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Trade Morals and Regulation: The American Scene

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OVER two hundred and fifty years ago, a London bookseller, John Dunton, journeyed all the way to Boston in a bold effort to collect some long outstanding debts from the book trade there. How successful he was may be judged from a letter he wrote home:

"But for Lying and Cheating, they (i.e., The Bostonians) out-vye Judas, and all the false cheats in Hell. Nay, they make a Sport of it; Looking upon Cheating as a commendable Piece of Ingenuity, commending him that has the most Skill to commit a piece of Roguery; which in their Dialect (like those of our Yea-and-Nay-Friends in England) they call by the Genteel Name of Out-Witting a Man and won't own it to be cheating. ... In short, These Bostonians enrich themselves by the ruine of Strangers; and like ravenous Birds of Prey, strive who shall fasten his Tallons first upon 'em ..."

"I had not given you the Trouble of so large an Account of the Manners of the Bostonians ... but that this sort of People are so apt to say, Stand off, for I am holier than Thou."

That this appraisal of Western trade morals was by no means limited to the practices of the Bostonians, would appear from an account written fifty years earlier (1632) by a Dutchman, David DeVries, a visitor to the tobacco-planters of Virginia: "the English there," he reported, "are very hospitable, but they are not proper persons to trade with. You must look out when you trade with them ...; for if they can deceive any one, they will count it among themselves a Roman action. They say in their language 'he played him an English trick'; and then they have themselves well es-teemed."

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1. Oppenheim, Cases on Trade Regulation (1936) (cited hereafter merely as Oppenheim). This article will ultimately be included in the present writer's Studies in Comparative Trade Morals and Control, phases of which have already appeared as A Study in Comparative Trade Morals and Control (1933) 19 V.A. L. Rev. 794-845; The Law and Morals of Primitive Trade in Radin and Kidd, Legal Essays in Tribute to Orren Kip McMurray (1935) 546-622; Fog and Fiction in Trade-Mark Protection, Part I (1936) 36 Col. L. Rev. 60 (as to projected Part II of this article see notes 23 and 41 infra); Would Compulsory Licensing of Patents be Unconstitutional (1936) 22 V.A. L. Rev. 287.

2. John Dunton's Letters from New England in 4 Publications of the Prince Society (1867) 73-74. The irate Bostonian regards the last paragraph of this letter as "copled" from an "obscene pamphlet" (Ibid. at 73, note 35), although he admits that "there Is no improbability in the assumption that Dunton has correctly represented the tone of society here ..." (Introd. p. xviii). For further information concerning Dunton, see Weedon, 1 Economic and Social History of New England (1890) 298 et seq.; 7 Dict. of Nat. Biog., at 236; The Life and Errors of John Dunton (1818).

3. Voyages from Holland to America, 1632 to 1644, tr. by H. C. Murphy, in COLLE
These two seventeenth-century impressions of the trade ethics of the Colonists and their successors in the New World are characteristic of that habit of generalization regarding practices and ideals denominated as peculiarly and exclusively "American," which has so persistently survived and which, ultimately, James Russell Lowell so effectively and amusingly castigated, after the Civil War, in his classic essay, "On a Certain Condescension in Foreigners." A scathing and thoroughly documented indictment of this "Condescension in Foreigners," is to be found in the recent work by the eminent and courageous historian of "Great American Fortunes," who, after reciting that "for more than five centuries Parliament was steadily occupied in the attempt to overcome frauds in British business," apparently finds consolation in the fact that "before America became independent of Britain, there were brisk frauds in exporting.... These frauds were only a few transplantations of a large number long established in Europe, of which England gives a plenitude of recorded examples." To the student of comparative trade morals and control the display of an addiction to this form of consolation and to this _tu quoque_ argument is no unusual phenomenon. It is indeed strange with what uniform and often humorless, though frequently learned, shortsightedness, every generation, every phase or stage, every race or people, the enforcement of a uniform standard of weights and measures in every part of the United Kingdom and among all classes of subjects was regarded as a forlorn hope by many official administrators and experts; nor, in spite of the vigilance of an army of inspectors, will tomorrow's market be wholly free from the 'subtlety of them that sell or buy'."

