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Revision of the Anti-Trust Laws

Although there have been a host of suggestions as to how industry can be re-patterned to permit industrial stabilization, no basic change can be effected until the applicable legal prohibitions are cleared. As interpreted by the courts, the Sherman Anti-Trust Act of 1890¹ forbids price and production agreements controlling a substantial part of an industry.² Its language inveighs against monopoly.³ Since the essence of these plans for stabilization is monopolistic control of an industry through production agreements, it is evident that their accomplishment requires a re-interpretation or revision of the act. To certain changes therein which would permit practical experimentation with industrial self-stabilization, this paper is devoted.

The problem is particularly acute in California. The anti-trust statute of this state,⁴ the Cartwright Act, a tangled ruin of legislation, casts an uncertain shadow over the desk of the business executive as well as that of the lawyer.⁵ The original statute so sweepingly condemned combinations which restrained trade or lessened competition that it was promptly amended. The amendment exempted from the statute agreements or combinations "the object and business of which are to conduct its operations at a reasonable profit or to market at a reasonable profit those products which cannot otherwise be so marketed."⁶ But in passing upon language of a Colorado statute identical to this, the Supreme Court of the United States held that the standard of "reasonable profit" was too vague a criterion for a criminal statute.⁷

¹ 26 STAT. (1890) 209, 15 U. S. C. A. (1927) §§ 1, 2.

² The writers of this article have previously considered the first section of the Sherman Act, which declares illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade . . . among the several states . . .," in *The Legality of Price-fixing Agreements* (1932) 45 HARV. L. REV. 1164.

³ "Every person who shall monopolize, or attempt to monopolize . . . or conspire . . . to monopolize any part of the trade . . . among the several states shall be deemed guilty of a misdemeanor." 26 STAT. (1890) 209.

⁴ Cal. Stats. 1907, p. 894; *ibid.* 1909, p. 593.

⁵ See Colby and Tobriner, *California's Anti-Trust Law* (1932) 7 CALIF. STATE BAR J. No. 8, p. 184.

⁶ Cal. Stats. 1909, p. 593.

⁷ *Cline v. Frink Dairy Co.* (1927) 274 U. S. 445, 47 Sup. Ct. 681.

The consequent illegality of the amendment to the Cartwright Act does not seem open to doubt. But does the original act, in all its rigor, remain, or does the unconstitutional amendment drag down the whole enactment? The answer to this question is not known. Consequently the anti-trust law of the state is from every angle hopelessly confused, and neither lawyer nor industrialist can foretell the legal fate of plans for cooperation or stabilization.

Plans for stabilization range from entirely voluntary devices for self-control of competing units in an industry to rigid and intricate structures for their compulsory regulation. Since they propose control of production they trespass in common upon the interdicts of the Sherman Act. Benjamin A. Javits⁸ suggests that no more is needed than strong trade associations which will bind their members not to sell below cost and which will evolve schemes for the control of production. The associations are also to tax the members a percentage of their gross sales for "research, standardization, simplification, and cost reduction" as well as to maintain a fund "to increase wages, shorten hours, or guarantee substantial regularity of employment." A similar voluntary organization is set out by Walton H. Hamilton.⁹ Industrialists, laborers and consumers, who are interested in an industry, will organize it, "order" production, and divide by a process of collective bargaining its product among themselves. This is reminiscent of the earlier, and some of the still active, German cartels.¹⁰ An "alliance between industry, trade association, and government to control investment (*i.e.*, plant capacity) on the one hand, and to guard against unwarranted monopoly prices on the other; a universal system of minimum wages . . . ; the setting up of a National Industrial Planning Board . . ." is the proposal of Stuart Chase.¹¹ Parallelling this, the Report of a Subcommittee of the Committee on Unemployment and Industrial Stabilization of the National Progressive Conference¹² proposes a National Economic Board which, with suitable powers and after power investigation, is to lay out schemes for planned production in various industries. "The Board should have the power to propose legislation for the setting up" of its suggested plans. This borders upon compulsory regulation of the individual producer, such as the Gos-plan in Russia, but it does not propose it.

⁸ JAVITS, *BUSINESS AND THE PUBLIC INTEREST* (1932) 52.

⁹ Hamilton, *The Anti-Trust Laws and the Social Control of Business* in HANDLER, *THE FEDERAL ANTI-TRUST LAWS—A SYMPOSIUM* (1932) 12.

¹⁰ NATIONAL INDUSTRIAL CONFERENCE BOARD, *RATIONALIZATION OF GERMAN INDUSTRY* (1931) 31 *et seq.*; STOCKING, *THE POTASH INDUSTRY* (1931) 65 *et seq.*

¹¹ Chase, *The Enemy of Prosperity* (1930) 161 *HARRERS MAG.* 641; see Chase, *A Ten Year Plan for America* (1931) 163 *ibid.* 1.

¹² *Long-Range Planning for the Regularization of Industry* (1932) 59 *NEW REPUBLIC* No. 893, pt. II. See SOULE, *A PLANNED SOCIETY* (1932).

Charles A. Beard,¹³ however, urging a national board that will represent the basic industries and control their production, does suggest compulsory regulation. A striking example of such a scheme—notable for the industrial prominence of its author—is the Swope plan. Gerard Swope,¹⁴ president of the General Electric company, on September 16, 1931, proposed that all companies employing fifty or more employees be compelled to join trade associations which, through the control of production, could attempt to balance output with demand. Member companies would be required to maintain for their employees life and disability insurance, a pension system and unemployment insurance. For these purposes funds would be partially recruited from the employees themselves.

Ranging all the way from voluntary to required cooperation, these plans, archetypes of others,¹⁵ meet the same criticisms.¹⁶ The chief

¹³ Beard, A "Five Year Plan" for America (1931) 86 FORUM 1.

¹⁴ Swope, *Plan to Stabilize Industry and Employment* (1931) 133 COMMERCIAL AND FINANCIAL CHRON. 1918; FREDERICK, THE SWOPE PLAN (1932) 19 *et seq.*

¹⁵ Thus Thomas, in *America's Way Out* (1931), suggests compulsory control of production (p. 88 *et seq.*) but also favors socialization of the means of production (p. 161 *et seq.*) and wider distribution of wealth (p. 170 *et seq.*). An interesting variation of the Swope Plan is suggested in a pamphlet by Stevenson, *The Way Out*, which suggests that a certain percentage of an industry be empowered to unite in order to compel the remainder of the industry to regulate production.

¹⁶ Criticism of the concept of planned production, as epitomized in the Swope Plan, can be pigeon-holed into various categories: (1) It nullifies free exercise of taste. "Unless and until the community as a body of consumers is ready to forego the privilege, not only of buying according to whim or fancy but also of having its passion for new things and for novel frills on old things indulged by the managers of industry, there can be no genuine gain from 'planned production.' The assumption of the readiness of the community to submit to an arbitrary curtailment of consumers' choice, in the interest of productive efficiency, is in our view the most ill-founded and unreal assumption upon which the case of these critics of the anti-trust laws depends." Watkins, *The Economic Philosophy of Anti-Trust Legislation* (1930) 147 ANNALS 21. (2) It will artificially preserve the life of "sick" or dying industries to the exclusion of younger and more vital ones. "If we try to force prosperity upon our 'sick' industries through master planning, we will fail unless we follow the dictatorial policy of Russia and either forbid the manufacture of newer or better or cheaper products which might replace those of the older industries, or ration the quality of the new products which individuals may buy. We will have to stop the manufacture of oil-burners because of the injury their use inflicts upon the coal industry. We will have to ration the quantity of milk and vegetables which each family buys in order to make sure that it consumes its quota of wheat bread." Borsodi, *We Can't Legislate Prosperity* (1931) ADVERTISING AND SELLING. (3) It so radically changes the present economy as to be unworkable. "Competition and economic planning are violently opposing forces, with nothing in common between them. Realists know that no corporation will voluntarily surrender any of the advantages that it has over its competitors. A planned system of economy can be erected only over the dead body of the competitive system." Epstein, *The Stabilization Nonsense* (1932) 25 AM. MERCURY 67, 73. (4) Being a vast extension of government into business it will compel business to attempt to control government. "Now I fully believe

objection is that they call for a compulsory control of industry incompatible with the pattern of competition and profit-making. They demand regimentation of production which, in turn, requires regimentation of taste. Who is to tell the rugged individual what and how he is to buy? If some super-power does not order want and desire, your standardized output will crack up on the varied demands of individual buyers. If demand is so stabilized, progress and change become difficult, if not taboo. We will then have exchanged a dynamic competitive society for a static feudal one.

