supra* note 22, at 335 (transcript).

83. REPORT at 240.

84. A majority of a large number of businessmen polled by *Tide Magazine* expressed the opinion that fair trade will not exist on a broad scale for more than two years. *Tide*, June 4, 1955, p. 20.

85. At this writing, "fair trade" laws have been held unconstitutional in entirety, or as to non-signer control, in ten states under the decisions of five high courts and five lower courts. All of these decisions have occurred in the past three years. 1 CCH TRADE REG. REP. (10th ed.) ¶3085.

86. *Schwegmann Bros. v. Eli Lilly & Co.*, 205 F.2d 788 (5th Cir.), *cert. denied*, 346 U.S. 856 (1953). Note, *Fair Trade—Does It Warrant Re-Examination?*, 48 NW. U.L. REV. 777 (1954). See generally on current problems, Derenberg, *Trade Regulation*, 30 N.Y.U.L. REV. 345, 352 (1955).

the resale prices of independent outlets with which his own stores compete, as against the law's proviso against horizontal price-fixing.⁸⁷ The McGuire Amendment's attempted overruling of the *Wentling* case⁸⁸ to permit application of state non-signer control to interstate sales, together with the whole problem of extra-territoriality of the state laws, will continue to be a fruitful problem for litigation; and the perpetual question of the meaning of the "free and open competition" requirement of the federal law is always with us.

The Committee adroitly avoided grappling with these legal issues by the simple expedient of urging outright repeal.

PRICE DISCRIMINATION

Although price discrimination may occasionally become involved in Sherman Act proceedings,⁸⁹ the subject is largely dominated by the Robinson-Patman Act. The Department of Justice has full power to enforce both the civil and criminal provisions of the act, but it almost never does so, the act being the virtually exclusive property of the Federal Trade Commission and the private treble damage litigant.

The *Report's* failure to subject the act to fundamental inquiry has been discussed above. This is a major weakness, but nevertheless the *Report's* careful construction of the act's various provisions is a distinct contribution. From a practical point of view, it is perhaps well that the *Report* did not recommend repeal; the act would stay with us anyway, and we might have lost the benefit of the *Report's* thoughtful, detailed recommendations for making life with the act at least a little more rational.

Nearly 70 pages of tightly-packed discussion (17 per cent of the entire *Report*) are addressed to the act's provisions. Comment on this whole discussion would take an equal number of pages. Since this is out of the question, remarks here are limited to some of the most significant recommendations.

It would be well to bear in mind the *Report's* main thesis for Robinson-Patman Act interpretation: that there should be ". . . resolution of every statutory doubt in favor of the Sherman Act's basic

87. Section 5(a)(5), 38 STAT. 719 (1914), 15 U.S.C. § 45(5) (1952). See discussion in Comment, *The Dual Entrepreneur and Fair Trade*, 50 NW. U.L. REV. 78 (1955).

88. *Sunbeam Corp. v. Wentling*, 185 F.2d 903 (3d Cir. 1951).

89. See, e.g., *New York Great Atlantic & Pacific Tea Co. v. United States*, 173 F.2d 79 (7th Cir. 1949). See REPORT at 164 n.116, for the Committee's contention that when price discrimination of the sort dealt with in the Robinson-Patman Act is attacked under the Sherman Act (or Federal Trade Commission Act), the proceeding should be governed by Clayton Act provisions.

antitrust directives,"⁹⁰ that is, that application of the Robinson-Patman Act should be harmonized with the policy of free competition. This "reconciliation" theme, which acknowledges the conflict in philosophy symbolized by the act, seeks to give the statute at least the semblance of an "inner logic" which it now lacks.⁹¹ But with the statute being essentially anti-competitive in aim, it must be anticipated that despite the *Report's* optimistic tone, miracles cannot be expected.

Effect on Competition and Burden of Proof

Section 2(a),⁹² in accordance with standard Clayton Act technique, prescribes an "effect on competition" test, and this, by any standard, would seem to be a substantive matter. Section 2(b)⁹³ contains a burden of proof provision, a procedural matter. Substance and procedure became united in one concept, however, in the incredible *Moss*⁹⁴ doctrine that mere proof of a price discrimination constitutes a prima facie case and that it is up to the respondent to demonstrate a lack of adverse effect. This not only placed upon respondents the burden of proving a negative; but its chief significance was that it necessarily meant that adverse effect on competition was not an integral element in the violation. More than any other decision, this construction proclaimed open warfare between the act and "antitrust policy."