4. _The Writings of James Russell Lowell_ (Riverside ed.) 220.
5. _Myers, American Strikes Back_ (1935) 5. _Cf._ _Hall, Select Cases Concerning the Law Merchant_ (1929) Intro. Il: "But even as late as 1868 the enforcement of a uniform standard of weights and measures in every part of the United Kingdom and among all classes of subjects was regarded as a forlorn hope by many official administrators and experts; nor, in spite of the vigilance of an army of inspectors, will tomorrow's market be wholly free from the 'subtlety of them that sell or buy'."
6. _Id_. at 11.
7. For a discussion of the oft-claimed distinction between so-called "primitive" trade morals and those of "civilized" peoples, see the present writer's _The Law and Morals of Primitive Trade_, in _Radin and Kline, op. cit. supra_ note 1. To the authorities cited in that article add _Mead, Cooperation and Competition Among Primitive Peoples_ (1937); _Frazer, Asienraum_ (1937); _Radin, Economic Factors in Primitive Religion_ (1937) 1 _Science and Society_ 310; _Benedict, Patterns of Culture_ (1934). The forthcoming work of Professor Julius E. Lips, _The Savage Hits Back_, will undoubtedly be a valuable contribution to this subject.
8. The fallacy underlying the alleged contrast between "Occidental" and "Oriental" trade morals is superbly illustrated in the recent colloquy between one of the Du Ponts and Senator Nye, in the _Hearings on the Munitions Industry_. Answering Senator Nye's doubts as to the propriety of obtaining munitions contracts in the East through bribery, Mr. A. Felix Du Pont explained (Dec. 10, 1934): "I think you raise a very complicated question there, Senator Nye. The customs of the different countries are so entirely different that it is quite difficult to dispose of the question in any very few words.

"For instance, while I have not travelled in the Orient, except in a very limited way, all that I have heard about it is that the methods used in the way of bribery are quite different from what they are in this country, and certain things that are frowned upon in this
Occidental or Oriental, every religion, every segment of civilization or country, and perhaps done in a different way are the natural course of trade and trade competition in those other countries.

"I believe that bribery of a certain kind is used in most of the countries of the Orient in all walks of commercial life. It is no different in the munitions business than it is in any other commercial business. It is accepted; not talked about very much; but people in competition in those countries simply could not possibly carry on their trade if the customs of the country were not adhered to." Hearings before The Special Committee Investigating the Munitions Industry, Sen., 73rd Cong., pursuant to S. Res. 206, Part II (1935) 2478. Cf. the testimony of A. J. Miranda, Jr., Pres. of American Armament Corporation: England would want to establish a Peruvian Naval Academy, to "create an interest in British battleships, torpedo boats, and destroyers, and the order should go to Britain." Id., in Part III (1934) 569. See also Mr. Miranda's comment on the propriety of the use of "grease" and "palm oil" in the sale of munitions to South America: "... I guess that they have been doing business that way for a great many years, Senator. Maybe the Europeans taught them to do business that way." Answering Senator Bone's question whether "the Europeans seduced and debauched the South Americans," Mr. Miranda replied, "Let us give them an even break." Id., in Part III (1934) 619-620. For further consideration of the validity of the distinction between "Oriental" and "Occidental" trade morals, see the present writer's article in (1933) 19 VA. L. Rev. 794, cited in note 1, supra. See also "Lawrence of Arabia's" comment on a grievance arising out of the abolition of the Turkish civil code and a return to "the undiluted Koranic procedure"; "Abdull explained to us, with a giggle, that when there was time they would discover in the Koran such opinions and judgments as were required to make it suitable for modern commercial operations, like banking and exchange. Meanwhile, of course, what townsmen lost by the abolition of the civil law, the Beduins gained. Sheriff Hussein had silently sanctioned the restoration of the old tribal order..." LAWRENCE, SEVEN PILLARS OF WISDOM (1935) 68.

For matters dealing with the technique of purely Occidental, all-American business bribery, see FLYNN, GRAFT IN BUSINESS (1931) and, s.t. "Commercial Bribery," in OPPENHEIM, 545-550.