While such criticism is not so disturbing as it may seem, it must be admitted that most of the plans are difficult to conceive as working systems. Schemes for compulsory control of production, such as Swope's and Beard's, require a constitutional amendment.¹⁷ Suggestions for set-

in the use of government as an agent in socializing basic industries. I am very suspicious, however, of the bureaucracy, tyranny, and inefficiency of using government on such a vast regulatory scale as Mr. Swope proposes. There is nothing in the history of the most successful of our regulatory authorities—the Interstate Commerce Commission—to make us look at an extension of its powers over other industries as the way out. . . . In short, Mr. Swope's scheme of regulation is a probably unconstitutional plan for putting the power of government behind the formation of strong capitalist syndicates which will seek to control the government which regulates them and, failing that, will fight it." Thomas, *A Socialist Looks at the Swope Plan* (1931) 133 *NATION* 357, 358. See *Stabilizing Business* (1931) 133 *ibid.* 323; *The Swope Plan for Industry* (1931) 159 *OUTLOOK* 139. (5) It is not workable in industries where combination is impossible. Such non-combinative industries have been listed as: "(1) Industries in which products cannot be standardized and establishments which make products to suit the different tastes of consumers. Such industries produce tailored suits, high-grade furniture, art goods and finely bound books. (2) Industries producing for a small market, such as those manufacturing artists' materials. (3) Industries in which the local market is small and whose product has high transportation costs. (4) Industries in which the material used is widely scattered and cannot be concentrated because of high transportation costs or perishability. Cheese factories and cider mills may be included in this class. (5) Industries in which skilled labor is the chief element, such as engraving and job printing, whose products are really services rather than commodities. (6) Industries whose operations must be spread out over a wide area, so that much of the labor performed must be by a scattered, self-directed worker. Most branches of farming belong in this group." SEAOER AND GULICK, *TRUST AND CORPORATION PROBLEMS* (1929) 656. (7) It requires a constitutional amendment. JAVITS, *op. cit. supra* note 8, at 52.

¹⁷ A legislative declaration that a particular industry where affected with a public interest and therefore subject to governmental regulation would win judicial approval only if the courts themselves found the industry of that character. The courts argue that regulation of rates may be a taking of property without due process of law and consequently unconstitutional, and that they, as final interpreters of the Constitution, must decide for themselves whether the business is affected with a public interest. This attitude has raised Mr. Justice Holmes' vigorous protest. In his dissenting opinion in *Tyson v. Benton* (1927) 273 U. S. 418, 446, 47 Sup. Ct. 426, 434 (holding unconstitutional a New York law limiting theatre ticket speculators to a mark-up of fifty cents per ticket) he says: "I think . . . that the notion that a business is clothed with a public interest and

ting up giant planning boards, whatever their merit, raise basic questions. Any organization which is to survey all the markets of this country, decide on capacity for production and consumption, organize industry, co-ordinate it, and protect the public from the evils of private monopoly must necessarily be stupendous. What will be its legal status? Is it to suggest or to compel? Under our constitution can industry be mobilized by government as it was during war-time? It may well be that the evolution of industry is toward voluntary or compulsory super-planning but its present enactment as legislation is only a remote possibility.

has been devoted to the public use is little more than fiction intended to beautify what is disagreeable to the sufferers. The truth seems to me to be that, subject to compensation when compensation is due, the legislature may forbid or restrict any business when it has a sufficient force of public opinion behind it. Lotteries were thought useful adjuncts of the State a century or so ago; now they are believed to be immoral and they have been stopped. Wine has been thought good for man from the time of the apostles until recent years. . . . What has happened to lotteries and wine might happen to theaters in some moral storm of the future, not because theaters were devoted to a public use, but because people had come to think that way." With this view no court at present agrees. The courts hold that the final decision as to whether a business is affected with a public interest rests with them and not the legislature. While they have admitted new industries into the public interests category such as insurance, and possibly coal mining, their principle in so doing is seldom clear. Mr. Justice Stone, also dissenting in the theater ticket case from which we have just quoted, attempts the following statement of the principle which goes to the very limit of what the courts have allowed. "An examination of the decisions of this Court in which price regulation has been upheld will disclose that the element common to all is the existence of a situation or a combination of circumstances materially restricting the regulative force of competition, so that buyers or sellers are placed at such a disadvantage in the bargaining struggle that serious economic consequences result to a very large number of members of the community. Whether this situation arises from the monopoly conferred upon public service companies or from the circumstance that the strategical position of a group is such as to enable it to impose its will upon those who sell, promulgated in schedules of practically controlling constancy [here reference to regulation of insurance rates]; or from a housing shortage growing out of a public emergency [citations], the result is the same. Self-interest is not permitted to invoke constitutional protection at the expense of the public interest and reasonable regulation of price is upheld." 273 U. S. at 446, 47 Sup. Ct. at 434. In *New State Ice Co. v. Liebmann* (1932) 285 U. S. 262, 52 Sup. Ct. 371, Mr. Justice Brandeis, in an epochal and highly challenging dissenting opinion supports an Oklahoma statute requiring certificates to engage in the ice business on the ground that it may lead to the stabilization of the industry, stating, "The people of the United States are now confronted with an emergency more serious than war. Misery is wide-spread, in a time, not of scarcity, but of over-abundance. The long-continued depression has brought unprecedented unemployment, a catastrophic fall in commodity prices and a volume of economic losses which threatens our financial institutions. Some people believe that the existing conditions threaten even the stability of the capitalistic system. Economists are searching for the causes of this disorder and are reexamining the bases of our industrial structure. Business men are seeking possible remedies. Most of them realize that

It is our belief that voluntary planned production should be tried tentatively in industries in which a condition of over-production is now chronic. In those industries where disparity between production and consumption causes waste, and injures the public, cooperation among producers should not be illegal. In the oil, gas, lumber and many natural resource industries, competition has not only produced enormous wasteage,¹⁸ but legal mandate has prevented cooperation to avoid this loss. Over-capitalization in many industrial fields¹⁹ as well as in the mining

failure to distribute widely the profits of industry has been a prime cause of our present plight. But rightly or wrongly, many persons think that one of the major contributing causes has been unbridled competition. Increasingly, doubt is expressed whether it is economically wise, or morally right, that men should be permitted to add to the producing facilities of an industry which is already suffering from over-capacity. In justification of that doubt, men point to the excess-capacity of our productive facilities resulting from their vast expansion without corresponding increase in the consumptive capacity of the people. They assert that through improved methods of manufacture, made possible by advances in science and invention and vast accumulation of capital, our industries had become capable of producing from thirty to one hundred per cent more than was consumed even in days of vaunted prosperity; and that the present capacity will, for a long time, exceed the needs of business. All agree that irregularity in employment—the greatest of our evils—cannot be overcome unless production and consumption are more nearly balanced. Many insist there must be some form of economic control. There are plans for proration. There are many proposals for stabilization. And some thoughtful men of wide business experience insist that all projects for stabilization and proration must prove futile unless, in some way, the equivalent of the certificate of public convenience and necessity is made a prerequisite to embarking new capital in an industry in which the capacity already exceeds the production schedules." 285 U. S. at 306, 52 Sup. Ct. at 385.