The *Report* renounces the *Moss* doctrine, and the only surprising thing about this is that a few Committee members dissented.⁹⁵ The *Report's* position is based not only upon a "sound and accurate reading of the Act," but is compelled by the thesis that reconciliation of the statute can be accomplished only on the level of real inquiry into competitive effect. This construction received major support in the Supreme Court's *Automatic Canteen*⁹⁶ rationale and in the direct decision

90. REPORT at 131.

91. See Levi, in Symposium, *The Robinson-Patman Act—Is It in the Public Interest?*, A.B.A. SECTION OF ANTITRUST LAW 60 (1952): "... its concepts and theories are incomplete and contradictory, and the Act as a whole has no inner logic to remedy these defects." *Id.* at 68. See the same author's general observation that: "The central question . . . for a society which wishes to be competitive must be to ask whether with all the dangers that the Act represents of imposing and strengthening patterns of non-competitive and government regulated behavior this legislation is really necessary; either because of the protection it gives the small against the large, or because of such curbing of monopolistic abuses as it is thought to achieve. The larger deficiencies of the Act call less for legislative tampering than they do for an answer to this basic question." *Id.* at 73. On the problems of the act generally see Sunderland, *The Robinson-Patman Act, A General Appraisal*, in *Conference*, *supra* note 59.

92. 49 STAT. 1526 (1936), 15 U.S.C. § 13(a) (1952).

93. 49 STAT. 1526 (1936), 15 U.S.C. § 13(b) (1952).

94. *Samuel H. Moss, Inc. v. FTC*, 148 F.2d 378 (2d Cir. 1945).

95. REPORT at 163. See *The Schwartz Dissent*, 1 ANTITRUST BULL. 37, 57 (1955).

96. *Automatic Canteen Co. v. FTC*, 346 U.S. 61 (1953).

of the Court of Appeals for the Seventh Circuit in the *Minneapolis-Honeywell* case.⁹⁷ And most important of all, the Commission itself disavowed the *Moss* theory in its recent *General Foods* opinion.⁹⁸ The Committee's position almost certainly will represent the law on this question.

Restoring the "effect" test to its proper procedural position does not mean that it will thereby achieve great practical significance. In the *Morton Salt* case,⁹⁹ the Supreme Court held that the Commission may infer the requisite effect, where buyer competition is concerned, from the mere fact that the discrimination is reflected in different resale prices. Even absent an effect on such prices, statutory injury may result from the fact that the discrimination gives one buyer more profit than another. The Commission has been alert to translate these ideas into positive action which has tended to bring all but the most inconsequential differentiations between competing buyers within the scope of section 2(a).

If potential illegality of most price differentiations is the thing which brings the act into "collisions" with antitrust policy by fostering "price uniformity and rigidity in open conflict" with the purpose of the Sherman Act,¹⁰⁰ reconciliation without major revision of the "effect" test may be difficult indeed.¹⁰¹ The *Report* avoids any recommendation for a change in language and concentrates on an effort to interpret existing language in such a way as to achieve compatibility. The statute speaks of lessening of or injury to *competition*, not of injury to *competitors*. The inquiry must therefore go beyond mere focus on individual competitors' sales or profits and must ascertain the probable effect upon the "vigor of competition in the market" and the "health of the competitive process." A "thorough economic analysis" of market data is called for.¹⁰²

This interpretation is based upon an accurate reading of the statute, upon traditional Clayton Act reasoning, and upon the *Report's* reconciliation theme. It is nevertheless difficult to reduce to operative effect. The statute is not only an "incipiency" statute calling for a

97. *Minneapolis-Honeywell Regulator Co. v. FTC*, 191 F.2d 786 (7th Cir. 1951).

98. *General Foods Co.*, F.T.C. Dkt. 5675 (April 27, 1954).

99. *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948).

100. *REPORT* at 131.

101. The 1936 amendment, which added the "injure, prevent or destroy" phraseology was plainly designed to broaden the condemnations of the statute; see note 102 *infra*. The Committee might at least have considered repeal of this language, although the language that would remain would probably itself be sufficient to continue the strict approach now in vogue, as the analogies of § 3 of the Clayton Act and the *Standard Stations* case show.

102. *REPORT* at 164-65. See Levy, *Section 2(a) of the Robinson-Patman Act*, in *Conference*, *supra* note 59.

prediction of what "may be," but its assumption that price discrimination is an immediately dangerous phenomenon results in a failure to supply an internal concept which will enable separation of those injuries to competitors which will and those which will not injure competition.¹⁰³ It is therefore impossible for the *Report* to produce a differentiating formula, as it did in its "actual foreclosure" test for section 3. The result is that the *Report* is able to say that the focus should not be exclusively on sales or profits, but it is unable to point to the commercial activities and market facts upon which focus should be made.¹⁰⁴ The matter tends to become one of degree rather than of difference in kind.