9. With particular reference to the relation of ethical theory under Canon Law to the realities of the trade practices of those living under Canon Law, especially concerning financing and usury, see TAWNEY, "HISTORICAL INTRODUCTION" TO THOMAS WILSON, A DISCOURSE OF USUERY (1925); TAWNEY, RELIGION AND THE RISE OF CAPITALISM (1926); ASHLEY, INTRO. TO ENG. ECON. Hist. Part I (1919) c. III; id., Part II (1920) c. IV; O'BRIEN, AN ESSAY ON MEDEVAL ECON. Hist. (1920); THE JUST PRICE (V. A. Demant ed.) (1930); Lincoln and Loewe, Excurseses, in 2 STARRS AND JEWISH CHARTERS PRESERVED IN THE BRITISH MUSEUM (Jewish Hist. Soc. of England, 1932). For assignments to Christians of debts see Lincoln and Loewe, id. at lxiv; Postan, Private Financial Transactions in Medieval England in 23 Viereljahrschrift für Sozial—und Wirtschaftsgeschichte (1930) 26, 42 et seq.; CAL. OF SELECT PLEAS AND MEMORANDA OF . . . LONDON, A. D. 1381-1412 (1932) xxxiv et seq.; for such assignments to the clergy, see the present writer's The Rightlessness of Medieval English Jewry in 4 J. Q. R. (New Ser., 1913) 121, 124-125.

For still the lively controversy as to whether modern capitalism, with all its "casuistry of economic conduct," was developed, or at any rate, tacitly nurtured by Protestantism or by Catholicism, see TAWNEY, RELIGION AND THE RISE OF CAPITALISM (1926); TAWNEY, Introduction to RICHARD BAXTER, CHAPTERS FROM A CHRISTIAN DIRECTORY (1925); WEBER, THE PROTESTANT ETHIC (tr. by T. Parsons, 1930), also his GENERAL ECONOMIC Hist. (tr. by F. H. Knight); THE JUST PRICE (ed. V. A. Demant 1930); COHEN, LAW AND THE
of industry, however small, when writhing under problems of greed-control, seeks refuge and comfort in the *tu quoque* argument or in the self-delusive reminiscence of a golden age of trade morals. Even G. K. Chesterton, unusually clear-visioned (despite his love of paradoxes), believed that "my own people had in any case a strict standard of commercial probity, but I fancy (he insisted) the standard was stricter in all that more stolid commercial class than in a later time, when the notion of success was mixed up not only with cynicism but with a queer sort of piratical success." Chesterton's belief was characteristic of the universal tendency—in America, as elsewhere—to claim a personal or local monopoly of devotion to the "just price," and of an abhorrence of trademark piracy, of adulteration of goods, of short weights and measures and of all other forms of unfair trade.

Social Order (1933) 82 et seq.; Wright, Middle-Class Culture in Elizabethan England (1935) 245 et seq., 268, 458-459; Grubb, Quakerism and Industry before 1839 (1931); Fanfani, Catholicism, Protestantism and Capitalism (1938).

10. See the amazing internationalism or cosmopolitanism of greed disclosed throughout the Hearings of the U. S. Senate Munitions Industry Investigation under S. Res. 206, note 8, supra. For further data on patriotism and greed well worth reading see the recent study (fictional) of Belgian occupied territory during the First World War, entitled Invasion, by Van der Meersch (tr. by Hopkins, 1937) and an article by J. T. Flynn on the possibility of a billion-dollar loan by the United States to Germany, perhaps "fostered" by England, 9 The New Republic 18, Feb. 10, 1937. Cf. an analysis of difficulty in proration in the sugar industries of "directed economies" in ten different countries by Wilcox, Can Industry Govern Itself? (1936).

11. The romanticism of the history of commercial greed-control is most pointedly demonstrated in the frequent viewing of the medieval gildsman's motives and method through "the rose-hued glasses of sentimentality." 1 Gross, The Gold Merchant (1930) 36. See, for instance, General Johnson's testimony on the origin of the "law merchant" in Hearings before Committee on Finance on S. R. 79, 74th Cong., 1st Sess., part VI (1933) 2413. For a contrast of "pious protestations and smug preambles" (Justice McReynolds') phrase in Maple Flooring Ass'n v. United States, 263 U. S. 567, 587), ever-present in gild ordinances, with gildsmen's actual objectives and practices see the examples collected in the present writer's Historical Foundations of Trade-Mark Law (1 Columbia Legal Studies, 1925) 42 et seq., 102 et seq.; also Hewitson, Preston Court Leet Records (1905) 10, 43, 85, 107; Bazeley, The Guilds of Gloucester in 13 Tracts. Bristol and Gloucestershire Archaeol. Soc. (1889) 265; Englefield, Hist. of the Painter-Stainers' Company of London (1923) 14, 68; Stanley-Street, The Worshipful Company of Turners of London (1925) 252. Cf. Hamilton, The Ancient Maxim of Caveat Emptor (1931) 40 Yale L. J. 1133, 1146. Under a careful scrutiny of contemporary evidence of gild life and activity, the charming picture of the gilds as "organized to maintain the Just Price" and other exalted though highly theoretical canons of "fair trade" soon fades out.

