MARTK IMPERFECTIONS: ENFORCEMENT OF THE ANTI-TRUST LAWS IN A FRICTION-AFFLICTED ECONOMY
G. E. Hale† and Rosemary D. Hale††

INTRODUCTION

In analyzing the nature of monopoly economists distinguish between market "impurities" and "imperfections." "Pure" competition is a simple concept: there must be many buyers and many sellers, no one of whom can affect prices. Since the sales or purchases of each trader are small, each seller is faced with a perfectly elastic demand curve for his product.1 A second requirement of market "purity" is that the commodity must be homogeneous.2 When the two foregoing

† A.B., Yale College 1935; LL.B., Harvard Law School 1938, J.S.D., University of Chicago 1940. Member of the Illinois Bar.
†† A.B., Mount Holyoke College 1940; M.A., American University 1946; Sometime instructor in economics, Lake Forest College. The authors were assisted by Mr. Daniel Levin, third year law student at the University of Chicago. For advice and encouragement they are under obligations to Mr. Justice Felix Frankfurter and to Dean Edward H. Levi of the University of Chicago Law School. For assistance in gathering factual and legal materials, the authors are indebted to Messrs. Graham Aldis, David W. Dangler, John D. Hastings, Stuart S. Palmer and Samuel L. Rosenberry.

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conditions for "purity" have been achieved, all monopoly elements have been removed from the market.

"Perfect" competition is a residual concept. All obstacles to an economic allocation of resources other than monopoly are referred to as "imperfections." Time lags, immobility of capital and labor, ignorance on the part of producer or consumer, and irrational decisions by buyers and sellers are prominent examples of "imperfections." As we shall see, commodities must also be homogeneous in order to avoid market "imperfections;" thus there is an overlap between the concepts of "purity" and "perfection." 5

This study examines the nature of imperfections and suggests their application in the enforcement of the anti-trust laws. In a free


4. As stated by Professor Knight, the condition of perfect competition: "... assumes complete absence of physical obstacles to the making, execution and changing of plans at will; that is there must be 'perfect mobility' in all economic adjustments, no costs involved in movements or changes. To realize this ideal all the elements entering into economic calculations—effort, commodities, etc.—must be continuously variable, divisible without limit. Productive operations must not form habits, preferences, or aversions, or develop or reduce the capacity to perform them. In addition the production process must be constantly and continuously complete; there is no time cycle of operations to be broken into or left incomplete by sudden readjustments. Each person continuously produces a complete commodity which is consumed as fast as produced. The exchange of commodities must be virtually instantaneous and costless." Id. at 128. Cf. Haney, Value and Distribution 149 (1939). Imperfections prevent application of the "profits" test to determine the existence of monopoly. High profits, in other words, may reflect merely frictions in the market place and not monopoly power. Knight, Risk, Uncertainty and Profits 19 (1921); Machlup, Monopoly and Competition: A Classification of Market Positions, 27 Am. Econ. Rev. 445, 448 (1937); Robinson, What Is Perfect Competition?, 49 Q.J. Econ. 104, 107 (1934).

5. Differentiation of products is a way of avoiding pure competition. Hence the existence of homogeneous commodities is a necessary condition of purity. Chamberlin, The Theory of Monopolistic Competition 7 (5th ed. 1946); Robinson, The Economics of Imperfect Competition 90 (1936); Triffin, Monopolistic Competition and General Equilibrium Theory 133 (1940); Samuelson, Economics An Introductory Analysis 492 (1st ed. 1948); Haney, Value and Distribution 181 n. (1939). Cf. Kaldor, Professor Chamberlin on Monopolistic and Imperfect Competition, 52 Q.J. Econ. 513, 517 (1938). Many subtle forms of product differentiation impair commodity homogeneity. Delivery service, extension of credit and the privilege of returning merchandise are three prominent examples. Robinson, The Economics of Imperfect Competition 89, 90 (1936); Copeland, Competing Products and Monopolistic Competition, 55 Q.J. Econ. 1, 30 (1940). Standardization of commodities is also important in the concept of "perfect" competition. Without such standards it is impossible for buyers to identify what they are paying for. Id. at 32. Cf. Lyon, The A.B.C. of the N.R.A. 173, 174, 177, 178 (1934) (Code provisions under the N.R.A.). Such standardization, however, can be carried so far as to deny consumers any real choice. At that point there may be conflict between the requirements of "purity" and "perfection" and of consumer sovereignty. Chamberlin, Monopolistic or Imperfect Competition?, 51 Q.J. Econ. 557, 577 (1937); Stocking and Watkins, Monopoly and Free Enterprise 508 (1951).

market economy allocation of resources is guided by consumer demand. Frictions and imperfections which reduce mobility of capital and labor or cloud the reign of consumer sovereignty may be just as injurious to the economy as monopoly itself. In addition, such frictions and imperfections may themselves give rise to a degree of monopoly power: if Ivory is the only brand of soap known to a housewife, its maker can monopolize her trade. This paper suggests that in some instances monopoly elements in effect merely eliminate imperfections which may be more disruptive to the economy than the impurities which they create. In any anti-trust case, therefore, not only the monopolistic tendencies, but also the imperfections which they tend to remove must be examined and weighed in order to obtain an economically sound result.

**The Nature of Market Imperfections**

Indivisibility and immobility are obvious imperfections. A town may not be large enough to support a second theater. Workers may hesitate to leave family and friends in order to secure higher wages in a distant area. Space itself is an imperfection and likewise gives rise to part of the problem of mobility. Similarly, time lags prevent

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9. Cf. Knight, *Risk, Uncertainty and Profits* 177 (1921); Chamberlin, *Monopolistic or Imperfect Competition?*, 51 Q.J. Econ. 557, 564-5 (1937); Haney, *Value and Distribution* 151 (1939); Wilcox, *Competition and Monopoly in American Industry* 2 (TNEC Monograph 21, 1940); Gregory, *Fashion and Monopolistic Competition*, 56 J. Pol. Econ. 69, 73 (1948). Such imperfections are often equivalent to those economies of scale which stand in the way of "pure" competition. Kaldor, *Professor Chamberlin on Monopolistic and Imperfect Competition*, 52 Q.J. Econ. 513, 521 (1938). Query whether differences in managerial ability should be considered imperfections. In United States v. Aluminum Co. of America, 148 F.2d 416, 431 (2d Cir. 1945), one of the elements of monopolization mentioned was that the defendant had kept the elite of personnel in its industry available for production of its goods. Note also, the following statement: "Small business by its very nature—the low financial requirements, easy entry, attractiveness to the individual—invites entrants without management experience while it is usually unable to contain within itself the elements of good management in the way of accountants, financial experts, fact finding, and so on." Wexman, *Financial Advice and Guidance for Small Business*, 11 Law & Contemp. Prob. 334, 336 (1945).