¹⁸In 1890 the United States contributed 50.8 per cent of the world's oil production; in 1927 it contributed 72.2 per cent. "True, we may have exhausted only forty per cent of the supply, but the remaining sixty per cent, constituting 8,000,000,000 barrels cannot last for many generations at the present annual consumption rate of 766,000,000 barrels." Hervey, *Anti-Trust Laws and Conservation of Minerals* (1930) 147 ANNALS 68. In 1925 the United States supplied 54 per cent of the world's supply of copper, and there is danger of exhaustion of reserves. *Ibid.* at 73. The output of lead in this country has increased disproportionately with that of other countries since 1890 and in 1928 we supplied approximately 40 per cent of the world's production. *Ibid.* at 85. Since 1890 we have likewise contributed between 34 and 42 per cent of the total world output of pig iron. *Ibid.*; see Steel, *The Anti-Trust Laws and the Oil Industry* (1930) 147 ANNALS 63.

¹⁹It is said we have shoe factories equipped annually to produce 900,000,000 pairs of shoes but an annual normal consumption of only 200,000,000 pairs; automobile plants geared to an annual 8,000,000 unit output but a world demand of 6,295,000 cars; a woolen mill capacity for \$1,750,000,000 annual production against a \$656,000,000 consumption. The printing trades were said to be 50 per cent over-equipped. The steel industry was reported capable of a 66,000,000 ton annual production though normal demand reached but 42,000,000 tons. Machine tool factories were estimated to be operating at 65 per cent capacity; flour mills at 40 per cent, and plants manufacturing gas at 75 per cent. Chase, *op. cit. supra* note 11, at 646, 641, 648.

of bituminous coal²⁰ has engendered comparable loss; yet they suffer the same restrictions. We propose that the law should validate plans aimed to assist in the stabilization of an industry through the balancing of production to consumption, whereby economic waste in such industry will be reduced.²¹ Such agreements, we believe, should be excepted from the Sherman Act. In this state they should be expected from the Cartwright Act. An amendment accomplishing this object should replace the present one to the latter statute; and it will in fact do no more than realize the aim of the proponents of the original amendment.²²

A number of persons who believe in this principle of exemption from the anti-trust laws of industries wherein competition is not properly functioning have suggested that we apply it piece-meal²³ rather than write it into our law as a general working standard. Thus, the oil or the coal industry would be granted by Congress special monopoly privileges. Each industry, if it felt the need, could petition Congress

²⁰ The productive capacity of the mines is estimated at 750,000,000 tons a year as against a market demand of 500,000,000 tons. Hervy, *op. cit. supra* note 18, at 70. In his annual message to Congress, in December, 1930, President Hoover said: "I recommend that the Congress institute an inquiry into some aspects of the economic working of these laws. I do not favor repeal of the Sherman Act. The prevention of monopolies is of the most vital public importance. Competition is not only the basis of protection to the consumer, but is the incentive to progress. However, the interpretation of these laws by courts, upon those enterprises closely related to the use of the natural resources of the country, makes such an inquiry, advisable. The producers of these materials assert that certain unfortunate results of wasteful and destructive use of these natural resources, together with a destructive competition which impoverishes both operator and worker, cannot be remedied because of these prohibitive interpretations of the anti-trust laws. The well-known condition of the bituminous coal industry is an illustration. The people have a vital interest in the conservation of their natural resources, in the prevention of wasteful practices, in conditions of destructive competition which may impoverish the producer and the wage earner, and they have an equal interest in maintaining adequate competition. I, therefore, suggest that an inquiry be directed especially to the effect of the workings of the anti-trust laws in these particular fields, to determine if these evils can be remedied without sacrifice of the fundamental purpose of these laws." *New York Times*, Nov. 29, 1931, §3 at 1.

²¹ Mr. Gerard Swope, in presenting his plan, stated "Production and consumption should be coordinated on a broader and more intelligent basis." Swope, *op. cit. supra* note 14, at 133. The Chamber of Commerce of the United States, (Referendum 58, Oct. 30, 1931) polled its members on the proposition that "the anti-trust laws should be modified so as to make clear that the laws permit agreements increasing the possibilities of keeping production related to consumption." A large vote recorded affirmance of the suggestion. For an exposition of this standard as a legal enactment, see Hines, *The Anti-Trust Act of 1890 and Trade Associations*, in HANDLER, *op. cit. supra* note 9, at 76 *et seq.* See also Montague, *Proposals for the Revision of the Anti-Trust Laws*, *ibid.* 23, 45 *et seq.*

²² See Colby and Tobriner, *loc. cit. supra* note 5.

²³ Gordon, *What the Anti-Trust Laws Should Do* (1930) 147 *ANNALS* 195, 201; SEAGER AND GULICK, *TRUST AND CORPORATION PROBLEMS* (1929) 668 ff.

for such treatment. The scheme has much to recommend it.²⁴ It is in accord with our already acquired technique of admitting one by one new industries into the roster of public utilities. Our present crisis and some of our recent history, however, indicates that this policy does not give the monopoly principle sufficient scope. Every advance becomes a political issue. Each industry must endure a long period during which public opinion has to be brought around; influence, sometimes corrupt

²⁴The question of special treatment for the oil industry, the physical conditions of which induce excessive production and waste has received much attention.

In a speech at Tulsa, Okla., Oct. 1926, Secretary Hoover said: "An amendment to the Sherman Act permitting oil companies to curtail their drilling activities in small localized fields, which may threaten to upset the condition of the entire country seems to be advisable."

Probably, however, curtailment in small localized fields and cooperative development of single pools would not violate the Sherman Act, since restrictions on local production do not restrain interstate commerce. *United Mine Workers v. Coronado Coal Co.* (1922) 259 U. S. 344, 42 Sup. Ct. 570; *United States v. Knight* (1895) 156 U. S. 1, 15 Sup. Ct. 259.

Proration statutes, designed to limit oil production, have been enacted in various states. In Texas a conservation statute, originally passed in 1928 (TEX. CIV. STAT. (Vernon, 1928) arts. 6014, 6023, 6029) was considerably strengthened by the legislation of August 12, 1931. (1931) 30 OIL AND GAS J. (No. 14) 32. In Oklahoma a statute, *inter alia*, prohibits waste due to production in excess of "reasonable market demands," and invests the corporation commission with jurisdiction to ascertain facts and issue orders reviewable by the state supreme court. OKLA. COMP. STAT. (1921) §§ 7954, 7957, 7958-60. A California statute enacted standards similar to the Oklahoma legislation (California Senate Bulletin No. 232) but, upon referendum, was defeated by popular vote.

An excellent discussion of the constitutional issues involved is contained in (1932) 45 HARV. L. REV. 557. See also Marshall and Myers, *Legal Planning of Petroleum Production* (1931) 41 YALE L. J. 33; Merrill, *Stabilization of the Oil Industry and Due Process of Law* (1930) 3 So. CALIF. L. REV. 396. The case of *Champlin Refining Co. v. Corporation Comm.* (W. D. Okla. 1931) 51 F. (2d) 823, wherein the Oklahoma statute was sustained, was affirmed by the Supreme Court of the United States. (1932) — U. S. —, 52 Sup. Ct. 559.