Equally fallacious is the idea, occasionally expressed, of an emergence from the "Dark Ages" of trade morals into a "new era" or a "revival" of commercial sweetness and light. E.g., Taesch, Policy and Business in Ethics (1931) 53; Heinsmann, The Ethics of Business (1932) 55.

And now comes Professor Oppenheim's volume, modestly entitled "Cases on Trade Regulation," but actually constituting a veritable thesaurus of the problems and technique of modern American greed-control. The pages of this volume record a tale of commercial depravity and of the invention of devices to keep abreast of these tendencies that should make interesting reading for the historian of "Great American Fortunes."

Equally effective are the materials gathered here from the American scene in dispelling the romantic and frequently invoked, but entirely untenable interpretation of the problems of greed-control or trade regulation in terms of "good sportsmanship." This "sportsmanlike" conception of competition is "one of those dangerous metaphors" that "are to be narrowly watched, for," writes Judge Cardozo, "starting as devices to liberate thought, they end often by enslaving it." Thus, in a leading treatise on the law of unfair competition, it is stated: "This action of unfair competition is the embodiment in law of the rule of the playground,—’Play fair!’ For generations the law has enforced justice. In this action the basis is fairness—quite a different ethical principle." Similarly, General Johnson, Administrator of the N. R. A., when referring to the codes of fair competition, translated what he conceived to be their sportsmanlike spirit into the vigorous language of the prize ring. Linking the codes to the establishment of "the Marquis of Queensberry and other boxing rules," he found:

"That is all there is to the code. They eliminate eye-gouging and knee-groining and ear-chewing in business. Above the belt any man can be just as rugged and just as individual as he pleases. All he has to do is to start from an even taw line and then all the damage he can do his competitor, by ability, aggressiveness, experience, wisdom, and organization is perfectly legitimate. There is more chance for progress, more latitude for ability, more chance for profit and stability than ever before in our business history."


15. JOHNSON, THE BLUE EAGLE FROM EGG TO EARTH (1935) 282. Cf. Llewellyn, On Warranty of Quality, and Society: II (1937) 37 Col. L. Rev. 341, 394; in commenting upon "a pre-ring, pre-matchmaker, pre-Marquis of Queensbury picture" of "New York, in 1820, ... on the civil side, and on quality," he states, "For it is the societal function of private law, as of public law, to provide ring, referee, and rules. Let the best outfit win, indeed, and let ring-strategy and careful training count. But are featherweights to be matched against unlimited heavies, and is the use, by one party, of the knee or foot to be allowable, with no fouls called?"
This athletic concept of the basis of trade regulation, while appealing as an admirable figure of speech to administrators and business men in their rhetorical moments, has from time immemorial been punctured by realists in various fields and situations. Thus, over twenty-five hundred years ago, Solon, the very Law-Giver himself grimly admitted “that men keep covenants, because it is to the advantage of neither party to break them”; in the Renaissance, defaulting Florentine merchants in Turkey, threatened by the Sultan with the loss not only of their goods, but of their ears and noses, were stricken with “a great terror, so that they will be careful to do their duty and not act dishonestly.” In the eighteenth century, Adam Smith remarked: “It is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own interest. We address ourselves, not to their humanity but to their self-love, and never talk to them of our own necessities but of their advantages.” At the end of the nineteenth century, the great German jurisprudent, von Jhering, analyzing competition, discounted all “disinterested motives” and found that “the egoism of the seller who tries to force too high a price is paralyzed by the egoism of another who prefers rather to sell for a moderate price than not to sell at all, and the egoism of the buyer who offers too little is paralyzed by that of another who offers more—competition is the social self-adjustment of egoism. . . . Commerce knows no benevolence; all busi-

16. E.g., Address Business Under the N.R.A. by H. J. Tily, President, National Retail Council in America's Recovery Program (ed. by Wilcox, 1934) 196: “And then the second Roosevelt, because of conditions which confronted him and confronted us, used the gentle shepherd's crook to get us together and herd us into huddles—that we might compete, yes, but compete according to rule, compete exactly as you do on the football field, with plenty of room for initiative but bound by rules that govern both sides in the interest of your game, with the cards squarely dealt; and we are going to play the game according to the new rules.”