10. Stated differently: The fact that all economic activity does not occur at one place is in itself an imperfection.

a perfect allocation of resources: even though a new product is not protected by patent some delay normally ensues before the innovator is challenged by competition.\textsuperscript{12}

Inertia is an important imperfection.\textsuperscript{13} Many economic decisions are the result of habit and custom rather than rational choice. We do not and we could not pause to re-examine every day the quality of the commodities which we buy.\textsuperscript{14} The man who has always driven a Buick may purchase another car of that make to save an afternoon of shopping around for his game of golf. Closely akin to inertia are the emotional barriers to a free flow of resources.\textsuperscript{15} Sectional,
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social, family and religious considerations make markets rigid. Racial prejudice warps employment and other transactions. Hopes and habits, customs and conventions often prevent consumers from acting in a manner which others might consider rational.\(^{16}\)

Government action in the nature of intervention—control over prices and the rationing of commodities—should be considered as an impurity.\(^{17}\) Other types of governmental action may, however, well result in imperfections. Thus taxes levied on particular products such as gasoline and cigarettes tend to distort consumer demand for those commodities.\(^{18}\) In the short run, police power regulation


"... Consumers tend to choose wisely, but because they have so many alternatives before them they need help in discriminating on the actual market. We have only 24 hours a day, and we cannot spend the whole 24 weighing potatoes, burning silk, experimenting with coffee grinders and feeding guinea pigs." Hoyt, *Consumption in Our Society* 78 (1938). Another observer said: "... To learn really to select wisely among the many items in order to build a program of consumption would be a lifetime task. To learn, in addition, to choose the best value among the many qualities in which each item is offered at different prices would take the proverbial nine lives of a cat ..." Vaile, *Consumption, The End Result of Marketing*, 209 Annals 14, 21 (1940).


designed to protect public health and safety may have some similar effect. A statute requiring theatres to be constructed with a minimum number of fire exits may make it more expensive to erect such structures and hence discourage entry. In the long run, however, statutes designed in good faith to protect public health and safety should not be considered imperfections because the barriers which they create will be counter-balanced by subsequent savings to society. In such instances the burden of regulation can be justified if the countervailing savings actually exist. Contrariwise, even statutes designed to protect investors from fraud may be administered in such a manner as to handicap small and growing business to the point where resources are allocated imperfectly.

IGNORANCE, THE GRAND IMPERFECTION

Lack of knowledge is surely the most important imperfection and perhaps the underlying cause of the others listed above. Upon the part of producers, ignorance of demand and costs is the most damaging. A taxi driver sinks the savings of a lifetime in a chicken


23. For a detailed analysis of the problem mentioned in the text see Knight, Risk, Uncertainty and Profits 86, 198, 213, 225, 226, 230, 252, 253, 254, 260, 263 (1921). Many observers have recognized the problem, e.g., Pigou, The Economics
farm; but his location is too distant from urban markets to permit profitable operation. At great effort an inventor develops a method of fixing nitrogen only to find that the cost of manufacture by his process is prohibitive.

Consumer ignorance is a far more important cause of market imperfections. Faced with a vast selection of goods and imprisoned by prejudice, habit and emotion, it is next to impossible for the average consumer to buy intelligently. "Family units are not sufficiently large and their requirements are too varied to allow a detailed investigation of all the goods purchased. Exhaustive laboratory tests are necessary to determine the relative merits of goods offered in the market place. Even governmental and industrial buyers are not always able to determine precisely which product is the most satisfactory. As a result, correlation between price and quality is often loose.

Rain boots selling for eighty-eight cents a pair were found...


24. Marketing research has now been refined to a point where it is able to give producers considerable help in determining the nature of consumer demand. Testing devices indicate the preferences of consumers for various types of products and the marketing methods which will be most effective. See Brown, Marketing and Distribution Research 16 (1949); Cowan, The Function of Management in Marketing, 209 Annals 71, 74 (1940). It appears likely, however, that marketing research is employed only by large and perhaps medium size firms. Small producers appear not to have utilized such techniques. Smith, Increasing Distribution Efficiency by Better Organized Research, 17 J. Marketing 233, 234 (1953); Oxenfeldt, Industrial Pricing and Market Practices 130 (1951); Mulvihill, Marketing Research for the Small Company, 16 J. Marketing 179 (1951). Cf. Knight, Risk, Uncertainty and Profits 3 (1921).


28. Nelson and Keim, Price Behavior and Business Policy 60 (TNEC Monograph 1, 1941); cf. Gordon, Economics for Consumers 8, 12, 221 (2d ed. 1944). Just as names are convenient to identify persons, uniform labels for commodities are important to the exercise of rational choice by consumers. See Kaidanovsky, Consumer Standards 141, 339 (TNEC Monograph 24, 1941).


better than another brand of the same commodity retailing for $1.85.\textsuperscript{31} Product differentiation and the difficulty of evaluating credit, delivery and installation services render it almost impossible for the domestic consumer to achieve rational results in buying.\textsuperscript{32}

Advertising is frequently seen as an important cause of consumer ignorance and hence of imperfections in the market place.\textsuperscript{33} Advertising assists in the differentiation of otherwise identical commodities and thus permits sellers to discriminate among groups of buyers. Identical goods are sold to different groups at widely varying prices when advertised under different trade-marks.\textsuperscript{34} So heavy have been the expenditures for advertising of cigarettes and tooth paste and so great is the attachment of consumers to the established brands\textsuperscript{35} that it has become more difficult and expensive for new producers to

\textsuperscript{31} Rainboots for Women, 30 CONSUMERS' RESEARCH BULL. 17, 18 (Aug. 1952). See also The New Carpets, 30 CONSUMERS' RESEARCH BULL. 13, 16, 17 (Sept. 1952); Vacuum Cleaners, 30 CONSUMERS' RESEARCH BULL. 5, 8-9 (Nov. 1952); 1952 Automobiles, 29 CONSUMERS' RESEARCH BULL. 5, 6 (June 1952); Hearings before Temporary National Economic Committee, Part 8, 76th Cong., 2d Sess. 3331 (1939); Borden, The Economic Effects of Advertising 305 (1942). Indeed, observers have often noted that consumers frequently take price as an index of quality: the higher the price the better the quality. Corey, Fair Trade Pricing: A Reappraisal, 30 HARV. BUS. REV. No. 5, 47, 52 (Sept.-Oct. 1952); cf. Gordon, Economics for Consumers 13 (2d ed. 1944); cf. Robinson, The Economics of Imperfect Competition 89 (1936). Price reductions are sometimes avoided for fear that buyers, ignorant of quality, will assume a deterioration has taken place in manufacture. Edwards, Competition in Selling Consumer Goods in Social Meaning of Legal Concepts #4, 353, 361 (Cahn ed. 1952).

\textsuperscript{32} Cf. Mack, Economics of Consumption in A Survey of Contemporary Economics 61 (Haley ed. 1952); Oxenfeldt, Consumer Knowledge: Its Measurement and Extent, 32 Rev. Econ. & Statistics 300, 313 (1950). However, it has proven difficult or impossible to determine the quantitative importance of the problem. Ibid. Consumer ignorance can have broad effects upon the economy generally. It raises questions as to the whole doctrine of consumer sovereignty. See id. at 312, 313; Hildebrand, Consumer Sovereignty in Modern Times, 41 AM. ECON. REV. 19, 21 (Supp. 1951) (Proceedings American Economic Association); Clark, An Appraisal of Certain Criticisms of Advertising, 15 AM. ECON. REV. 5, 13 (Supp. 1925) (Proceedings American Economic Association); Gordon, Economics for Consumers 7, 13 (2d ed. 1944). As to the relationship between consumer ignorance and standardization suggested in the text see Wilcox, Competition and Monopoly in American Industry 2 (TNEC Monograph 21, 1940); Montgomery, Consumer Standards and Marketing, 209 ANNALS 141, 143 (1940); Edwards, Maintaining Competition 33 (1949); Hearings before Temporary National Economic Committee, Part 8, 76th Cong., 2d Sess. 3346 (1939).

\textsuperscript{33} Knight, Risk, Uncertainty and Profits 185 (1921); Nelson and Keim, Price Behavior and Business Policy 55 (TNEC Monograph 1, 1941); Brown, Advertising and the Public Interest, 57 YALE L. J. 1165, 1171, 1173 (1948); Borden, The Economic Effects of Advertising 21, 322 (1942).

\textsuperscript{34} See Nelson and Keim, Price Behavior and Business Policy 80 (TNEC Monograph 1, 1941); Timberg, Trade-Marks, Monopoly and the Restraint of Competition, 32 LAW PROB. 23, 34 (1949); Hearings before Committee on the Judiciary, Subcommittee on Study of Monopoly Power, Serial 12, S. H. C. 1st Sess. 462 (1952). But cf., Knight, Risk, Uncertainty and Profits 262 (1921). From time to time the courts have had to determine whether a brand designation distinguished otherwise identical commodities. Hale, Size and Shape, 1950 U. OF ILL. L. FORUM 515, 525.

enter those fields. Finally, it is urged that advertising, when not downright dishonest and misleading, appeals to the emotions more than the intellect and hence contributes to the irrationality of consumer behavior. If the seller of a face cream does not promise to rejuvenate sweet nothings in their ears until his product is on their faces.