But *cf.* the statement in *Wolff Co. v. Industrial Court of Kansas* (1923) 262 U. S. 522, 537, 43 Sup. Ct. 630, 633 *per* Taft, C. J.: "It has never been supposed . . . that the business of . . . the mining operator, or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by state regulation." However, it may be that control of production can be justified on the special ground that the state has a vital interest in conservation of natural resources.

Plans of control in the bituminous industry are suggested in HAMILTON AND WRIGHT, *THE CASE OF BITUMINOUS COAL* (1925); SOULE, *THE USEFUL ART OF ECONOMICS* (1929); Gandy, *Some Trends in the Bituminous Coal Industry* (1930) 147 ANNALS 849.

Gandy argues that since the coal industry must be ready to supply emergency demands, over-capacity is inevitable in normal times. He considers government control helpless to remedy this difficulty. Some relief would be afforded by increasing the size of operative units, better trade practices and co-operative selling agencies. Such agencies are at present treated as price agreements, consequently illegal. *Pocohontas Coke Co. v. Powhatan Coal & Coke Co.* (1906) 60 W. Va. 508, 56 S. E. 264.

and demoralizing, must be exerted on politicians; and needed readjustments must await the invariable procrastinations of lawmaking. It is comparable to the situation some years ago where the privilege of incorporation was granted by special legislative charter, which became so fertile and scandalous a field for favoritism that general incorporation laws, under which any group might incorporate upon meeting standard requirements, were enacted.

Having, then, grounded our principle that schemes for monopolistic integration of chronically over-produced industries be sustained, we must see how this can be accomplished in the law. We must first determine whether the Supreme Court can so re-interpret its past decisions as to reach this result; if we find this impossible we must propose revisionary legislation to accomplish it.

I. THE LEGAL BACKGROUND

Could the Supreme Court be induced to sanction a scheme of monopolistic control in a depressed or chronically over-produced industry? Monopoly as such is not condemned by common law or the Sherman Act. When it results from "normal growth" it does not offend the law. "Monopolization" (prohibited by the Sherman Act) is the act of controlling a market. Can this latter doctrine be refined by cross-breeding it with the concept of "normal growth?" The essence of "normal growth" is the functioning of the principle of economic efficiency. Economic efficiency is assumed to be a desired goal, so desirable that, even should it result in monopoly, its force is nevertheless not to be checked by law. A depressed or over-produced industry is really an inefficient one. One of the objectives and functions of efficiency is to produce profit, an essential of continued economic life under our system. It is at least arguable that where competition is inefficient, a monopoly devised to eliminate it is a product of "normal growth." "Monopolization" under this theory would require, in addition to mere intent to control a market, the intent to control it for the purposes of securing a monopoly profit. This line of reasoning has been used in the cooperative marketing cases. The Supreme Court itself has approached it in the *Window Glass* case,²⁵ though, perhaps, without complete awareness of the purport of its decision.

Occasionally, in some of the decisions of the lower federal courts appears the phrase "reasonable monopoly."²⁶ This may be merely a way

²⁵ National Ass'n of Window Glass Mfgs. v. United States (1925) 263 U. S. 403, 44 Sup. Ct. 148.

²⁶ See *United States v. International Harvester Co.* (D. Minn. 1914) 214 Fed. 967, 1011, 1012; *United States v. Eastman Kodak Co.* (W. D. N. Y. 1915) 226 Fed. 62, 65.

of indicating monopolies of "normal growth." If, however, it means that the "rule of reason" as such is applicable to monopolies or is available to achieve the result we are now seeking, it is probably wrong. The "rule" was devised in answer to the contention that it was absurd to hold every restraint of trade (as the statute says) illegal no matter how harmless it might be and in the face of the fact that though at common law all covenants to compete were called in "restraint of trade" they were only condemned when unreasonable. There is nothing ridiculous, however (even if undesirable), in holding "every attempt to monopolize" illegal.²⁷ Furthermore, a consolidation, to be "reasonable," must not control the market, and must thus not be a monopoly.

It is very improbable that the Supreme Court will develop the "normal growth" theory along the line suggested or that the implications of the *Window Glass* case will be followed to their logical limits. If it did, the situation would not be entirely satisfactory. The judicial decision—a fixing of consequences after the event—is a poor device for protecting the public or even for doing full justice to the industrialist. It is true that the use of "consent decrees" offers some escape from the narrowing of choices between "good" and "bad" or "guilt" or "innocence."²⁸ In the later anti-trust cases the courts have developed considerable flexibility in using the decree. The decree enables the court to enjoin objectionable practices and save the good ones, and to indicate what future policies should be. The defendants may from thence on be kept under court supervision in so far as their future conduct impinges

²⁷ See *Pulpwood Co. v. Green Bay Paper Co.* (1919) 168 Wis. 400, 411, 170 N. W. 230, 235.

²⁸ In fixing criminal responsibility under the Sherman Act, the court has had to arrive at approximations and to test the good against the bad, reaching wide decisions of guilty or not guilty, which often could not forbid the specific anti-social practices pursued. Thus, in *United States v. United States Shoe Machinery Co. of New Jersey* (1918) 247 U. S. 32, 38 Sup. Ct. 473, the question arose whether that company had monopolized or attempted to monopolize. The formation and existence of the company was justified on the ground that the combining units had all been complementary rather than competitive. The shoe company, however, was maintaining its position through an extensive leasing system penalizing those who used the machines of other companies by refusing the use of their own patented machines. The scheme was obviously an oppressive monopolistic device, but the Court could not find enough harmful intent therein to counterbalance the absence of wrongful intent in the general existence of the company, which it was unwilling to declare a monopolistic conspiracy. The ideal solution would have allowed the company to continue intact and to have done away with the abuse of the leasing system. As it was, the Court was intent on deciding whether the shoe company was or was not a criminal. And if the Court has difficulty what of a jury? In an article, *Who Shall Administer the Anti-Trust Laws?* (1930) 147 ANNALS 171, James L. Young tells us of a friend who sat on a jury in an anti-trust suit for damages and told him: "We were so dazed by the deluge of evidence and the uncertainty of the term 'restraint of trade' that we had to find for the defendant." The case was apparently a clear one of liability.

on matters covered by the decree. This is at best, however, a clumsy make-shift device. In consent decrees desirable changes may be balked on the court's treatment of the decree as a contract to which both parties must hold.