The difficulties are already evident in recent Commission decisions. Although the Commission has asserted its intention to justify its role as an expert by avoiding mechanical rules and by making a real examination of economic data in Clayton Act cases,¹⁰⁵ its most recent price discrimination opinions have still focused on profits of individual competitors and have not revealed any real effort to go beyond to an appraisal of overall competitive health.¹⁰⁶ And even if subsequent decisions do require a broader inquiry, reconciliation with antitrust policy will remain a difficult goal so long as price differentiation evidencing vigorous competition between sellers may be attacked as an injury to competition among buyers.

Injury to buyer competition is the act's chief concern, but it also applies to injury to seller competition. The operative relationship of price discrimination to effect on seller competition is obviously quite different from its relation to buyer competition. There may be no rational connection at all between a seller's differentiation in price be-

103. S. REP. NO. 1502, 74th Cong., 2d Sess. 4 (1936) laid down a principle for the act's construction which is hard to ignore, explaining that the language of the original § 2 of the Clayton Act had "... in practice been too restrictive in requiring a showing of general injury to competitive conditions in the line of commerce concerned, whereas the more immediately important concern is an injury to the competitor victimized by the discrimination. Only through such injuries, in fact, can the larger injury result, and to catch the weed in the seed will keep it from coming to flower." See Note, *The Robinson-Patman Act in Action*, 46 YALE L.J. 447, 450 (1937).

104. See REPORT at 165; note 103 *supra*.

105. Pillsbury Mills Corp., F.T.C. Dkt. 6000 (Dec. 21, 1953); Maico Corp., F.T.C. Dkt. 5822 (Dec. 7, 1953).

106. In several recent automotive parts cases, the Commission invalidated price differentials among competing purchasers on the ground that the price differences resulted in varying profit margins for the different customers. No attention was paid to the question of the "vigor of competition" in the buyers' market. Whittaker Cable Corp., F.T.C. Dkt. 5722 (April 29, 1955); Moog Industries, Inc., F.T.C. Dkt. 5723 (April 29, 1955); E. Edelman & Co., F.T.C. Dkt. 5770 (April 29, 1955); 3 CCH TRADE REG. REP. (10th ed.) ¶25443 to 445. Commissioner Mason, dissenting in these cases, contended that the decisions rested simply on the *Morton Salt* doctrine and that the Commission was really drawing the inference of illegal effect on competition solely from the fact that the discounts granted were substantial.

tween customers and his competitive success against other sellers of similar commodities. The act contains no language giving recognition to the vastly different nature of the problem here, but fortunately the courts have largely seemed to sense that too much direct legal interference with price competition between sellers threatens serious danger to antitrust policy.¹⁰⁷ It is unfortunate, however, that the *Report* does not propose some pertinent standards for this separate problem.¹⁰⁸ The one good thing about section 3 of the Robinson-Patman Act is that it recognizes that this is a problem which should be analyzed only in terms of "predatory intent."¹⁰⁹

Cost Justification

The cost justification proviso is a concession to efficiency, but it has proved so far to be a slight concession indeed.¹¹⁰ Its very existence in the statute, however, suggests the kind of economy which the draftsmen of the act seem to have envisaged. Only in an economy in which sellers' prices are free from competitive influence and in which demand for products is inelastic can sellers accurately determine in advance of sales what the unit production and distribution costs of their products will be. Cost justification, in principle, suggests a static and controlled market. Competition and fluctuations in consumer demand disrupt nice calculations, and this will always make such a defense difficult to establish.

But anything which contributes to some flexibility in the act is ipso facto worthwhile. The *Report* indicates that the proviso does offer the possibility of justification for some differentials if good faith subjective judgments are accorded weight, if reasonable approximations rather than exact measurements are required, if joint costs may be allocated among reasonable categories rather than among individual transactions, and if sound accounting procedures will be honored.¹¹¹

107. Cf. the opinion in *General Foods*, F.T.C. Dkt. 5675 (April 27, 1954), stating that the issue of injury to competition on the seller level is governed by the same standards as the issue on the buyer level, although the economic inquiry which must be made is different. The *Report* agrees. REPORT at 162-63; cf. *Purex Corp., Ltd.*, F.T.C. Dkt. 6008 (April 16, 1954); *Minneapolis-Honeywell Regulator Co. v. FTC*, 191 F.2d 786 (7th Cir. 1951).

108. For discussion, see Comment, *The Standard of Injury Applicable to First-Line Competition*, 49 NW. U.L. REV. 209 (1954).

109. Section 3 states, in part: "It shall be unlawful . . . to sell or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States." 49 STAT. 1528 (1936), 15 U.S.C. § 13a (1952). (Emphasis added.)