36. *Hearings before Temporary National Economic Committee, Part 8, 76th Cong., 1st Sess. 3399* (1939). As to the existence of monopolistic profits in such situations compare *Nelson and Keitm, Price Behavior and Business Policy* 81 (TNBC Monograph 1, 1941) with *Borden, The Economic Effects of Advertising* 175, 176 (1942). As stated in the text, heavy advertising expenditures can raise barriers to entry into competition. *Stewart and Dewhurst, Does Distribution Cost Too Much?* 227 (1939); *Oxenfeldt, Industrial Pricing and Market Practices* 283 (1951); *Stocking and Watkins, Monopoly and Free Enterprise* 75, 164 (1951); *Simons, Economic Policy for a Free Society* 71, 72 (1948); *Borden, The Economic Effects of Advertising* 859 (1942). Such advertising may also force competitors into defensive and retaliatory measures of the same type. *Oxenfeldt, Industrial Pricing and Market Practices* 224 (1951). Note, for example, the following comment appearing in an annual report: "... Quality of product, although all important, is only a starting point. Unless the consumer is repeatedly convinced through advertising and merchandising, as well as by experience, that the Company's products offer the best value, sales volume will drop." *The Best Foods, Inc., Annual Report* 5 (August 15, 1951). It is probably true, however, that the foregoing effects of advertising operate only in the short run. *Borden, The Economic Effects of Advertising* 860 (1942).


39. It is argued that advertising is merely persuasive and not informative and that trade-marks are not a scientific mechanism to identify product quality. *Clark, An Appraisal of Certain Criticisms of Advertising, 15 Am. Econ. Rev. 5* (Supp. 1925) (Proceedings American Economic Association); *Robinson, The Economics of Imperfect Competition 90* (1936); *Nourse, Price Making in a Democracy* 248 (1944); *Wilcox, Brand Names, Quality and Price*, 173 *Annals* 80, 82 (1934). Advertising is often designed merely to catch the attention of consumers so that they may receive a message of persuasion. Thus a cigarette manufacturer may employ well-known theatrical performers for its radio broadcasts simply to assure a large audience for its "commercial." See, e.g., *P. Lorillard Company, 1950 Annual Report* 13 et seq.

40. See *Charles of the Ritz Distributors Corporation v. FTC*, 143 F.2d 676 (2d Cir. 1944). It is sometimes argued that advertising can actually create demand. *E.g., Shove, The Imperfection of the Market, 43 Econ. J. 113, 124* (1933). Such a view would compel sweeping revision of the whole theory of consumer sovereignty. *Stocking, Modern Advertising and Economic Theory, 21 Am. Econ. Rev. 43, 44, 50, 53* (1931). But see *Hotchkiss, An Economic Defense of Advertising, 15 Am. Econ. Rev. 14-6* (Supp. 1925) (Proceedings American Economic Association). Similarly, it is sometimes urged that advertising can shift consumer demand from one brand or product to another. *E.g., Mack, Economics of Consumption in A Survey of Contemporary Economics* 59 (Haley ed. 1952). It is often urged that such advertising is merely persuasive and hence wasteful in character. *Brown, Advertising and the Public Interest, 57 Yale L.J. 1165, 1169* (1948); *Simons, Economic Policy for a Free Society* 71 (1948). But see *Borden, The Economic Effects of Advertising* 165, 168, 313 (1942). It was reported, for example, that parent teachers associations had induced school boards to remove candy vending machines from school houses. So successful had the campaign been that only 5% of the schools had such machines as against 80% before the campaign started. Candy distributors proposed a campaign to remedry the situation by advertising candy as a food contributing to health and good spirits. *Opportunities and Dangers Ahead, 10 Southern Candy Jobber* 10, 13 (Dec. 1951). Whether advertising can "create" that which is not is often credited with an ability to influence demand and much money is spent in reliance on such beliefs. *Borden, The Economic Effects of Advertising* 337, 380 (1942); *The Lambert Company, 1950 Annual Report* 2; *Gulf Presents a New TV Show, 10 Orange Disc 21, 22* (Sept.-Oct. 1952).
On the other hand, advertising and trade-marks serve as devices to remove imperfections in that they inform buyers of the existence of products and their prices.\textsuperscript{41} Classified advertising in newspapers surely constitutes an important element looking to the reduction of consumer ignorance. Mail order catalogs supply a host of information concerning products, their quality and prices.\textsuperscript{42} Trade-marks identify goods by reference to standards of quality which have been tested and approved by consumers.\textsuperscript{43} Newly developed products are quickly brought to the attention of consumers through advertising\textsuperscript{44} and thus achieve a volume of sales which permits mass production and hence low prices far more rapidly than would otherwise be possible.\textsuperscript{45}

\textsuperscript{41} Knight, Risk, Uncertainty and Profits 261 (1921); Gordon, Economics for Consumers 69, 155, 156, 165 (2d ed. 1944); Hotchkiss, An Economic Defense of Advertising, 15 Am. Econ. Rev. 15, 17 (Supp. 1925) (Proceedings American Economic Association); Borden, The Economic Effects of Advertising 27, 169, 415 (1942); Stocking and Watkins, Monopoly and Free Enterprise 72, 73 (1951); Brown, Advertising and the Public Interest, 57 Yale L.J. 1165, 1168 (1948). How salesmen overcome inertia, as well as ignorance, is described in $1,000,000 A Year Insurance Men, 40 Fortune 79, 81 (July 1949); Sales People Aren't Selling, 40 Fortune 78 (Sept. 1949).

\textsuperscript{42} Gordon, Economics for Consumers 154 (2d ed. 1944); Borden, The Economic Effects of Advertising 668 (1942). Note the important role played by display advertisements inserted in newspapers by department stores and chain groceries. Hearings before Temporary National Economic Committee, Part 8, 76th Cong., 2d Sess. 3290 (1939).

\textsuperscript{43} Hotchkiss, An Economic Defense of Advertising, 15 Am. Econ. Rev. 14, 21 (Supp. 1925) (Proceedings American Economic Association); Auerbach, Quality Standards, Informative Labeling, and Grade Labeling as Guides to Consumer Buying, 14 Law & Contemp. Prob. 362, 381 (1949); Wilcox, Brand Names, Quality and Price, 173 Annals 80, 83 (1934); Borden, The Economic Effects of Advertising 23, 25 (1942); Hearings before Temporary National Economic Committee, Part 8, 76th Cong., 2d Sess. 3442 (1939). But see id. 3325; Robinson, The Economics of Imperfect Competition 89 (1933); Borden, The Economic Effects of Advertising 25 (1942). Note the following comment by a well known proponent of protection for consumers: "... it isn't possible to draw sweeping conclusions that a well known brand is necessarily the consumer's guarantee of a high-quality product. Sometimes it is an important safeguard to assure at least reasonable quality, but it all depends on the sense of public responsibility of the company's management, and new developments in the character of its advertising" Schlink, Off the Editor's Chest, 30 Consumers' Research Bull. 2, 18 (Oct. 1952).