It would seem that in order to uphold production agreements in prostrate industries we must amend the anti-trust laws. The courts will not take the burden. In shaping such legislation we must heed two possible dangers. First, we must be sure that we ossify the legislation in a verbal encasement strong enough to avoid any interpretation that the statute does no more than restate existing law. The courts have often nullified anti-trust legislation by reducing it to a re-declaration of past law.²⁹ The lingual symbols of the legislative will must therefore be pristine, and they must be free of the deadening decisions that hang upon old phrases. For instance, the suggestion has been made that no further amendment is needed than to except from the federal anti-trust laws any "contract, combination or act" that is in "the public interest."³⁰ But the courts have already held that the Sherman Act forbids

²⁹ Examples of judicial devitalization of statutes are cited by Gilbert Montague in the most penetrating article on this subject which has come to the writers' notice. *Proposals for the Revision of the Anti-Trust Laws*, in HANDLER, *op. cit. supra* note 9, at 42. Section 6 of the Clayton Act, enacted in 1914, provided that "Nothing contained in the anti-trust laws shall be construed to forbid the existence or operation of labor, agricultural, or horticultural organizations, . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade . . ." 38 STAT. (1914) 731. Yet, in *Duplex Printing Press Co. v. Deering* (1921) 254 U. S. 443, 41 Sup. Ct. 172, the Supreme Court held (Justices Brandeis, Holmes and Clark dissenting) that the statute merely re-enacted the previous legal rules as to strikes and boycotts. For a similar interpretation of the statute as applied to agricultural organizations, see *United States v. King* (D. Mass. 1915) 229 Fed. 275, (D. Mass. 1916) 250 Fed. 908. Section 5 of the Federal Trade Commission Act declared unlawful "unfair methods of competition in commerce." 38 STATS. (1914) 719. But the Supreme Court (Justices Brandeis and Clark dissenting) in *Federal Trade Commission v. Gratz* (1920) 253 U. S. 421, 40 Sup. Ct. 572, brusquely stated it is for the courts, not the commission ultimately to determine what 'unfair methods of competition' are. The Wilson Tariff Act declared, "every combination, conspiracy trust, agreement or contract is hereby declared to be contrary to public policy, illegal and void when . . . intended to operate in restraint of lawful trades, or free competition in lawful trade or commerce, or to increase the market price in any part of the United States of any article or articles imported or intended to be imported into the United States." 28 STAT. (1894) 570. Yet the courts whittled down this statute in *Fosburgh v. California & Hawaiian Sugar Refining Co.* (C. C. A. 9th, 1923) 291 Fed. 32, to a re-declaration of existing law. It "is not more comprehensive in scope than the Sherman Act, and serves only to make the law more specific in its application, as it relates to foreign commerce."

³⁰ JAVITS, *op. cit. supra* note 8, at 176. See provision in §3256, introduced by Senator Walsh of Massachusetts on January 25, 1932, at the first session of the 72d Congress; bill introduced at 3d Session, 71st Congress, as H. R. 17360, suggested by National Civic Association.

only such contracts and combinations as "prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade."³¹ Hence they may well hold that past decisions show that the standard of the Sherman Act itself is "public interest." The amendment would then be but a re-statement of the law. We must beware such general standards that are impregnated with the seed of their own disintegration.

The second great obstacle the new legislation must meet is that which wrecked the Colorado statute. The statute must afford a means for pre-determining the criminality of the acts which it proscribes. In *Cline v. Frink Dairy Co.*,³² the United States Supreme Court, passing on the anti-trust legislation of Colorado,³³ held that a statute which

³¹ *Thomsen v. Cayser* (1917) 243 U. S. 66, 37 Sup. Ct. 353. We are indebted, once more, to Mr. Montague for citation of judicial expressions that the anti-trust laws forbid only such combinations as are against the public interest. Montague, *Proposals for the Revision of the Anti-Trust Laws*, in HANDLER, *op. cit. supra* note 9, at 14. Thus in *United States v. American Tobacco Co.* (1911) 221 U. S. 106, 179, 31 Sup. Ct. 632, 648, the Court held the Sherman Act "only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade." In *Nash v. United States* (1913) 229 U. S. 373, 376, 33 Sup. Ct. 780, —, the Court again said the Sherman Act forbade only such contracts as "prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade. . . ." In *Eastern States Lumber Ass'n v. United States* (1914) 234 U. S. 600, 609, 34 Sup. Ct. 951, 953, the Court said the Sherman Act "only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade or which . . . injuriously restrained trade."

³² (1927) 274 U. S. 445, 47 Sup. Ct. 881. This decision accords with previous and subsequent holdings of the Supreme Court. In *International Harvester Co. v. Kentucky* (1914) 234 U. S. 216, 221, 34 Sup. Ct. 853, 855, the Court held a statute forbidding "combination for the purpose . . . or with the effect of fixing a price that was greater or less than the real value of an article" (KY. STAT. (Carroll, 1922) §§ 3915, 3916, 3917) was too vague a standard. Section 4, Food Control Act of August 10, 1917, as amended October 22, 1919 (40 STAT. 276, 41 STAT. 297) ("The Lever Act") providing "that it is hereby made unlawful for any person willfully . . . to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessities," was held vague and uncertain as a rule of criminal conduct in *United States v. Coben Grocery Co.* (1921) 255 U. S. 81, 41 Sup. Ct. 298. The remaining portion of section 4, forbidding any person "to conspire, combine, agree, or arrange with any other person . . . (e) to exact excessive prices" was held equally ineffective as the basis for a criminal action in *Weeds, Inc., v. United States* (1921) 255 U. S. 109, 41 Sup. Ct. 306. As a measure of civil conduct the act was similarly condemned in *Small Co. v. American Sugar Refining Co.* (1925) 267 U. S. 233, 45 Sup. Ct. 295. The Court, in *Connally v. General Construction Co.* (1926) 269 U. S. 385, 46 Sup. Ct. 126, declared invalid an Oklahoma statute imposing penalties upon contractors with the state who paid their workmen less than the "current rate per diem wages in the locality where the work is performed." OKLA. COMP. STAT. (1921) §§ 7255, 7257.

³³ Colo. Laws 1913, c. 161.

did not accurately specify the crime contemplated therein violated the guarantees of the Fourteenth Amendment. The Colorado legislation declared that agreements to fix or raise or lower prices, are unlawful and void, but "that no agreement . . . shall be deemed to be unlawful . . . the object and purpose of which are to conduct operations at a reasonable profit or to market at a reasonable profit those products which cannot otherwise be so marketed." The Supreme Court interpreted this statute to require the concurrence of three conditions to establish legality (1) that the business was such that reasonable profits could be secured only through combination, (2) that the profits earned were reasonable for that business, (3) that the profits earned were reasonable for defendant's particular case. The Court held that these criteria were too vague. It would be impossible for a business man to define exactly what were reasonable profits.

Interpreting the statute as the court did, the result is sound. The interpretation, however, seems open to doubt. The proviso, by its terms, applied where the object and purpose were to conduct business at a reasonable profit or (the use of the alternative here was ignored) to market at a reasonable profit those products which could not otherwise be so marketed. In other words, criminality depended on the object and purpose of the combination rather than the exact determination of whether it was necessary, or its prices were, in fact, reasonable.

In passing upon a similar statute,³⁴ an Australian court held³⁵ that guilt depended not on whether the combination did *in fact* operate to the detriment of the public but on whether the defendants *intended* it so to operate. Logically this theory should have prevailed in the *Frink* case. Practically, such a criterion is a poor measure of the social worth of a combination. This lies in its economic effect rather than in the purity of its founders' motives.³⁶

II. A PROPOSED STATUTE

To frame a statute which will set up within itself a sufficiently concrete standard of criminality and also avoid the judicial inclination

³⁴The Australian statute in its first and earlier form is comparable to the Colorado statute since it provided, "any person . . . who engages in any combination in relation to trade . . . with *intent* to restrain . . . to the detriment of the public . . . is guilty of an offense." AUSTRALIAN INDUSTRIAL PRESERVATION ACT (Acts 1906, No. 9.)

³⁵Attorney-General v. Adelaide Steamship Co. [1913] A. C. 781 *aff'g* (1912) 15 C. L. R. 387, *rev'g* Attorney-General v. Northern Colliers (1911) 14 C. L. R. 387.