110. REPORT at 171: ". . . the cost defense has proved largely illusory in practice."

111. REPORT at 172-75. For discussion, see Massel, *Cost Justification*, in *Conference*, *supra* note 59.

The difficulty is that both legal ambiguities in the statute and great problems in administration have combined to frustrate the defense. The Committee finds that too often the Commission and the courts have imposed arbitrary and unrealistic requirements upon those attempting justification and have failed to evolve workable criteria which can be followed by those who seek in good faith to comply.¹¹²

The *Report* does not regard statutory revision as essential, although it suggests a new text in the event that administration in the future does not measure up to reasonable standards.¹¹³ The Committee commends the recent appointment of an Advisory Committee to the Commission to propose technical accounting standards. It also emphasizes that many of the problems are legal and not accounting questions, and on this level its most important recommendation is its general advice: ". . . [w]e recommend recognition that a Robinson-Patman cost defense is not susceptible to testing by precise or mechanical rules."¹¹⁴ The *Report* goes on to commend the general principles summarized above.

Two important legal principles are suggested which will add to the reasonableness of the defense. One, already recognized by the Commission,¹¹⁵ is that a de minimis principle should prevent failure of a defense which only falls short of full justification by a "fractional amount"; this can be achieved within the "due allowance" language of the proviso. The second is that where a cost justification falls short of covering the full differential, the act should nevertheless not be offended if the unjustified portion of the differential would alone be insufficient to cause the requisite competitive injury. This requires a reasonable application of the "effect on competition" test and is a principle which, if it commends itself to enforcement bodies, will greatly amplify the utility of the cost proviso.

Quantity Limits

The "quantity limits" proviso, which permits the Commission to place a ceiling on justifiable cost differentials, carried the ineptitude in draftsmanship which characterizes the act to new heights. It has

112. REPORT at 172-73. See Comment, *Cost Justification Under the Robinson-Patman Act*, 49 NW. U.L. REV. 237 (1954).

113. REPORT at 175 n.162: "That nothing shall prevent price differentials which make only due allowance for savings in any of the seller's costs, determined by any sound accounting principles, which may reasonably flow from differences in the categories of transactions involved." (Italics omitted.)

114. *Id.* at 174.

115. The B. F. Goodrich Co., F.T.C. Dkt. 5677 (1954).

been employed in only one industry, and the complexity of the issues now being litigated in the resulting case plainly reveals the immense difficulties which the proviso's "novel and perplexing criteria" create.¹¹⁶ But litigation could iron out the worst ambiguities, and the Committee does not halt with objection to the language.

In spirit, the quantity-limits proviso authorizes the Commission to engage in a limited form of direct price-fixing, and it is an instance in which the act's disbelief in competition comes plainly to the surface. Price-fixing may be a legitimate government activity, but it is not a legitimate part of an antitrust policy. The Committee's faith in the value of competition led it inevitably to condemn the proviso as ". . . ineptly sanctioning a crude form of price-fixing by administrative fiat where competition should safeguard the public interest."¹¹⁷ Strangely, the *Report* pauses at the doorstep and does not expressly recommend repeal as it did at the end of its comparable objections to "fair trade." But there can be no doubt as to where the Committee stood on the question. Only three members dissented.

The Meeting Competition Defense

The "meeting competition" defense of section 2(b) of the Robinson-Patman Act is one of the hottest battlegrounds of the statute. It is an arena in which the conflicting aspirations surrounding the act come into obvious clash. The conflict underlying section 2(a) is broader and deeper, but it is obscured by the fact that the section is piously cast in the language of antitrust. But the "meeting competition" proviso expressly poses the question: may the seller compete with a price differentiation, or not? If the act will not permit such competition, it is plainly anti-competitive. But the act cannot permit very much of such competition without being destroyed. The most ardent Robinson-Patman supporters will have none of it; the Committee was not very ardent about the act, but it accepted it in principle and though its pro-competition philosophy required it to allow the proviso to have some utility, it could not propose a defense which would undermine the act. The result is a set of recommendations which seek to give the proviso a little room in which to operate but which rather carefully confine it within safe limits.

The *Report* begins by strongly approving the *Standard Oil* decision¹¹⁸ that the defense is substantive and not a mere procedural

116. *The B. F. Goodrich Co. v. FTC*, 208 F.2d 829 (D.C. Cir. 1953); see Comment, *The Quantity Discount and Now the Quantity Limit*, 49 NW. U.L. REV. 251 (1954).

117. *REPORT* at 177.