Without advertising many American women might still be deprived of a Toni permanent.46

Many private weapons in addition to advertising are employed in the struggle against ignorance. Producers commonly employ "market research" as a device to ascertain the rough outlines of consumer demand.47 Mass merchandisers seek constantly to inform themselves as to product quality and market conditions.48 Both sellers and buyers are aided in securing knowledge of market conditions by employment agencies, real estate brokers, trade journals and similar services.49 Trade associations and professional societies engage in standardization and testing activities.50 Specialized services exist to advise domestic consumers of the relative merits of products offered for consumption in the home.51 Because, however, the tastes and subjective values of consumers vary widely, the services rendered by organizations such as Consumers' Research fall considerably short of removing all the ignorance and irrationality with which purchasers are afflicted.52

46. It is sometimes suggested that advertising might be able to smooth out hourly, daily, seasonal or longer fluctuations in business volume. Advertising, for example, might induce housewives to buy their groceries earlier in the week when stores are not operating at capacity levels. Shifts in Advertising Sought for Weekly "Second Food Day," 20 The American Baker 50 (Jan. 1952). See What's the Matter with American Statesmanship?, 40 Fortune 67, 69 (Sept. 1949). Query whether such an effect should be deemed the removal of an imperfection or an effort to alter demand.

47. Jeuck, Marketing Research—Milestone or Millstone?, 17 J. Marketing 381 (1953); Borden, The Economic Effects of Advertising 127 (1942).

48. Stocking and Watkins, Monopoly and Free Enterprise 316 (1951); White, Marketing Research, 209 Annals 183, 185 (1940); Kaidanovsky, Consumer Standards 306, 311 (TNEC Monograph 24, 1941). But see id. at 323. Even relatively small retailers sometimes approach market studies. A highly amusing account of the efforts of a dealer in infants' wear to secure the names of potential customers before its competitors will be found in Watson, "Crib of the Month" Club Plan Rocks Miami, 6 Juvenile Merchandising 60 (Jan. 1952).


50. Gordon, Economics for Consumers 517, 519 (2d ed. 1944); Kaidanovsky, Consumer Standards 211 (TNEC Monograph 24, 1941). But see Hearings before Temporary National Economic Committee, Part 8, 75th Cong., 2d Sess. 3380 (1939) (complaint that "Good Housekeeping" seal of approval granted too liberally).


52. Mitchell, The Backward Art of Spending Money in American Standards and Plans of Living 377, 384 (Eliot ed. 1931); Montgomery, Consumer Standards and Marketing, 209 Annals 141, 142 (1950); Lyon, et al., Government and
Hence private efforts have not been wholly successful in overcoming such frictions.53

**STATUTORY EFFORTS TO REDUCE IMPERFECTIONS**

Much governmental activity has been directed at the reduction of frictions in the market place.54 Establishment of uniform weights and measures by statute has contributed immensely to the smooth flow of commerce.55 Many agencies and particularly those of the federal government, such as the Departments of Agriculture and Commerce, are constantly engaged in the collection and dissemination of information concerning crops, minerals, finished products and their prices.56 The whole census of manufactures can be regarded as an effort to improve our knowledge of industry and hence to reduce imperfections arising out of ignorance. In the labor field, establishment of an employment service on a national basis at public expense...

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ECONOMIC LIFE 235 (1939); BORDEN, THE ECONOMIC EFFECTS OF ADVERTISING 646 (1942); Beem, Consumer-Financed Testing and Rating Agencies, 16 J. MARKETING 272, 274, 278 (1952). In part the difficulty arises from an attempt to determine which commodity is "best" for everyone and hence, in some degree, to limit consumer sovereignty. But see Clark, An Appraisal of Certain Criticisms of Advertising, 15 AM. ECON. REV. 5, 11 (Supp. 1925) (Proceedings American Economic Association); DUESENBERRY, INCOME, SAVING AND THE THEORY OF CONSUMER BEHAVIOR 1 (1949). Attempts to avoid the standardization inherent in an effort to specify which commodity is "best" encounter the obstacle of consumer failure to understand the technical problems involved. Beem, Consumer-Financed Testing and Rating Agencies, 16 J. MARKETING 272, 280 (1952); KAIDANOVSKY, CONSUMER STANDARDS 351 (TNEC Monograph 24, 1941). Take, for example, Administrator, Production and Marketing Division, U.S. Department of Agriculture, U.S. Standards, Fruit Preserves, 17 FED. REG. 11,683 (1952). In section 52.30.333(f)(4) of that Regulation, the Administrator was attempting to specify grades of jams. His method was to weigh various factors. The "flavour" was given a weight of 40%. In the discussion of flavour, however, all the Administrator could say was that it should be "good" and "characteristic" of the kind of fruit involved.

53. It has sometimes been urged that consumers be organized for political purposes into "pressure groups." GORDON, Economics for Consumers 291, 397, 518, 592 (2d ed. 1944). On the other hand, it appears that agencies purportedly representing the interest of consumers have sometimes held other objectives. Such political objectives have probably hindered the agencies in the accomplishment of their ostensible purposes. SORENSEN, THE CONSUMER MOVEMENT 127, 226 (1941); Hearings before Temporary National Economic Committee, Part 8, 76th Cong., 2d Sess. 3381 et seq. (1939).

54. Interventionist measures adopted by government should, of course, be distinguished from activity designed to reduce imperfections. Some legislation may fall on the border line. Take, for example, the prescription of minimum wages and the prohibition of usury. 52 STAT. 1062 (1938), 29 U.S.C. § 206 (1946), as amended, 66 STAT. 912 (1949), 29 U.S.C. § 206 (Supp. 1952); Illinois Act to revise the law in relation to the rate of interest, ILL. REV. STAT. c. 74, § 1 (1947). If free market prices are above the minima prescribed by the wage legislation or below the rates fixed by the usury statutes, then governmental action merely removes imperfections in that it protects ignorant workers and borrowers who are unfamiliar with market values.

55. LYON, et al., GOVERNMENT AND ECONOMIC LIFE 217 (1939); KAIDANOVSKY, CONSUMER STANDARDS 20 (TNEC Monograph 24, 1941). Similarly, our whole system of commercial law has a like purpose.

56. LYON, et al., GOVERNMENT AND ECONOMIC LIFE 240, 243, 245 (1939); GORDON, Economics for Consumers 570 (2d ed. 1944).
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reflects a congressional desire to assist both employers and employees through the rapid dissemination of information concerning the availability of jobs and workers.87

Misrepresentations, of course, are a prime source of ignorance in the market place. Although the rule of caeae emptor may still hold some sway, the common law always protected buyers against active deceit.88 In recent years statutory regulation, both state and federal, has gone far to protect buyers against positive misstatements. Measures to protect the public against adulterated and mis-branded foods have long enjoyed popularity and recent amendments have made those measures more effective.89 Regulation has not been limited, however, to situations in which public health and safety are affected. Several federal statutes require affirmative labeling of goods in the market place. The names which can be applied to furs, for example, are now controlled under statutory authority.90 In the sale of securities governmental requirements are particularly strict and detailed. "Blue Sky" legislation compels sellers of stocks and bonds to make full disclosure of all pertinent facts to their customers.91

It has often been urged that governmental action should go far beyond mere prohibitions of misrepresentation. As indicated above,

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61. Note also the legislation compelling disclosure in the solicitation of proxies and the like. 15 U.S.C. § 78 (1946) (Securities Exchange Act); Loss, Securities Regulation 492, 523 (1931). Similarly, attempts have been made to compel issuers of securities to sell them on a basis of competitive bidding. Id. at 264.
the standardization of commodities is necessary for them to achieve that homogeneous character requisite for both pure and perfect competition. Buyers cannot act rationally if they do not identify goods by precise quality standards. Hence it has been urged that statutes should authorize the standardization and "grade labelling" of all commodities. Standardization and grading activities, however, are subject to several objections. Complicated machines, for example, reflect a series of compromises among various engineering aims and it would be difficult to grade them in terms which would be significant and meaningful to all buyers. Similarly, standardization could be carried so far as unduly to limit consumer choice and hence to defeat the very consumer sovereignty which a free market economy seeks to achieve. Again, standardization and grading activities might be subject to political pressures of a monopolistic character and hence—if not for other reasons—tend to curb innovation and stultify the economy.