³⁶Another difficulty of this analysis of "intent" as a test of legality is that the industrialist's intent is a mixed thing—a mass of tendrils reaching to different ends. Of these the court will isolate one and center its decision upon it, ignoring the others—an arbitrary and unfair procedure. For an interesting exposition of the alleged disastrous results of the use of such a test to determine the legality of labor combinations, see BERMAN, LABOR AND THE SHERMAN ACT (1931).

to merge it into past law is an undertaking fraught with danger. Hence we believe an amendment should provide for setting up of machinery whereby a commission may determine the legality of a monopoly³⁷ before, rather than after, its operation. Such a commission, possibly a division of the Federal Trade Commission for the federal jurisdiction,³⁸ and a division of the railroad commission³⁹ for the state legislation, will establish the legality of proposed schemes involving the exercise of monopoly power. The associates in such schemes must at their peril submit their plans to the commission. If they do not, the present provi-

³⁷ The proposal to set up a commission to interpret and apply the anti-trust laws is a common one. It dates from the proposal of President Roosevelt (Message, March 25, 1908) that the commissioner of corporations acting under the secretaries of commerce and labor, pass on contemplated schemes. Ever since it has had frequent proponents. For an interesting history of the Roosevelt proposal and its legislative progeny, see CLARK, *THE FEDERAL TRUST POLICY* (1931) 109 *et seq.* 113, 129, 159, 179. Typical proposals for the establishment of a commission are Fernley, *Special Privilege Under Our Federal Anti-Trust Laws* (1930) 147 *ANNALS* 39, "a board, court or commission to which business men may refer their proposed plans;" WORMSER, *FRANKENSTEIN INCORPORATED* (1930) 225, "antecedent approval or disapproval of proposed trade agreements and mergers" (by a commission); Watkins, *The Federal Trade Commission* (1932) 32 *COL. L. REV.* 272, 289, "The Bureau of Industrial Coordination would be charged with a purely advisory responsibility"; HANDLER, *op. cit. supra* note 9, at 206, "if the new legislation contains definite standard of legality, there is no reason why advance opinions regarding the legality of a proposed merger should not be obtainable"; Williams, *Advisory Councils to Government* (1930) 147 *ANNALS* 147, "advisory councils" to guide business.

³⁸ The specific suggestion that the Federal Trade Commission undertake this work has been made by LEVINE AND FELDMAN, *DOES TRADE NEED ANTI-TRUST LAWS?* (1931) 134 *et seq.*; Hamilton, *The Problem of Trust Reform* (1932) 32 *COL. L. REV.* 173; Williams, *The Reign of Error* (1931) 147 *ATLANTIC MONTHLY* 787; *Report of Legislative Committee of the Congress of Industries*, quoted in JAVITS, *op. cit. supra* note 8; remarks of T. M. Gordon, in HANDLER, *op. cit. supra* note 9, at 211 *et seq.*

³⁹ The use of the railroad commission in California for this purpose entails many definite advantages and disadvantages. It gains the prestige of the commission and its carefully worked-out technique, developed from many years of experience. It avoids the expense of creating and maintaining a new tribunal. On the other hand, the claim has been made that the commission has the viewpoint of a regulatory, public utility body rather than of an advisory group to guide industrialists. To give the commission power to pass upon agreements, as suggested in the text, moreover, it is probably necessary to enact an amendment to the constitution. The courts have declared, in interpreting the constitution, that "the only reasonable conclusion is that the authority intended to be given to the legislature by this section to confer powers upon the railroad commission must be limited to the subject of powers over common carriers and transportation and the control and regulation thereof by the commission, and such other things as may be necessary or convenient for the proper and effectual exercise of such powers of regulation and control." *Pacific Tel. & Tel. Co. v. Eshleman* (1913) 166 Cal. 640, 137 Pac. 1119; *City of Pasadena v. Railroad Com.* (1920) 183 Cal. 526, 182 Pac. 25; *East Bay Municipal Utility Dist. v. Railroad Com.* (1924) 194 Cal. 603, 229 Pac. 949.

sion of the Act will be applied to them. As a criminal statute it will retain whatever clarity and precision it now possesses.⁴⁰ Defendants must be judged according to present rules if they have not availed themselves of the privilege of placing their scheme before the commission. The industrialist cannot complain of this. As the law stands "monopolization" is illegal under all conditions.

Realizing that the criteria of judgment by which the commission is to be guided must be reduced to a word-formula which may signify to it things very different from what they mean to us, we set down with some hesitation the following proposed amendment to the Sherman Act:

Provided that no existing or proposed contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations and no monopoly or attempt to monopolize, or combination or conspiracy to monopolize any part of the trade or commerce among the several States or with foreign nations, shall be deemed illegal or within the provisions of this Act, the plan and details of which shall have been submitted to and approved by the Federal Trade Commission as tending to assist in the stabilization of an industry through the balancing of production or distribution of goods or performance of services with demand therefor whereby economic waste in such industry is or will be reduced.⁴¹

⁴⁰ One may well wonder, if the standards of criminality set down by the Colorado act, *supra* note 33, were found too indefinite, how the Sherman Act itself could be held constitutional. An attack on this basis came in 1913, 23 years after its passage, in *Nash v. United States*, *supra* note 31. In 1911 the Supreme Court had decided that only unreasonable or undue restraints were illegal. The opponents of the act claimed that this standard was too indefinite. The court upheld the statute on the ground that a standard involving judgment of differences in degree was not necessarily too vague. Civil and criminal responsibility attach to acts of negligence; yet negligence involves a determination founded on the reasonableness of conduct. Furthermore, it was said that the doctrine of reasonable restraints of trade being of common law origin, decisions at common law would give content to the standard and provide guidance. As a matter of fact, however, the great body of common law on restraint of trade had to do with covenants not to compete, and afforded very little guidance as to specific applications of the "rule of reason," which is deduced from the common law, rather than found there as a complete doctrine.

⁴¹ The Committee on the Anti-Trust Laws of the State Bar of California has approved a statute embodying the principles of that suggested in the text. This statute would retain the original Cartwright Act of 1907 (Cal. Stats. 1907, p. 984), remove the invalid amendment of 1909 and put in its place the following: "Section 1: Every such trust as is defined herein is declared to be unlawful, against public policy and void, provided that this act should not be deemed to prohibit any existing or proposed agreement, combination or association which tends to assist in the stabilization of an industry through the balancing of production or distribution of goods or performance of services with demand for such goods or services whereby economic waste in such industry is or will be reduced, and the plans and details of which shall have been submitted to and approved by the Railroad Commission as so tending." The proposed statute sets out the procedural devices by which this standard would be applied.

Does this statute meet the tests suggested above? We believe that it furnishes to business men a means for predetermining the legal status of schemes of combination. Industry is given the opportunity to submit plans to the commission, which will tell it most definitely whether its plans are or are not legal under the amendment. The commission itself will have a sufficiently certain standard by which to administer the law.⁴² This criteria does not deal in the terms of reasonable price or profit, which has proven dangerous and unsatisfactory in the past. Instead it directs the commission to approve plans which assist in stabilizing an industry through balancing production with demand, whereby economic waste is reduced. At no time has the Supreme Court held illegal a plan designed for these purposes; hence the statute will not be compelled to fight its way through previous adverse decisions. In fact the proposed statute seeks to capture the distinction, hinted at in the *Window Glass* case,⁴³ between legitimate attempts to stabilize an industry and efforts to monopolize it for extortionate profit. And it attempts to cast into legal mould the recognition of many economists that in chronically depressed industries some kind of concerted action to balance supply and demand is necessary. Its purpose is to cut a legal avenue for the self-experimentation⁴⁴ of industry in stabilization, while it seeks, at the same time, to protect the public from the abuse of monopoly.