17. 1 Plutarch's Lives, Life of Solon, V (tr. Stewart and Long [1899] 133). This seemingly cynical remark may be coupled with the extremely varied and widespread mercantile experience attributed to Solon. [See Linforth, Solon the Athenian (1919) 36-38; Hasebroek, Trade and Politics in Ancient Greece (1933) 13. From this business experience the remark quoted in the name of Solon is probably nearer the truth than the statement ascribed by Plato to Megillus, an admirer of the Athenians, that he regarded “as absolutely true, the common saying that 'good Athenians are always incomparably good, for they alone are good not by outward compulsion but by inner disposition.” [1 Plato, Laws (Berry's trans. 1926) 61]. This adoration of the “good Athenians” inevitably recalls that little girl, who “when she was good . . . was very very good, but . . .” C.f. Xenophon, The Greek Commonwealth (4th ed. 1924) 130 ff.

18. Quoted from a letter from a merchant in Pera to another in Florence, dated March 29th, 1502, in Florentine Merchants in the Age of the Medici (Richard's ed. 1932) 167. C.f. id. at 45.

ness contracts are built upon egoism, and so is association.¹²⁰ And finally, Clarence Darrow, reporting to the President on the N. R. A., had this to say of "fair competition":

"The opinion, therefore, is forced upon us from what we have heard so far that 'fair competition' is merely a resounding and illusory phrase. There is, in fact, no such significance of general acceptance, and under existing conditions there can be none. What the powerful producer calls fair, his weaker rival fiercely denounces as most unfair; and there is no way to reconcile the difference. All competition is savage, wolfish, and relentless; and can be nothing else. One may as well dream of making war lady-like as of making competition fair."²¹

If competition reflects any of the atmosphere of the football field or the track meet, it possesses at best that compulsory rivalry and joie de vivre that marked so characteristically the recent Olympic games. As Professor Knight has recently said, "No game is possible unless the players have the attitudes and interests to which the term 'sportsmanship' is understood to refer..."²² Or as Professor Fetter puts it, "Com-

²⁰. VON JERERING, LAW AS A MEANS TO AN END (tr. by Husik in the Modern Legal Philosophy Ser. [1913]) 102, 104.

²¹. See Investigation of the National Recovery Administration, in Hearings Before the Committee on Finance on S. R. 79, 74th Cong., 1st Sess., Part II (1935) 299. See Keeser's Statement on Behalf of the Consumers' Advisory Board, id., in Part 3 (1935) especially at 603; also the testimony of Professor Walton Hamilton, id., Part 6 (1935) at 2054. The Generalissimo of the N.R.A., General Johnson, evidently bitterly resented the reports of the so-called Darrow Board (see The BLUE EAGLE FROM ECO TO EARTH [1935] 272-274); see likewise Report and Statements by Sinclair, member of the National Recovery Board, in Hearings before the Committee on Finance on S. R. 79, 74th Cong., 1st Sess., Part VI, 2588-2591. It is not altogether inconsistent with the mental habits of bureaucracy that "N.R.A. officials privately complained... that the opportunity of representing the consumer generally seemed to attract a peculiarly fatuous sort of idiot..." McLaughlin, Legal Control of Competitive Methods (1936) 21 IOWA L. REV. 274, 292, note 66. The Brookings Institution found that the "Darrow Board" "was ill-equipped, on the side of fact-finding and procedure, for effective accumulation and analysis of evidence. Nevertheless, its existence was of very great importance... It dramatized the need for internal re-examination of the results of code making." See Lyon, THE NATIONAL RECOVERY ADMINISTRATION (1935) 710-711.