We find, however, a number of statutes which do require governmental action looking to the standardization and grading of commodities. Most of them fall in the field of agriculture and were designed primarily for the promotion of producers' interests. The present Food, Drug and Cosmetic Act, however, has a broader purpose and it has been applied so as to prohibit the production and sale of whole-


65. Note, for example, the authoritarian over-tone in Sorensen, The Consumer Movement 24 (1941). Congressional reaction to OPA efforts looking to the standardization of commodities is illustrative of such fears. Auerbach, Quality Standards, Informative Labeling, and Grade Labeling as Guides to Consumer Buying, 14 Law & Contemp. Prob. 362, 374 (1949).


some and honestly labeled food. Such utilization of the statute was approved by the Supreme Court on the express ground that the intent of the Congress was to protect consumers against a confusing variety of products through exercise of a standardization power. In the case referred to, The Quaker Oats Company was prevented from marketing a type of farina enriched with certain vitamins. The Quaker product was unacceptable because it was neither plain farina nor enriched with all the vitamins prescribed in the governmental standard for "enriched farina." Whether such statutory restrictions are desirable may be open to debate. Their existence, however, indicates a Congressional intent to reduce the imperfection of ignorance through administrative standardization.

**Effects upon Interpretation of the Anti-Trust Statutes**

Anti-trust decisions have always taken account of market imperfections. There has, however, been little if any explicit discussion of such frictions in anti-trust opinions. It is thus possible that the role of imperfections has not received due recognition: judicial zeal to extirpate "impurities" may have been so powerful as to blind the courts to the desirability of curbing market frictions. No doubt such frictions are present in every situation from which an anti-trust case arises. In subsequent paragraphs we shall only consider decisions in which the role of imperfections has been most obvious.

*Trade Commission Activities against Fraud:*—There has been much dissatisfaction with the performance of the Federal Trade Commission. As many observers have noted, the commission was expected to take vigorous action against monopoly but has devoted most of its attention to the suppression of misrepresentations in trade. That shift in emphasis has been the subject of many biting comments. Mr. Henderson rebuked the commission.

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70. Many other examples could be cited in which imperfections have played a role, e.g., United States v. United Shoe Machinery Corp., 110 F. Supp. 295, 336 (D. Mass. 1953); *Restatement, Contracts* § 516(a) (1932). Indeed, the whole problem of entry into competition may be profoundly affected by the imperfections of inertia and ignorance. See Wright, *Some Pitfalls of Economic Theory as a Guide to the Law of Competition*, 37 Va. L. Rev. 1083 (1951).

71. The organic statute is the Federal Trade Commission Act, 15 U.S.C. § 41 (1946). Section 45(a), as amended, provides: "... Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."
for wasting time "upon petty squabbles and dishonesties." 72 Even so sophisticated a jurist as Mr. Justice Brandeis did not believe that the Federal Trade Commission Act was designed directly to protect consumers.73 A statutory amendment in 1938 74 was required before the courts recognized that misrepresentations may be harmful even though no competitor is directly affected.76 Sophisticated sneers greeted the opinion in the Standard Education Society case,76 in which one court finally permitted the commission to pursue a stringent anti-fraud policy. Most lawyers preferred the opinion of Judge Learned Hand in the court below and agreed that the commission's "trivial niceties" were "too impalpable for practical affairs." 77

It may be conceded that the commission could easily push its powers too far. Elimination of all puffing and a requirement of absolute truth in advertising could result in a bureaucratic paternalism of dangerous proportions.78 Any such program would probably exceed the needs of the market place. If consumer ignorance, however, con-

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76. FTC v. Standard Education Society, 302 U.S. 112 (1937). Cf. (earlier cases) FTC v. R. F. Keppel and Bro., Inc., 291 U.S. 304 (1944); FTC v. Algoma Lumber Co., 291 U.S. 67, 81 (1934). Accord (later cases), Book-of-the-Month Club, Inc. v. FTC, 202 F.2d 486 (2d Cir. 1953); Rothschild v. FTC, 200 F.2d 39 (7th Cir. 1951); R. E. Lee Tobacco Co. v. FTC, 192 F.2d 535 (7th Cir. 1951); P. Lorillard Co. v. FTC, 186 F.2d 52 (4th Cir. 1950); Carlaw Co. v. FTC, 153 F.2d 493 (7th Cir. 1946); Gulf Oil Corp. v. FTC, 150 F.2d 106 (5th Cir. 1945); Charles of the Ritz Distributors Corp. v. FTC, 143 F.2d 676, 679 (2d Cir. 1944); Moretrench Corp. v. FTC, 127 F.2d 792, 795 (2d Cir. 1942); Ford Motor Co. v. FTC, 120 F.2d 175, 182 (6th Cir. 1941).
tributes as greatly to market imperfections as this study indicates, the position of the Federal Trade Commission may be more rational than heretofore supposed. Common law remedies are often inadequate and, without expressing a view as to any particular decision, we may well find ourselves sympathetic to the position taken by the commission. Similarly, there may be more justification than has heretofore been recognized for the affirmative labeling requirements contained in various trade practice conference rules of the commission. Those advisory interpretations of the commission's organic act have often been regarded as ultra vires to the extent that they imposed an affirmative duty upon sellers of labeling goods. For reasons expressed above, we may well hesitate to endow the commission with broad powers to standardize goods. To the extent that such regulation removes market imperfections, however, it may contribute to an economic allocation of resources.


80. Professor Handler is one of the few experts in the field who has vigorously approved the commission's activities in the area of misrepresentation. Handler, The Control of False Advertising Under the Wheeler-Lea Act, 6 Law & Contemp. Prob. 91, 98 (1939); Handler, Unfair Competition and the Federal Trade Commission, 8 Geo. Wash. L. Rev. 399, 405, 406, 418, 420 (1940). To the same general effect see Stocking and Watkins, Monopoly and Free Enterprise 351 (1951); Knight, Risk, Uncertainty and Profits 78 (1921); Miller, Unfair Competition 115 (1941). It should be recorded, however, that few voices were raised in support of the commission's position at the University of Chicago's anti-trust seminar on June 17, 1953.


82. See Albert v. FTC, 182 F.2d 36 (D.C. Cir. 1950), cert. denied, 340 U.S. 818 (1950); Scientific Mfg. Co. v. FTC, 124 F.2d 640 (3d Cir. 1941). But cf. Perma-Maid Co. v. FTC, 121 F.2d 282 (6th Cir. 1941). Instances may arise in which the expense of precise labeling is more costly than the imperfections which would thereby be removed, e.g., Gimbel Bros., Inc. v. FTC, 116 F.2d 578 (2d Cir. 1941); Kaianovskv, Consumer Standards 350 (TNEC Monograph 24, 1941). It is also not impossible that regulation of the type in question could take on an interventionist character. Thus the following statement was found in a trade journal: "After considerable discussion it was the general opinion that the Fur Products Labeling Act held great promise of eliminating a substantial part of the unfavorable competition from low grade pelts and means were agreed upon to advance this project as fast as expedient." National Board of Fur Farm Organizations, Report of Meeting of Executive Committee, 19 Fur J. 11 (Sept.-Oct. 1952). See Hamilton, The Ancient Maxim Caveat Emptor, 40 Yale L.J. 1133, 1138, 1148, 1152 (1931); Miller, Unfair Competition 113 (1941).