In passing on applications, the commission's general standard will be, as we have said, the need of the industry or of the petitioning group for monopolistic power. The application of this standard may be flexible, the aim being always to smooth out the rough places in the competitive system and to ease the rigors of its operation. The determination will be made with reference to the particular plan of association and the peculiar situation in which the industry finds itself at the time. A scheme of monopolistic control may be solely needed in an industry by reason of temporary stress. Excessive financial strain, bankruptcy of valuable producers, demoralization of an industry, may be alleviated to a considerable degree by co-operation.

⁴² The constitutional objection to the vagueness of criminal statutes as standards for individual conduct does not apply to statutory standards for commissions. There is not the same requirement as to certainty for the former as to the latter. Thus a criminal statute forbidding persons from charging more than a "just and reasonable rate" is unconstitutional. *Louisville & Nashville Ry. Co. v. Commonwealth* (1896) 99 Ky. 132, 35 S. W. 129. But a statute empowering a commission to fix rates that do not furnish more than a "just compensation" is constitutional. *Railroad Commission Cases* (1886) 116 U. S. 307, 6 Sup. Ct. 334.

⁴³ *Supra* note 25.

⁴⁴ The adaptability of American industry has been one of its most remarkable attributes in the past. See JAVITS, *MAKE EVERYBODY RICH* (1929) 270 *et seq.*

Yet this will not mean that every flurry, no matter how inconsiderable, should be the occasion for a grant of monopolistic power. Competition has for many years performed valuable disciplinarian services. It should only be displaced in situations where the discipline threatens to inflict too severe punishment. It is true, as economists point out, that monopoly often bars the road to necessary readjustment, maintaining price levels so high as to choke off expanding demand, putting a premium on efficiency, stifling progressive economies. In times of stress and deflation monopolies may hold prices too high and so interfere with business finding a healthy level. This is the criticism now being made of the German monopoly cartels.⁴⁵ When a monopoly is interfering with economic welfare, the commission, though it has at one time sanctioned it, should have the power to reform or even dissolve it.⁴⁶ We believe that our plan, making possible semi-permanent adjustments suitable to the time, capable of change and reformation as the times change, may enable us to chart a way between Scylla and Charybdis.

It will not, of course, be an easy matter to decide when an association is deserving of monopolistic power. Our Supreme Court in the one case in which it came close to sanctioning a scheme of market con-

⁴⁵ NATIONAL INDUSTRIAL CONFERENCE BOARD, RATIONALIZATION OF GERMAN INDUSTRY (1931) 47-54.

⁴⁶ In the German Cartel Law of 1923 (Decree against abuse of Powerful Economic Positions) it is provided (§4):

"If such agreements [price and production control agreements as defined in section 1] endanger the common welfare or business as a whole they may be (1) voided by the Cartel Court or ordered to discontinue objectionable practices, (2) cancelled by any cartel member with the permission of the Minister of Economic Affairs; or (3) the Minister of Economic Affairs may request that a copy of such agreements be sent to him for approval."

This section does not give power to dissolve the cartel itself (usually a type of joint stock company) but only to cancel specific agreements made by it. MICHELS, CARTELS, COMBINES AND TRUSTS IN POST-WAR GERMANY (1928) 52-53.

The statute proposed by the Committee on Anti-Trust Laws of the California State Bar provides:

"Section 1c: Notwithstanding the approval of such plan by the Commission the Attorney-General or any person affected thereby may file with the Commission a protest against such approved plan setting forth that: (a) the parties thereto have departed from the plan as approved by the Commission or (b) that the facts upon which such approval was based have materially altered or (c) that said plan in its operation has not tended to assist in the stabilization of an industry through the balancing of production or distribution of goods or performance of services with demand for such goods or services whereby economic waste in such industry is or will be reduced. When one or more of such protests have been filed, the Commission may, whenever it shall deem such protest sufficient, hold a hearing to determine whether its approval of such plan shall be revoked or modified. Before any such hearing is had, the Commission shall give to each party to such plan, to the Attorney-General and to each person who shall have filed such protest, at least twenty days written notice."

trol did not seemingly act on sound economic principles. This is the *Window Glass* case,⁴⁷ discussed above. Until recently window glass was made by hand.⁴⁸ Now the greater part is manufactured by machinery. The machine manufacturers sought to put the hand manufacturers out of business. Comparative costs were decidedly in favor of the former. The hand manufacturers were saved quite unexpectedly by the hand workers, who accepted wage cuts and part-time work to enable the hand manufacturers to cut cost. Apparently the two branches finally came to terms. Wages were put up again. But it was still possible to market only a part of the hand manufacturers' capacity. So, to keep the industry functioning, the labor unions and manufacturers in the hand trade agreed that the various plants were to be run on part time only, work-hours apportioned among all the workers, and production quotas assigned to the manufacturers.

This arrangement was sanctioned by the Supreme Court. The hand trade thus survives at the public expense. Prices are high enough to enable it to operate at a profit; consequently the more efficient machine producers pocket as extra profit the margin gained through their efficiency. This is hardly a proper application of the monopoly principle. The case again illustrates the point that such problems cannot be well solved by a court. Through some fault, perhaps of prosecution, very little of this general situation came to the Court's attention. The relation between the hand and machine trade was apparently not in evidence. The question presented to the Court was whether the agreement between the hand workers and the producers providing for periodic shut-downs and apportionment of hours among the workers was an unreasonable restraint of trade. The motive, said the Court, was the worker's desire to protect his job. Therefore, the agreement was not unreasonable. It would be superfluous to point out in detail how inadequate to true social needs is this legalistic device of reducing a complex situation to its simplest terms in order to arrive at an easy "guilty" or "not guilty" solution.

III. OTHER PROPOSED STATUTES

Aside from the change in the substantive law recommended in the text, there have been many suggestions of procedural devices designed to eliminate uncertainty in the law's administration. These do not proceed as far as our proposal. They do not change current legal tenets but seek to project them into specific factual situations so that industrialists may know exactly what courses of conduct are open to them.

⁴⁷ *Supra* note 25.

⁴⁸ This analysis of the window glass industry is a short statement of the account in WATKINS, *INDUSTRIAL COMBINATIONS AND PUBLIC POLICY* (1927).

One proposal is that a declaratory judgment upon the legality of the proposed plan be obtainable.⁴⁹ In view of the reluctance of the Supreme Court to pass upon problems which have not matured into a "case" or "controversy," the juristic difficulties in the way of such a scheme are formidable.⁵⁰ Since the decision must be made partly of the substance of economic fact, which is constantly changing, it cannot be permanent—or if it is, it will adjudicate, in many cases, dead issues. Nor will a court be able always correctly to divine the economic effect of the plan; yet if it errs, to the public detriment, no mechanism is offered to correct the mistake. The scheme carries with it the unwieldiness of juristic technique—its inability to discard the yes-and-no and right-and-wrong form⁵¹ in the place of the specific-fact-finding of a commission.

There have also been numerous suggestions⁵² that business men about to enter into an agreement possibly violative of the law should not be compelled at their peril to decide whether it is "unreasonable" and so criminal. It is urged that there should be some official authority to whom the plan could be submitted which could assure its proponents that, until express warning, the plan might be executed free of criminal consequences. There is obviously some conduct so clearly violative of the anti-trust laws—certain unfair and oppressive tactics—that even its perpetrators know it is illegal and will seek under all circumstances to keep it secret. For such conduct the punitive principle is appropriate. But the legality of many plans, having nothing fraudulent or immoral in them, may turn on questions of degree, particularly if non-monopolistic price agreements may under some circumstances be within the "rule of reason." Agreements which would be legal may nevertheless be shunned for fear of the unpredictable consequences with the result that not only will guessing carry criminal penalties, but the fear of this will restrict economic adjustments even more than the law desigus.