²². KNIGHT, THE ETHICS OF COMPETITION (1935) 302. For the relation of the N.R.A. to the preservation and control of competition, see works cited in this note, also J. Dickinson, The Major Issues Presented by the Industrial Recovery Act (1933) 33 COL. L. REV. 1095; Comment (1933) 33 COL. L. REV. 1394; the illuminating note on Evasion of Prevailing Rate of Wage Statutes: The "Kickback" Racket (1934) 34 COL. L. REV. 733, and on The Runaway Shop (1936) 36 COL. L. REV. 776. Cf. "wholesale evasion [of the Walsh-Healy Act] through bid-brokerage," Legis. (1937) 37 COL. L. REV. 102, 104; see also Balance Sheet of the New Deal in Supp. to 87 THE NEW REPUBLIC (1936) 141; BURNS, THE DECLINE OF COMPETITION (1936) c. 10. Perhaps it has all been best summed up by Professor McLaughlin's "To the business man, any aggressive or embarrassing competition tends to be unfair competition... almost anything that the customer might appreciate by way of first rate service or accommodation, is likely to be branded... as an unfair
petition is 'the rule of the game,' but some favored players 'get off-side' and hold, and the officials somehow fail to see what is happening."

III

With admirable candor, Oppenheim points out that the designation "Trade Regulation" was first used in 1923 by his predecessor in the American Casebook Series, Professor Herman Oliphant, who was, he says, "the first author to combine in one book the material on contracts and combinations in restraint of trade with the law governing various competitive practices." In the present casebook, Oppenheim, while adhering "in the main to the broad pattern which Oliphant designed," set out to keep the student as thoroughly abreast as possible of the developments in the law since 1923. In 1925 Judge Learned Hand wrote that "there is no part of the law which is more plastic than unfair competition, and what was not reckoned an actionable wrong twenty-five years ago, may have become such today." But Oppenheim's book demonstrates that twenty-five years is a pretty long stretch in the life of the modern law of unfair competition;—indeed when one studies his book carefully and recalls not only what it contains, but also the decisions in this field that were evidently handed down after he had gone to press, one despairs of keeping the student or the practitioner apace of the law of "unfair competition" except by a loose-leaf system. It would be im-

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I have not discussed here the "sports instinct" so often referred to in studies of new non-pecuniary incentives to competition in a non-capitalistic state, e.g., S. and B. Weed, Soviet Communism (1936) II, 700; Stackey, The Theory and Practice of Socialism (1936) c. 12; Chase, Government in Business (1935) c. 16. Cf. the oft-exploited comments of André Gide as to "competition" and "bad quality" in his Return from the U. S. S. R. (Bussy's trans. 1937) 20-21. The whole subject of the ethics and control of competition in a non-capitalistic state is a fascinating one that has been unfolding before our very eyes in an extraordinary, intensive tempo and a variety of forms since 1935; my desire to study and to attempt to fix the position of these developments in the history of both ethics and social control is responsible for the delay in completion of Part II of my article Fog and Fiction in Trade-Mark Protection, Part I of which appeared in (1936) 36 Col. L. Rev. 60. Part II of that article will deal with phases of unfair competition generally, not merely with trade-mark protection.


possible to illustrate fully this plasticity of the law of unfair competition:—a few illustrations will suffice.26

(1) Strikingly illustrative of the unpredictability of developments of this branch of the law is the decision of the Supreme Court, on December 7th, 1936, sustaining the validity of the so-called “Fair Trade Laws” regarding price maintenance.27 Judging from Oppenheim’s material on resale price maintenance,28 one would never have dreamt of the possibility that so soon after the publication of his work the Supreme Court would, not merely definitely, but seemingly almost enthusiastically have disregarded all of the philosophy and implications of its prior decisions on this question.29 Practitioners, law teachers, and business men have

26. The illustrations discussed below are decisions dealing with “the merits” of the cases. There should also be noted the decision of the Supreme Court on December 14, 1936, reversing, on purely jurisdictional grounds, the “KVOS” decision of the C. C. A., 1935, reprinted in Oppenheim, 361, by radio broadcasters of news gathered by the Associated Press. The Supreme Court intimated that “on the merits” it might, in the KVOS case, not be disinclined to extend to radio, as had the Circuit Court, the doctrine of International News Service v. Associated Press, 248 U.S. 215 (1918), but it reversed the Circuit Court solely on the ground that there had not been adequate allegation in the complaint or sufficient proof that the amount “in controversy” was in excess of $3,000, and hence that, the District Court being without jurisdiction, the complaint should have been dismissed. KVOS, Inc. v. Associated Press, 299 U.S. 269 (1936). Cf. Kroger Grocery Co. v. Lutz, 57 Sup. Ct. 215 (1936). This mode of dealing with what had been regarded as a key-case in the development of the law of unfair competition recalls a somewhat similar anti-climax in Ely-Norris Safe Co. v. Mosler Safe Co., 273 U.S. 132 (1927). See note 29, infra.