83. Lotteries have been forbidden as a means of selling goods. FTC v. R. F. Keppel and Bro., Inc., 291 U.S. 304 (1934); Deer v. FTC, 152 F.2d 65 (2d Cir. 1945); Handler, Unfair Competition and the Federal Trade Commission, 8 Geo. Wash. L. Rev. 399, 415 (1940). Elimination of the lottery feature in a sale consti-
Horizontal Size:—We experience great difficulty in defining a monopoly. It is hard to say how small firms must be in order to avoid "impurities." In that effort, however, account should be taken of the often repeated view that small firms are more likely to deceive their customers than large enterprises. No positive proof of that tendency has been found, nor can any specific size be named as indicative of questionable representations. It is true, however, that the extensive services offered by large concerns to teach consumers how to use their products and the like, could scarcely be offered by their smaller competitors. Mass merchandisers can inspect the goods...
MARKET IMPERFECTIONS

they offer for sale to the ignorant consumer with much greater care and expert knowledge than small independent merchants. Indeed, some of the largest distributing concerns maintain their own laboratories for the benefit both of consumers and producers.\(^7\) It follows that the confidence which consumers have placed in such large scale distributors, evidenced by acceptance of their private brands (often available at prices below those established for heavily advertised brands of the same commodities), may not be misplaced.\(^8\)

Recognition of market imperfections will not, in all likelihood, lead to any alteration in our notions as to an acceptable size for manufacturing concerns. As just indicated, however, mass merchandisers render services to consumers of a type which little merchants cannot match. Display advertising of chain and department stores in

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MINNEAPOLIS-HONEYWELL REGULATOR Co., 1950 Annual Report 15 (1951); PARKE, DAVIS & Co., 84th Annual Report 10 (1951). A flour miller conducts a cooking school with a tremendous registration, develops and promulgates new recipes, and broadcasts the information over a radio network of 187 stations. GENERAL MILLS, INC., 20th Annual Report 38 (1948). A public utility concern conducted a cooking school with over 9,000 home demonstrations given during a single year. Its electricians worked with architects and contractors to make recommendations for the wiring of residential and commercial buildings. OHIO EDISON Co., 1950 Annual Report 7 (1951). Metropolitan Life Insurance Company engages in activities designed to promote public health, and also conducts a nursing service for some of its policy holders. Hearings before Temporary National Economic Committee, Part 12, 76th Cong, 2d Sess. 5838, 5840 (1939). A firm which the Attorney General seeks to break into five separate competing companies produced six motion pictures in 1950 showing customers how to carve meat and how to cook foods. ARMOUR & Co., 1950 Annual Report 3, 5 (1951). A company engaged in the lending of money has published a number of helpful pamphlets telling its patrons how to buy intelligently. The pamphlets appear to be reliable and to give sound, non-political advice which should be of considerable assistance to consumers. HOUSEHOLD FINANCE CORPORATION, BETTER BUYERSHIP: MEAT, FISH, POULTRY AND EGGS (1951); HOUSEHOLD FINANCE CORPORATION, MONEY MANAGEMENT: YOUR HOME FURNISHINGS DOLLAR (1952). Note also, the activities of large firms as buyers. They conduct extensive investigations, standardize the commodities they require, and probably thus contribute in an important manner to the reduction of market imperfections at that level. KADANOVSKY, CONSUMER STANDARDS 191, 192 (TNEC Monograph 24, 1941). Such benefits may reflect the balancing of monopoly with monopsony which has, of course, effects in the realm of "impurities." It has been suggested that large firms are more likely to indulge in undesirable types of advertising than small ones. See STOCKING AND WATKINS, MONOPOLY AND FREE ENTERPRISE 73 (1951). If that assertion can be proven, it may relate only to very large firms and not to those of middle size. Another factor worthy of mention is that firms may be too small to comply with regulations designed to remove market imperfections. Take, for example, the case of a firm desiring to raise a small amount of capital by public sale of its securities. See note 61 supra.

87. STOCKING AND WATKINS, MONOPOLY AND FREE ENTERPRISE 316 (1951); GORDON, ECONOMICS FOR CONSUMERS 511 (2d ed. 1944); SEARS, ROEBUCK & Co., 1952 Annual Report 15-9 (1953). The catalog published by the rival mail order firm of Montgomery Ward & Company is famous for its detailed information on various products such as radios, hot water tanks and the like.

88. EDWARDS, MAINTAINING COMPETITION 368 (1941); SORENSEN, THE CONSUMER MOVEMENT 11 (1941); BORDEN, THE ECONOMIC EFFECTS OF ADVERTISING 42, 605 (1942). It does not follow, of course, that the private brand of merchandise is always of the highest available quality. 1953 TV Receivers, 30 Consumers' Research Bull. 5, 8 (Dec. 1952). As to the value of endorsements by publishers of magazines and the like, some information will be found in Hearst Magazines, Inc., 32 F.T.C. 1440 (1941).\end{quote}
metropolitan newspapers is often highly informative. It is clear, also, that some degree of size is necessary to permit sellers to engage in those market research activities which we have noted as important in the reduction of ignorance of demand. Thus it is possible that a desire to reduce market imperfections could affect the problem of horizontal size in the field of distribution.

Trade-Mark "Monopolies":—In recent years the view has often been expressed that trade-marks are monopolistic in character. Judge Jerome Frank, perhaps the most active proponent of that point of view, has stated that legal protection of trade names does not engender competition but, on the contrary, creates lawful monopolies. A producer seeking to enjoin use of his trade-mark on goods sold to the same type of consumers through identical channels of distribution was rebuked by the court of appeals for the seventh circuit, which referred to "[t]he unconscionable efforts of the plaintiffs to monopolize the food market by their monopoly of the word Sunkist." A more sophisticated view finds trade-marks objectionable in that they permit that product differentiation utilized by oligopolists to avoid the impact of pure competition. Upon whatever ground, some of the literature can be read as an argument in favor of the abolition of trade-marks and similar identifying mechanisms.

89. Note also that mass merchandisers may be able to reduce advertising costs. Borden, The Economic Effects of Advertising 465, 470, 483 (1942). Compare Nelson and Keim, Price Behavior and Business Policy 88 (TNEC Monograph 1, 1941).

90. White, Marketing Research, 209 Annals 183, 184 (1940).


94. See Brown, Advertising and the Public Interest, 57 Yale L.J. 1165, 1190 (1948); Timberg, Trade-Marks, Monopoly, and the Restraint of Competition, 14 Law & Contemp. Prob. 323, 326 (1949); Miller, Unfair Competition 116 (1941). As Mr. Timberg points out trade-marks can be used as vehicles for both horizontal and vertical price fixing schemes. Timberg supra, at 328, 352. It is also true, as indicated in the text, that if a commodity becomes known only by its brand name the producer using that mark will gain a monopoly advantage. Id. at 324; Montgomery, Consumer Standards and Marketing, 209 Annals 141, 144 (1950); Stocking, Modern Advertising and Economic Theory, 21 Am. Econ. Rev. 43, 52 and n.17 (1931). At that point, however, the mark has ceased to distinguish the brand of the commodity in question from other brands of the same commodity. It becomes descriptive in character and hence is denied protection. Restatement, Torts §735 (1938); Callmann, The Law of Unfair Competition and Trade-Marks §74.1 (1st ed. 1945); Oppenheim, The Public Interest in Legal Protection of Industrial and Intellectual Property, 40 T.M. Rep. 613, 625, 626 (1950). But see Timberg supra, at 332 (expensive to litigate issue of loss of distinctiveness).
Supporters of trade-marks point out the difference between a patent or a copyright and a mere trade-mark. Resources of the language, they argue, are inexhaustible and the existence of 6,000 brands of shoes and 10,000 brands of wheat flour is cited as evidence of that fact. Trade-marks, they urge, are mere means of identification and do not in themselves confer any monopoly in the commodities to which they are attached. In some degree, at least, trade-marks constitute a certificate of quality and the fact that the Federal Trade Commission has moved against those using the trade-marks of others indicates that infringement of a mark constitutes a positive misrepresentation. In short, if the courts refused to enjoin the use of trade-marks by those not entitled to them under the established law of unfair competition, their decisions would tend to promote rather than suppress market imperfections.