118. *Standard Oil Co. of Indiana v. FTC*, 340 U.S. 231 (1951).

maneuver to compel the Commission to produce evidence of effect on competition. The Commission's strange position that the proviso was only procedural was founded on the rationale exhibited in the *Moss* case that the Commission does not have the burden of showing "effect";¹¹⁹ this rationale was essential to the theory that the proviso was procedural, for if the Commission had to show effect in the first instance, there would be nothing whatever for the proviso to do. The departure of *Moss* would make the Commission's old position untenable.

The *Standard Oil* opinion, though holding that "actual competition, at least in this elemental form, is thus preserved,"¹²⁰ did not have a good opportunity to lay down the ground rules of the defense. The *Report* sets forth a number of standards for application of the defense which it believes can be derived from the existing language of the statute. Chief among these are: (1) The defense contemplates a good faith effort to meet an actual competitor's price; a general aim of meeting competitive conditions in the abstract will not do.¹²¹ (2) The seller must reasonably believe that the competitor's price is itself "lawful" under the act.¹²² (3) The defense is not confined to sporadic situations, but may be used to ". . . cope with competitive pressures so long as they exist. . . ." ¹²³ (4) The seller must aim only to "meet" the competitor's price, but is entitled to a reasonable mistake under the *Staley* formula.¹²⁴ (5) Dollar-for-dollar meeting is not necessarily the test if there are competitive price differences between the two products; the seller's price may seek to "equalize the competitive situation," and this may mean going below the competitor's price in some instances and

119. See text at note 94 *supra*.

120. *Standard Oil Co. of Indiana v. FTC*, 340 U.S. 231, 242 (1951). See Comment, *The Meeting Competition Defense Under Section 2(b)*, 49 NW. U.L. REV. 261 (1954).

121. This is based on *FTC v. Staley Mfg. Co.*, 324 U.S. 746 (1945), and is illustrated in the recent decisions of the Commission in *E. Edelmann & Co.*, F.T.C. Dkt. 5770 (April 29, 1955).

122. A dispute still rages over whether the Court's reference to "lawful" prices in the *Standard Oil* opinion meant that the seller bears the absolute risk that his competitor's price is unlawful, or merely that the seller must reasonably believe that the price is lawful. The distinction makes a tremendous difference. Two Commission hearing examiners are under the impression that the Commission will only require "reasonable belief"; see initial decisions in *C. E. Niehoff & Co.*, F.T.C. Dkt. 5768 (Aug. 2, 1954) and *E. Edelmann & Co.*, F.T.C. Dkt. 5770 (March 29, 1954). The full Commission in the *Edelmann* case, however, recently avoided expressing itself on this question on the ground that it was not necessary to the disposition of the case. 3 CCH TRADE REG. REP. (10th ed.) ¶25445, at p. 35562.

For the view that the lawfulness requirement should be totally dispensed with see Stevens, *Defense of Meeting the Lower Price of a Competitor*, MICH. U. INST. ON FED. ANTITRUST LAWS 129 (1953).

123. REPORT at 182.

124. *FTC v. Staley Mfg. Co.*, 324 U.S. 746, 759-60 (1945).

staying above it in others.¹²⁵ (6) The seller may meet competition for a new customer as well as for an existing customer.¹²⁶

These are reasonable suggestions designed to bring the defense into some conformity with business actualities without permitting it to go very far toward curtailment of the act's basic directives. As the *Report* points out, the defense has yet to be successful in a single decided case. The complex requirements of the defense, even as sympathetically interpreted by the *Report*, do not promise to extend the boundaries of the proviso very far into the land of free competition. The *Report* observes that without the defense there would be "irreconcilable conflict" with the Sherman Act. But if the price equalization which the defense contemplates were achieved by private agreement without legislative sanction, it would be a criminal offense, and so some question remains as to whether full reconciliation has been achieved.

*Sections 2(c), (d) and (e)*¹²⁷

By any standard of statutory consistency, the brokerage, services and allowances subsections are anomalies. Though they deal with forms of price discrimination, they give their subject-matter quite different substantive treatment from that contained in the basic subsection 2(a). No doubt brokerage and allowances have on occasion been used as subterfuges for passing concealed price discriminations to favored customers, and no doubt such payments, even when made in exchange for real services performed by the customer, may be regarded as economic benefits which should be controlled if Congress so chooses. But why should not such practices be subjected to the same "effect" test and be qualified by the same defenses as any other form of so-called "price discrimination"?

The *Report* notes that the services and allowances subsections in practice have received quite reasonable construction by the Commission, though the brokerage subsection has ironically been perverted into a weapon against voluntary organizations of the very independent

125. *REPORT* at 183-84. This is the only rational rule, unless the defense is to be allowed only in industries in which products are relatively homogeneous and of identical cost and consumer acceptance. The Commission has clearly recognized this principle in holding that a seller of a premium product may not go as low as the dollar and cents price of a competitor's less popular product where the result would really amount to undercutting in a realistic competitive sense. *Minneapolis-Honeywell Regulator Co.*, 44 F.T.C. 351, 396-97 (1948); *FTC v. Standard Brands, Inc.*, 189 F.2d 510, 514 (2d Cir. 1951).