28. See Oppenheim, c. 3, § 1, 834 et seq.

29. Just where “between worship of the past and exaltation of the present, the path of safety will be found” [Caroza, THE NATURE OF THE JUDICIAL PROCESS (1921) 160] cannot be prophesied with any degree of certainty. But when the Court, as in the Fair Trade Acts decisions, does actually shift “the path of safety,” it would facilitate the task of both the bench construing, and of the bar interpreting such decisions, if the Court shifting the path would indicate just whither, how far and why. For an admirable illustration of the judicial method of direct simplicity, see the decision of Mr. Chief Justice Hughes in Fox Film Corp. v. Doyal, 286 U.S. 123, 131 (1932) reversing the prior decision of the Court in Long v. Rockwood, 277 U.S. 142 (1928):

“The affirmation of the judgment in the instant case cannot be reconciled with the decision in Long v. Rockwood, 277 U.S. 142 (1928), upon which the appellant relies, and in view of the conclusions now reached upon a re-examination of the question, that case is definitely overruled.” Cf. Mr. Justice Brandeis, dissenting, in Washington v. Dawson & Co., 246 U.S. 219, 236 (1919): “If the court is of opinion that this act of Congress is in necessary conflict with its recent decisions, those cases should be frankly overruled.” See also Oppenheim v. Kridel, 236 N.Y. 156, 164 (1923); T. W. Arnold, Book Review (1935) 35 Col. L. Rev. 311; Radin, HANDBOOK OF ANGLO-AMERICAN HISTORY (1936) 357; Justice Oliver Wendell Holmes, His . . . UNCOLLECTED PAPERS (ed. Shriver, 1936) 11-12; FOUNT, THE SPIRIT OF THE COMMON LAW (1921) 181; cf. L. Duguit, THE LAW IN THE MODERN STATE (tr. by H. and F. Laski, 1919) 244.

A notable demonstration of such shifting from “the worship of the past” is to be found
for over twenty years\textsuperscript{30} understood that any system of resale price maintenance by agreements,—"whether express or implied by a course of dealings or other circumstances,"\textsuperscript{31} and any "written agreement" or "tacit understanding" to that end were essentially contrary to public policy, as interpreted by the Supreme Court.\textsuperscript{32} However, since the decision of December 7th, 1936, it would appear that this impression

in Motor Improvements, Inc. v. A. C. Spark Plug Co., 80 F. (2d) 385 (C. C. A. 6th, 1935)\textit{cert. denied}, 298 U. S. 671 (1936), printed in part in \textit{Oppenheimer}, 446-447. Thirty-five years previously, in the famous "Washboard" case, American Washboard Co. v. Saginaw Mfg. Co., 103 Fed. 281 (C. C. A. 6th, 1900) (\textit{Oppenheimer}, 431) the same Court affirmed a decree sustaining a demurrer to the complaint on the ground that the bill there was predicated "not because the defendant is selling its goods as and for the goods of complainant, but because it is the manufacturer of a genuine aluminum board, and the defendant is deceiving the public by selling to it a board not made of aluminum, although falsely branded as such..." (\textit{Oppenheimer}, 434). Students of the law of unfair competition have always been under the impression that it was this very "Washboard" case that definitely established in our law that deception of the public, as distinguished from private injury to the owner of a trade-mark, was not and could not be the basis of our law of unfair competition. It has always been believed that it was just because of this very "Washboard" decision, depriving the public from protection against deception that the Federal Trade Commission was established. \textit{E.g.}, see Federal Trade Commission v. Keppel & Bros. Inc., 291 U. S. 304, 313 (1934) (\textit{Oppenheimer}, 544); Federal Trade Commission v. Algoma, 291 U. S. 67, 79 (1934) (\textit{Oppenheimer}, 504); Royal Baking Powder Co. v. Federal Trade Commission, 281 Fed. 744, 751-2 (C. C. A. 2d, 1922) (\textit{Oppenheimer}, 691); Judge Learned Hand's opinion refusing to follow the "Washboard" decision in Ely-Morris Safe Co. v. Mosler Safe Co., 7 F. (2d) 603 (C. C. A. 2d, 1925)\textit{cert. granted}, 268 U. S. 684 (1925); \textit{rev'd on other grounds}, 273 U. S. 132 (1927) (\textit{Oppenheimer}, 446); B.V.D. Co. v. Davega-City Radio, Inc., 16 F. Supp. 659, 661 (S. D. N. Y. 1936). See also Comment (1926) 26 \textit{Col. L. Rev.} 199 and editorial in 73 \textit{N. Y. L. J.} (Sept. 28, 1925) p. 2028; \textit{Handler, False and Misleading Advertising} (1929) 39 \textit{Yale L. J.} 22, 35 \textit{et seq.}, also his \textit{Unfair Competition} (1935) 21 \textit{Yale L. J.} 175, 193-4; \textit{Haines, Efforts to Define Unfair Competition} (1919) 29 \textit{Yale L. J.} 1, 9; \textit{Henderson, The Federal Trade Commission} (1924) 179-192; \textit{Blaudsell, The Federal Trade Commission} (1932) 24; \textit{Schechter, op. cit. supra} note 11, 163. In the "Motor Improvements, Inc. case," supra, the practices there complained of might have been enjoined by reason of the developments in our standards of fair trade in the last thirty-five years (A. L. A. Schechter Poultry Corp. v. United States, 295 U. S. 495, 531 \textit{et seq.} (1935); however, the Court preferred to base injunctive relief upon the interpretation of its own prior holding in the American Washboard Co. case, \textit{supra}, of which neither bench nor bar had hitherto been aware.