The conflict between those who would curb impurities and those who would suppress imperfections through restricting or encouraging the use of trade-marks comes to a focus in cases wherein it must be decided how far trade-mark protection shall be extended. The most ardent "restrictionist" (with the exception of those who would abolish trade-marks altogether) would not permit a second user of the mark to apply it to identical goods. He would, however, deny the trade-mark owner injunctive relief in cases wherein the infringer is not


96. Wilcox, Brand Names, Quality and Price, 173 Annals 80, 82 (1934); Borden, The Economic Effects of Advertising 633 (1942); see Best & Co. v. Miller, 167 F.2d 374, 378 (2d Cir. 1948) (Judge Clark's dissenting opinion).


98. Borden, The Economic Effects of Advertising 23, 629, 631-2 (1942). Note the following statement: "CR Bulletins have often mentioned the desirability of knowing by what manufacturer an article has been produced, and the need, as a practical matter, and for very good reasons, of avoiding the purchase of any important food, beverage, or other article or appliance of unknown origin." Clinical Thermometers, 31 Consumers' Research Bull. 24 (Jan. 1953). But see Gordon, Economics for Consumers 247 (2d ed. 1944).

a competitor. Apparently that view is based on the belief that such protection of the trade-mark against "dilution" encourages a persuasive rather than an informative use of advertising. Informative advertising is recognized as desirable in that it reduces consumer ignorance. Mere persuasive advertising is, however, identified with product differentiation and hence with monopoly.¹⁰⁰

Historically, the basic principle of the law of unfair competition has been protection of the consumer from confusion.¹⁰¹ That view is, of course, closely related to the suppression of market imperfections. Undoubtedly, a narrow scope of legal protection would weaken the persuasive force of trade-marks. Tiffany, the jeweler, would not have sought an injunction against the use of his name in the production of motion pictures¹⁰² had he not believed that such use would detract from his good will;¹⁰³ and if advertising which is merely persuasive in character is a principal weapon of the oligopolist, then refusal to issue the injunction against a non-competitor may contribute in some degree to the enforcement of our anti-trust policy. On the other hand, if likelihood of confusion¹⁰⁴ can be proven even in a minor degree, the court denying injunctive relief may be striking a feeble blow against market impurities while adding in considerable measure to market imperfections.

**Cooperation Among Competitors:**—Trade associations often promulgate codes of ethics and take similar action against misrepresentation and other forms of activity regarded as unfair competition.


Support of "better business bureaus" and of the Federal Trade Commission's trade practice conferences constitute conspicuous examples of such trade association practices. Whether such groups should be permitted to curb style piracy, protect the public against indecency and prohibit the practice of medicine by corporations is, of course, debatable. To the extent, however, that such activity reduces fraud and unethical practices in the market place, it should at least receive the sympathetic consideration of the courts.

Trade associations also engage in market research activities and particularly in the gathering and dissemination of trade statistics. Over the years the permissible boundaries of such trade association activity have been delineated with reasonable clarity. The courts have, for example, insisted that the information circulated should be made available to purchasers and the public at large as well as to producers. Such restrictions are highly desirable because publication of trade statistics has often formed a convenient vehicle for price fixing conspiracies. Those who take the extreme position


106. Fashion Originators' Guild, Inc. v. FTC, 312 U.S. 457 (1941); American Medical Association v. United States, 317 U.S. 519 (1943); Hale, Agreements Among Competitors, 33 Minn. L. Rev. 331, 352, 375, 377, 379 (1949); Comment, 40 Col. L. Rev. 736, 739 (1940).

107. A leading authority said some years ago: "Regulation of unfair and deceptive competitive practices, the arbitration of commercial disputes, the standardization of identity and quality of products, the improvement of conditions of labor, the registration of trade-marks and original styles and designs, the conservation of natural resources, the elimination of wasteful practices, and the promotion of efficiencies in production and distribution are only a few of the fields in which trade associations perform a distinct social service." Handler, A Study of the Construction and Enforcement of the Federal Antitrust Laws 28 (TNEC Monograph 38, 1941).


109. Pearce, Trade Association Survey c. 5 (TNEC Monograph 18, 1941); Miller, Unfair Competition 285 (1941).


of advocating abolition of such activities,\textsuperscript{113} however, apparently overlook the contribution they make to the reduction of imperfections. Mr. Justice Brandeis argued that the Sherman Act did not require competition to be pursued blindly and Mr. Justice Holmes suggested that the ideal of commerce was an intelligent interchange made with full knowledge of the facts as a basis for a forecast of the future.\textsuperscript{114} It is true that governmental agencies do provide much the same service in the agricultural field which presumably, could be extended to those areas now served by trade associations.\textsuperscript{115} Any extension of such governmental activity, however, carries its own hazards of the development of intervention and in any event the trade associations perform an important role during a period when such public service is undeveloped.

As we have noted, standardization of commodities is important both for the suppression of impurities and imperfections in competition. Unless the product is homogeneous, pure competition cannot exist. Similarly, a bewildering array of differentiated goods may so confuse consumers as to prevent them from exercising their sovereignty in the market place.\textsuperscript{116} Trade associations have played a prominent role in the standardization and simplification of many types of goods. They have formulated standards of quality and "simplified" products to eliminate large numbers of shapes, sizes and models felt to be unnecessary. In some instances, associations have "graded" merchandise and applied certification marks thereto.\textsuperscript{117} As the record of anti-trust litigation shows, it is possible for groups of competitors to cloak price fixing and similar activities in the raiment of standardization and simplification.\textsuperscript{118} For such reasons § 14(d) was inserted in the Lanham

\textsuperscript{113} Some observers take the position that all price reporting systems tend to eliminate competition from their very nature. Fly, Observations on the Anti-Trust Laws, Economic Theory and the Sugar Institute Decisions, 45 YALE L.J. 1339, 1345 (1936); Oxenfeldt, Industrial Pricing and Market Practices 318 (1951).


\textsuperscript{115} Mund, Open Markets 246 (1948); Stocking and Watkins, Monopoly and Free Enterprise 255 (1951).

\textsuperscript{116} But see Marshall, Principles of Economics 325 (8th ed. 1920).

\textsuperscript{117} Kaidanovsky, Consumer Standards 193, 196, 198, 201, 225 (TNEC Monograph 24, 1941); Hale, Agreements Among Competitors, 33 MINN. L. REV. 331, 362 (1949); Agnew, The Movement for Standards for Consumer Goods, 173 ANNALS 60, 66 (1934); Hearings before Temporary National Economic Committee, Part 8, 76th Cong., 2d Sess. 3421, 3428 (1939). Professional and technical societies engage in similar activities. Kaidanovsky, supra, at 210, 224.

\textsuperscript{118} C-O-Two Fire Equipment Co. v. United States, 197 F.2d 489, 493 (9th Cir.), cert. denied, 344 U.S. 892 (1952). See also Hearings before Temporary National Economic Committee, Part 8, 76th Cong., 2d Sess. 3420, 3430 (1939);
Markets Imperfections Act to provide for cancellation of certification marks if used to restrain trade or to discriminate against producers. On the whole, however, there has been widespread acceptance of the desirability of such standardization programs. Unless used as a cloak for direct restraints of trade or carried to the extent where consumer sovereignty is effectively suppressed, most observers have found standardization and simplification to be meritorious. In that connection it is interesting to note that the governmental programs of the same type often lean heavily upon trade standards previously adopted by private groups.

Exchanges:—Unities of time and place are achieved when traders gather in organized markets. Imperfections can be removed from the flow of commerce when all trading is focused on a single exchange. Economists are agreed upon the desirability of such institutions, and in many decisions over the decades the courts have approved them. Indeed, the courts have permitted members of the exchanges


122. Robinson, The Economics of Imperfect Competition 51 (1948); Harrod, Doctrines of Imperfect Competition 48 Q.J. Econ. 442, 445 (1934); Sen. Doc. No. 35, 77th Cong., 1st Sess. 403 (1941). But see Chamberlin, An Experimental Imperfect Market, 56 J. Pol. Econ. 95 (1948). A particularly vigorous advocacy of organized exchanges will be found in Munden, Open Markets 212, 234-5, 237, 244, 257 (1948). An example of the market place in action is reported in To Market, To Market, 40 Fortune 87 (July 1949).