126. This is a controversial question, too, for the Court in the *Standard Oil* case, without any basis in the language of the statute, referred to the defense as one of "self-defense." 340 U.S. at 249-50.

127. 49 STAT. 1526 (1936), 15 U.S.C. §§ 13(c), (d) and (e) (1952).

merchants whom the act was designed to protect.¹²⁸ But as to all subsections, the obvious requirements of reconciliation with broader antitrust policy would dictate that competitive effect be demonstrated, and the *Report* therefore recommends that these provisions be "harmonized" with the overall standards of the act. The surprising thing is that the Committee halted there without recommending any legislation to accomplish this. Designation of the present subject-matter of the subsections as definitions of "indirect price discrimination" within the present coverage of section 2(a) would do the job.

The *Report* also recommends that the "for services rendered" clause of subsection 2(c), which has been read out of the act by judicial decision, be legislatively restored to "original vigor."¹²⁹ This is a commendable suggestion, but the *Report* contains no proposal as to what kind of implementing legislation should be drawn. Consequently, it is not clear how this change could be effected without impairing the act's aim to prevent chains from receiving compensation for the integrated functions they perform, and the proposal will require careful consideration.¹³⁰

Buyer Liability

The buyer liability subsection, 2(f),¹³¹ received its first Supreme Court interpretation in the *Automatic Canteen* decision.¹³² Although the decision was technically concerned with determining the burden of proof of a seller cost justification asserted by the buyer, resolution of this question led the Court into a general construction of the subsection. The resulting decision that the subsection applies only to buyers who reasonably know that the price concessions to them are unlawful under the act went far to relieve entrepreneurs in their role as purchasers from the strictures of the statute.

The rationale of the Court carried an emphasis which was strikingly different from its past decisions on the act, except for the *Standard Oil* opinion, and as already noted, its expression of a duty to reconcile the act with antitrust policy was adopted as the central guide of the Distribution Chapter. The Court's particular concern was for a

128. REPORT at 188, 190-91. For discussion and criticism of this section of the *Report*, see Gooder, *Sections 2(c), (d) and (e) of the Robinson-Patman Act*, in *Conference*, *supra* note 59.

129. REPORT at 192. Generally, see Comment, *Indirect Discrimination Under the Robinson-Patman Act*, 49 NW. U.L. REV. 225 (1954).

130. See Gooder, *supra* note 128; cf. problem of functional discounts discussed at pp. 218-21 *infra*.

131. 49 STAT. 1526 (1936), 15 U.S.C. § 13(f) (1952).

132. *Automatic Canteen Co. v. FTC*, 346 U.S. 61 (1953).

phenomenon of the free market which is not always emphasized and which suggests that the Court may have been reading Professor Galbraith's recent book.¹³³ In the words of the *Report*, the Court was impressed with "the imperative necessity for preserving the legal freedom of buyers to engage in aggressive bargaining over price as basic to effectively competitive distribution."¹³⁴ The Court's opinion was indeed a powerful brief for this brand of freedom, and the *Report* quite naturally gives its whole-hearted endorsement. The result reached by the Court is quite consistent with the language of subsection 2(f).¹³⁵

The present legal situation, however, underscores the dislocation in bargaining which subsection 2(a) produces. It takes two to make a bargain, and presumably the best elements of bargaining occur when the strength of the participants is roughly similar. The law now frees the buyer to bargain for anything which he does not know is illegal. But the seller has no such privilege and will be caught if the resulting bargain is illegal whether he knows of its illegality or not. The Court could do nothing about this disparity; but Congress could, if it were disposed to regard the value of "sturdy bargaining" as highly as did the Court.

Criminal Liability

Many pages could be written about the strange and occasionally indeterminate concepts embodied in section 3 of the Robinson-Patman Act. The *Report* ably catalogues its basic defects and concludes with the recommendation, apparently unanimous, that it be repealed, stating cryptically: "It does not serve the public interest of antitrust policy."¹³⁶

The section, being criminal, cannot be enforced by the Federal Trade Commission; the Department of Justice, notably disinterested in any of the price discrimination legislation, has seldom resorted to it. Its chief use in fact has been in treble damage litigation where it does not belong at all, but into which it has crept by a strange combination of accident and judicial oversight.¹³⁷

The *Report's* repeal recommendation was undoubtedly heavily influenced by the basic effort of the Committee to reconcile the price law with antitrust. Not only is the section so difficult to interpret that

133. GALBRAITH, *AMERICAN CAPITALISM; THE CONCEPT OF COUNTERVAILING POWER* 147-51 (1952).

134. *REPORT* at 196.