During the Coolidge administration, the United States Attorney-General was willing to advise unofficially that proposed plans submitted to him would or would not be the basis for prosecution.⁵³ This procedure had no official sanction. It provided no assurance of the attitude

⁴⁹ Donovan, *The Need for a Commerce Court* (1930) 147 ANNALS 138. See bill introduced, November 18, 1929 by Mr. Finkham in the House of Representatives, H. R. 5284. This bill evidently died in committee. 71 Cong. Rec. (1929) 5739.

⁵⁰ Note (1932) 45 HARV. L. REV. 566. Some of the criticisms in the text have been suggested by this excellent analysis.

⁵¹ The "right and wrong" postulates of the Sherman Act are well brought out by HENDERSON, *THE FEDERAL TRADE COMMISSION* (1924) 2.

⁵² Butler, *Needed Changes in the Anti-Trust Laws* (1930) 147 ANNALS 189.

⁵³ Donovan, *op. cit. supra* note 49, at 141.

which the subsequent administration would take. The attorney-general, moreover, would be likely to disapprove of any plan if at all doubtful; nor is it certain that the attorney-general will always perform this function, since it is no part of his prescribed duties.

The American Bar Association has proposed legislation empowering the Federal Trade Commission⁵⁴ to grant immunity from criminal prosecution in appropriate cases. "Contracts" are to be submitted to it by their proponents. Such contracts must be filed, and also published in a trade journal. The attorney-general may object that the contract will "substantially lessen competition or tend to create a monopoly." The commission hears the question.⁵⁵ Its decision is subject to review, on appeal, by the circuit court of appeals and, on certiorari, by the Supreme Court. If the decision is unfavorable to its proponents they may be ordered to cease and desist from performing the contract; if favorable (or if the contract is not objected to) the parties are immune from criminal prosecution for having entered into such contract or having performed the same pursuant to its terms, as well as from punitive, though not actual, damages in civil suits. In passing, we must point out that the Sherman Act condemns not only "contracts" in restraint of trade, but "combinations in the form of trust or otherwise," and that many of the cases before the court involved consolidations and are more aptly described as "combinations" than "contracts." Hence we do not know whether the draftsmen of this immunity statute intend to restrict its operation to business arrangements which are technically "contracts" or whether the scope of the statute is as broad as that of the Sherman Act. The latter would seem to be the desired goal.

There is, however, one further provision in the immunity statute of great importance which offers difficulty if the statute is applied to consolidations. The commission may amend its order upon proof "*of change in the facts or circumstances* surrounding any such contract or the performance thereof subsequent to the entering" of the order. This

⁵⁴It has been suggested that there be a special court, comparable to the Cartel Court in Germany, to deal with this and related matters arising under the anti-trust laws. *Ibid.*

⁵⁵The Australian Industries Preservation Act of 1904 has a little-known provision (§15) whereby plans could be published and declared to the attorney-general. As long as he fails to prosecute, the parties are immune from criminal responsibility in carrying out their agreement. There is no hearing as under the plans proposed by the bar association. The Australian procedure has the merits of speed and simplicity, particularly appropriate for two reasons; first, to be useful it may be necessary to put the agreement into effect at once; secondly, the legal effect of the proceeding is merely a temporary immunity. In defense of the bar association's plan, it may be argued that though in law a more temporary "immunity" is gained, yet, if a full hearing is had, the question of legality under it may be settled once and for all in practical effect.

provision is not entirely clear. A decision of the commission may involve predictions of the effects of the contract operating under conditions necessarily forecast. The facts or circumstances may not "change," but the commission may have miscalculated what they were at the time of the order, or what they would be when the contract became operative. The commission may have been properly apprized of the facts but wrong as to the effects of the contract. Is it capable, as the proposed statute reads, of amending its order? Should it be able to amend its orders? Once the parties receive initial sanction, they may invest considerable capital in the new scheme. If the commission makes a bad guess and can amend its order the parties suffer; if it cannot, the public does. In this connection it should be noticed that under this proposed law, the parties are at no time relieved of the possibility of injunction at the government's suit. If the government were successful in such a suit, the investment, of course, would be lost. As a practical matter the commission's sanction will afford assurance to the parties in the majority of cases but even where great care is used, prediction may fail, and it is too much to ask the public to forego protection in such an event. The clause relating to the commission's power to amend should therefore be clarified to allow its exercise where the effects of the contract have been other than those expected.

This law must not be confused with the proposals made in the text for the treatment of monopolies, though the two have many points in common. The bar association's law is entirely procedural; it has no effect on the substantive provisions of the anti-trust laws. The legality of a contract is judged by the same rules (the present ones), whether or not it is submitted to the commission prior to its operation. But under our proposal, a monopolistic scheme will be legal if submitted to and approved by a government commission. This, of course, changes the present substantive law on monopoly, and the submission of the plan serves a different, or at least additional function, to that in the bar association's proposal.

A final consideration must be given to the problem of appeal from the decisions of the commission. The history of the Federal Trade Commission shows how the judiciary, through the appellate power of review, may destroy the effectiveness of the commission, thoroughly encysting it in the surrounding body of judicial veto.⁵⁶ But any procedure in which appeal would not be provided could hardly find a place in Anglo-Saxon jurisprudence. Therefore it is submitted that an appeal should be allowed from the Federal Trade Commission to the circuit

⁵⁶ HENDERSON, *op. cit.* *supra* note 51, at 101 *et seq.*

court of appeals. The proposed California law⁵⁷ provides for appeal from the decisions of the railroad commission⁵⁸ to the supreme court of the state.

CONCLUSION

Although a re-interpretation of the Sherman Act by the courts themselves is eventually possible, the present situation demands more immediate action. Since any scheme for the stabilization of a particular industry calls for its unified or monopolized control, the law should sanction such control in those industries in which competition is wasteful and uneconomic. Let those groups who wish this permission submit their plans to a commission, probably a division of the Federal Trade Commission for the federal jurisdiction, and the railroad commission for the state jurisdiction. Let this commission determine the condition of the industry and the plan of the co-operators. If its effect is to stabilize a demoralized industry, and not monopolize it to make excessive profits, the plan should be approved. The commission should, however, have the right to revoke its approval upon due cause.

Business men will thereby have an opportunity of submitting their plans to the commission for approval. Since the commission will pre-judge these schemes and give its verdict on them the statute does not set down an unpredictable standard of action. No attack upon the ground that the law would, subsequent to their execution, condemn acts not known to be criminal, could properly be made. And plans not submitted to the commission will be judged by the present rules.

Such a statute would have the advantage of informing business men, before attaching criminal penalties, whether their schemes are monopolistic. It will also enable the courts to permit stabilization in prostrate industries. Thereby industry may be enabled to evolve a scheme of production which does not engender regular periods of crisis and unemployment so disastrous in a highly industrialized society.

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⁵⁷ "Section 1g. Any party to any proceeding hereunder or the Attorney General may apply to the Supreme Court of this state for a writ of certiorari or review for the purpose of having the lawfulness of any original order or any order on rehearing inquired into and determined. Any such application shall be made and determined in accordance with and subject to the provisions of Section 66 of the Public Utilities Act so far as such provisions may now or hereafter be applicable."

⁵⁸ It is hoped that the prestige of the railroad commission will induce the courts not to attempt to whittle away its powers.