123. In United States v. New York Coffee and Sugar Exchange, Inc., 263 U.S. 611, 619 (1924), it was said: "The usefulness and legality of sales for future delivery, and of furnishing an Exchange where under well-defined limitations and rules the business can be carried on, have been fully recognized by this court. . . . The machinery of such an Exchange has been at times made the means of promoting corners . . . thereby restraining and obstructing foreign and interstate trade. In such instances, the manipulators subject themselves to prosecution and indictment under the Anti-Trust Act. . . . But this is not to hold that such an Exchange with the facilities it affords for making contracts for future deliveries is itself a combination and conspiracy thus to restrain . . . trade." See, Anderson v. United States, 171 U.S. 604, 616 (1898); Board of Trade v. Christie Grain and Stock Co., 198 U.S. 236, 249 (1905); New York and Chicago Grain and Stock Exchange v. Board of Trade, 127 Ill. 153, 161, 19 N.E. 855, 858 (1889); State v. Duluth Board of Trade, 107 Minn. 506, 521, 121 N.W. 395, 401 (1909). The importance of organized exchanges to the economy is recognized in Commodity Exchange Act §§ 3, 4a, 4d, 4e,
to agree not to trade with non-members and even to fix the rate of commission which should be charged for dealings in the organized market. In the early Anderson case, the court examined such an exclusive trade arrangement and found "there is no feature of monopoly in the whole transaction." In the famous Chicago Board of Trade case, Mr. Justice Brandeis wrote an opinion sustaining a rule of that body prohibiting a change in the price of grain after the close of trading and until the exchange opened the following morning. Recent legislation appears to approve such rules of organized exchanges, at least if governmental supervision be exercised over them.

Transactions in restraint of trade can, of course, be carried out through the facilities of an organized exchange. Similarly, such an institution may be used as a cloak for price fixing or other undesirable practices. It was, however, disturbing when the Supreme Court of the United States recently cast doubt on prior favorable decisions. That doubt arises from an assertion that the older cases rested upon the ground that only local commerce was involved. The statement was made in a case involving real estate brokers, who are not, of course, traders on organized exchanges. Such agents, however, perform essentially the same service as brokers upon stock and grain exchanges. It is true that an agreement among such brokers looking to the fixing of commission rates flies in the face of the rule that price fixing is illegal per se under the anti-trust laws. If, however, the informal exchanges operated by real estate and similar brokers be properly credited with the important role they play in diffusing information to both buyers and sellers, a different result may well follow. Experience

4h, 6(b), 42 STAT. 999-1002 (1922), as amended, 7 U.S.C. §§ 2, 5, 6, 9 (1946). Note that § 4b of that statute is aimed at gambling on organized markets, a practice which has been suppressed by private exchanges with judicial approval in the past. Moore v. New York Cotton Exchange, 270 U.S. 593 (1926); Board of Trade v. Christie Grain and Stock Co., 198 U.S. 236, 252 (1905) (by implication).


129. Id. at 492. There is language in Hopkins v. United States, 171 U.S. 578, 588 (1898), which supports the recent statement made by the Court. But cf. id. at 592; Anderson v. United States, 171 U.S. 604, 615-6 (1898); Stafford v. Wallace, 258 U.S. 495, 524 (1922); Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 229-30 (1948).

130. See LYON and ABRAMSON, THE ECONOMICS OF OPEN PRICE SYSTEMS 9 (1936); ATKINSON, FUNDAMENTALS OF REAL ESTATE PRACTICE 291, 295, 309 (1946); MUND, OPEN MARKETS 244 (1948).
appears to indicate that fixing of commission rates on organized exchanges is essential to facilitate the fast flow of transactions. In informal markets similar considerations may apply. Fixing of rates of commission, of course, diverts competition among the brokers into service channels.131 While in the field of industry as a whole such diversion may be undesirable, it is entirely possible that buyers and sellers of the commodities dealt in by brokers benefit from the commission fixing. In other words, it may be more important for the vendor or purchaser of real estate to secure service competition in the making of a sale or purchase rather than some small concession from the broker’s normal rate of commission. If that be true, considerable question is cast upon the merits of cases holding that brokers of real estate, sugar and insurance cannot agree upon rates of commission.132

CONCLUSIONS

In the nature of things, we cannot assess the relative importance of impurities as against imperfections in the total commerce of the nation. Hence no firm suggestion can be made to a court trying a particular case as to the relative weight to attach to those two obstacles to an economic allocation of resources. Within the boundaries of a single suit, however, it is conceivable that calculations roughly approximating quantitative appraisals might be possible. Economists should be able to make an informed guess as to the cost of monopolistic factors in a given situation. Similarly, the expense of continuing those market imperfections which a trade practice seeks to suppress could be

131. State v. Duluth Board of Trade, 107 Minn. 506, 551, 121 N.W. 395, 414 (1909). A vivid illustration of service competition by a real estate broker is furnished in a direct mail advertising circular published by A. H. Gruetzmacher & Co. of 29 S. LaSalle Street, Chicago (1953). In that circular the broker offered to have a picture taken of the owner’s premises by a professional photographer and to mail a brochure containing that photograph to 25,000 prospective purchasers. He also offered to furnish the picture and a listing of property to 2,500 brokers place advertisements in the newspapers and render other services all at no cost whatever to the property owner and at no increase in commission above the standard rate charged in the city.

132. But cf. United States v. Sugar Institute, Inc., 15 F. Supp. 817, 903 (S.D.N.Y. 1934), aff’d, 297 U.S. 553, 587-9 (1936). See United States v. Southwestern Underwriters Ass’n, 322 U.S. 533 (1944). A question may arise as to whether the foregoing reasoning can be applied to the “fair trade” statutes so as to afford economic justification for those measures. Comment, Resale Price Maintenance and the Anti-Trust Laws, 18 U. of CHI. L. REV. 369 (1951); Hearings before Antitrust Subcommittee of the Committee on the Judiciary on H.R. 4365, H.R. 4593, H.R. 4662, H.R. 6367, 82d Cong., 2d Sess. (1952). For several reasons it is believed that the arguments applicable to organized and informal exchanges should not be extended to all retail trade. “Fair trade” statutes protect retailers who take title to the goods they sell and thus incur risks in reselling them. Brokers by definition merely act as agents for the trading parties. Hence there is a marked distinction between the retail druggist, for example, on the one hand, and the real estate broker on the other. There are several other reasons why the argument advanced in the text should not be applied to justify resale price maintenance.
appraised in some rough form. If a court were considering, for example, the validity of commission fixing by real estate brokers, it would not be too difficult to make an estimate of the additional expense resulting therefrom. Perhaps more difficulty would be encountered in assessing the counter-vailing cost of lethargy in service competition. If, however, markets could be found where commissions had not been so fixed by agreement among the brokers, testimony as to experience in those areas might be helpful in assessing the relative merits of the two systems.

It is submitted that the anti-trust laws cannot be enforced without taking account of frictions in the market place. A blind-zeal to remove all monopoly elements in the economy might well result in a less efficient allocation of resources than previously obtained.\textsuperscript{133} What we are urging is, of course, little more than a formalized application of the familiar rule of reason;\textsuperscript{134} and the fact that quantitative standards for its application may often be lacking cannot excuse a refusal to consider the impact of judicial action upon the economy as a whole. Extension of the doctrine of violations per se is not, in other words, a rational approach to the solution of most anti-trust problems.

\textsuperscript{133} Compare Edwards, Maintaining Competition 30-49 (1949) with Nelson and Keim, Price Behavior and Business Policy 56-7 (TNEC Monograph 1, 1941).