135. See Comment, *Buyer's Responsibility under the Robinson-Patman Act*, 49 NW. U.L. REV. 273 (1954).

136. *REPORT* at 201. See Comment, *The Meaning and Judicial Development of Section Three of the Robinson-Patman Act*, 49 NW. U.L. REV. 285 (1954).

137. *Id.* at 288-89.

its chief effect is to produce chagrin and harassment, but there can be no excuse for attaching the threat of criminal penalty to ordinary commercial competitive conduct.

Functional Discounts

The *Report's* discussion of the problem of "functional discounts" could, with a few changes, be converted into a brief for the repeal of the act. No other area of the statute's application shows quite so clearly the static conception of the economy implicit in the act as well as the great damage which the statute can do to efficiency and progress in distribution techniques. A careful reading of this section of the *Report* should give all who are concerned with the statute, of whatever persuasion, cause for reflection.

If distribution functions were all precisely segregated among different levels of manufacturing, wholesaling and retailing activity, there would be little problem, and this may have been the pattern of earlier days. But in our "dynamic economy," in the language of the *Report*, there is a "proliferation of modern marketing units" which "defies neat nomenclature and descriptive labels."¹³⁸ Manufacturers do much of their own distribution. Wholesalers sell at retail. Retailers integrate backward to perform wholesaling functions. Manufacturers and wholesalers sell both at wholesale and at retail.

Two major kinds of problems illustrate the effects of application of statute to this "proliferation," and as the *Report* points out, both were involved in the *Standard Oil* litigation.¹³⁹ One, a manufacturer sells to retailers and also sells to wholesalers. The act can be avoided if the manufacturer arbitrarily charges the same price to both classes, thus committing economic discrimination, but not "price discrimination." But he grants a discount to the wholesalers, recognizing their status and compensating them for the special distribution functions which they perform. One of the more efficient wholesalers resells to retailers at a price lower than that charged by the manufacturer in his direct sales to other retailers. Slavish application of the act's "effect" language can accord to this situation the result of illegality, and when this occurs, the only seeming remedy is for the manufacturer to cut off one of the two classes or else to control the wholesalers' resale prices in direct contravention of other antitrust policy. The *Report* quite naturally denounces this approach and calls for a rule absolving the

138. REPORT at 204.

139. *Standard Oil Co. v. FTC*, 340 U.S. 231 (1951), *reversing*, 173 F.2d 210 (7th Cir. 1949). For the extensive history of this case before the Commission and the courts, see REPORT at 205 n.243.

seller from any responsibility for his buyer's resale prices. Whether or not it is possible to achieve this result under existing statutory language, however, is a very real question.¹⁴⁰

The second problem is even more critical. A seller who sells only to wholesalers is in a relatively safe position. But many retailers, chains and others, have taken on full wholesaling functions by investing capital in warehousing, delivery and other facilities for performing intermediate functions. Some resell only at retail and others resell at both wholesale and retail. Retail sales of both may be in competition with retailers who are non-integrated and who purchase entirely from independent wholesalers. Economically it would seem that the integrated buyer should be entitled to seek a return for the service which he renders, and of necessity he must seek at least reimbursement for the extra costs of which he relieves the seller. However, if the seller accords to such a buyer a functional discount, he runs the immediate risk of being met with the charge that he is injuring competition on the retail level, especially if the integrated buyer's overall efficiency results in lower resale prices than are charged by the other buyers. Even without apparent reflection of the discount in lower resale prices, the discount may still possibly be attacked on the theory that it enhances the integrated buyer's profits or in some other way contributes to his competitive strength. Mindful of the act's anti-chain store parentage, the Commission, up to the time of release of the *Report*, had ignored the wholesale functions performed by the integrated buyer and had insisted that the character of his reselling as a retailer be determinative.¹⁴¹ In other words, on such goods as the buyer sold at retail, he was to pay the same price as that paid by his retail competitors who dealt with independent wholesalers, irrespective of the fact that the buyer may have performed true wholesaling functions in the purchase and handling of the goods.

There are only three ways to deal with this problem. One is to hold to the status quo and continue this uneconomic penalization of integration, thus using the law to attempt to stratify distribution along the lines of the nineteenth century. A second is to decide that neither good conscience nor the requirements of economic progress can permit us indefinitely to hold to such a legal policy and that the act must be repealed. A third is to seek some compromise.

140. Section 2(a) of the Robinson-Patman Act makes discrimination illegal "where the effect . . . may be . . . to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." 49 STAT. 1528 (1936), 15 U.S.C. § 13(a) (1952). (Emphasis added.)

141. REPORT at 205 nn.241-43.

The *Report* had to seek compromise and it made as powerful an argument for an intermediate position as could be made. Deploring the thwarting of efficiency and the affirmative discrimination in a rule compelling integrated distributors to furnish wholesaling functions free of charge, it called for abandonment of the inflexible position of the Commission and for adoption of an approach which would permit ". . . due recognition and reimbursement for actual marketing functions. . . . [A] distributor should be eligible for a discount corresponding to any part of the function he actually performs on that part of the goods for which he performs it."¹⁴²

It is important to note the legal theory offered by the *Report* in support of this principle. This is that where "injury" on the retail level comes from the integrated buyer's lower *resale* prices on the merchandise, this sort of injury, as a matter of law, must not be regarded as the "effect" of the seller's discount; it is instead the result of the buyer's own independent decision. As with the first problem discussed above, the seller should have no responsibility for the buyer's resale price, so long at least as the seller has in good faith sold to that buyer as a wholesaler and not as a retailer (" . . . [T]he law should tolerate no subterfuge").¹⁴³

This approach would go far to introduce flexibility into the act's application to sales to integrated buyers. Absolving the seller of responsibility for effects created by the buyer's resale price-cutting would permit true functional differentiation, and the seller's chief concern would be to treat all those performing wholesale functions equally and to make sure that he was not in reality giving a wholesale discount to one performing only retail functions. The difficulty with the theory is that it rests on a legal foundation whose support in the language of the act is debatable.¹⁴⁴

A partial victory has apparently been scored by the *Report* in this connection. In its recent *Doubleday* decision,¹⁴⁵ the Commission has

142. *Id.* at 207-09.

143. *Id.* at 208.

144. See note 140 *supra*.

145. *Doubleday & Co.*, F.T.C. Dkt. 5897 (Aug. 31, 1955) (mimeo.). Count IV of the case involved price discrimination, and the respondent attempted to justify certain discounts to three large wholesalers, one of whom also operated retail stores, on the ground that the discounts were only compensation for extra distributive functions performed. The hearing examiner ruled that this theory was legally invalid and excluded the proffered evidence, although the evidence was in the record. The opinion of the Commission, per Chairman Howrey, ruled that the evidence should have been admitted but that no prejudicial error was committed because on its face the evidence was insufficient to substantiate respondent's theory.

It is not entirely clear how many Commissioners agreed with Chairman Howrey. Commissioners Secrest and Mead expressly disagreed, though concurring in the result. Commissioner Mason expressly agreed with Chairman Howrey, dissenting on another part of the opinion. Commissioner Gwynne, however, was recorded simply as concurring "in the result."

rendered an opinion which, borrowing heavily from the language of the *Report*, reverses the long-standing refusal of the Commission to look at other than the character of the buyer's selling activities and announces that wholesaling functions of an integrated buyer are entitled to discount recognition.

The *Doubleday* opinion does not state the legal theory on which it is based, and notably does not expressly rest itself upon the *Report's* theory that legally the seller should have no responsibility for the buyer's resale prices. The relatively narrow formula stated is that the "amount of the discount should be reasonably related to the expenses assumed by the buyer. It should not exceed the cost of that part of the function he actually performs on that part of the goods for which he performs it."¹⁴⁶ If the discount must be no greater than the buyer's wholesaling costs, thus apparently precluding the buyer from a profit on this part of his investment, it would seem that the Commission has not adopted the *Report's* legal theory. Rather, although this is not stated, it would appear that the Commission's theory is that the seller remains responsible for effects on the buyer's resale level of competition, but that a discount which only returns the buyer's extra costs cannot injure competition on that level for the discount will be eaten up by costs not incurred by the competitors who do not receive the discount. This theory would seem to be entirely compatible with the act's language.

The Commission has thus taken a step in the right direction but perhaps has not gone the distance. The result is a contribution, but apparently the integrated buyer must continue to be content with something less than full reward for the functions he performs, unless subsequent clarification of the *Doubleday* opinion unfolds a different theory.

The widespread hostility to large buyers, of course, means that both the *Report's* theory and the lesser *Doubleday* theory will meet determined opposition from those to whom the act is not supposed to be an invitation to market analysis but rather a program for reducing distribution to its simplest common denominators.

The Distribution Chapter is not a fully comprehensive manifesto for a new birth of distribution freedom. But it makes many suggestions which should be carefully considered, and it certainly provides the occasion and the stimulus for an intensified reappraisal of our complex and perplexing distribution laws. There is nothing else like it available.

146. *Id.* at p. 5 (mimeo.).