\textsuperscript{30} For examples of the difficulty of predicting what a court will do, see the following analyses of what a court could do and the rather sensibly faint-hearted prognostications on the attitude of the Supreme Court towards the "Fair Trade Acts": \textit{Martin, The Fair Trade Acts} (1936) 5 \textit{Fordham L. Rev.} 50; \textit{cf. Legis.} (1936) 36 \textit{Col. L. Rev.} 293.


was more or less erroneous. Furthermore apart from this question of resale price maintenance, there is in this same decision of December 7th, 1936, a striking extension by the Supreme Court of the doctrine of trademark law that ownership of trade-marked goods "does not carry the right to sell them with a specific mark." There the Supreme Court has gone far beyond its own body of doctrine in protecting the owner of a trade-mark as the symbol of his good will. In sustaining the validity of that section of the Illinois Fair Trade Act, making it unfair competition to sell a trade-marked article by means of the trade-mark, at a cut price, the Court found that "the primary aim of the law is to protect the property,—namely the good will,—of the producer, which he still owns . . ." and that "the ownership of the good will . . . remains unchanged, not-

33. For comments on the reversal in the attitude of the Supreme Court, on the question of price maintenance implied in the Fair Trade Acts decisions, see the opinion of the New York Court of Appeals, March 9, 1937, per Crane, C.J., in Bourjois Sales Corp. v. Dorfman, 273 N. Y. 167 (1937).

"The complaint in this action has been dismissed upon the authority of our decision in Doubleday, Doran & Co. v. Macy & Co. (269 N. Y. 272), decided Jan. 7, 1936, Mr. Justice Steinbrink at Special Term felt obliged to follow this case, although later, in the October term of the same year, the United States Supreme Court took a different view of the law in Old Dearborn Distributing Company v. Seagram-Distillers Corporation.

"The justice was quite right as it is our duty to determine what we shall do with our former decision in the light of the more recent case. . . .

"When Macy & Co. undertook to sell these books at its own figure, the publisher sought an injunction to compel Macy to sell the books at the price it had fixed with the other Doubleday corporation.

"We thought this to be a clear case of unauthorized restriction upon the disposition of one's own property and unconstitutional within the former decisions of the United States Supreme Court. That court has taken a different view in the case above mentioned, Old Dearborn Distributing Company v. Seagram-Distillers Corporation (Dec. 7, 1936). . . .

"Had the Seagram case been decided before argument in the Doubleday case we certainly would have followed the Supreme Court's ruling on the Federal Constitution. We do so now by sustaining the complaint in this case and reversing the order of the Special Term." On the foregoing basis the Court of Appeals itself reversed its previous attitude towards price maintenance, as expressed in Doubleday, Doran & Co. v. R. H. Macy & Co., 269 N. Y. 272, and Seeck & Kade, Inc. v. Tomshinsky, 269 N. Y. 613—both decided in 1936. Cf. Comments (1937) 37 Col. L. Rev. 459, in (1937) 25 Calif. L. Rev. 368, and in (1937) 50 Harv. L. Rev. 667.

34. A. Bourjois Co., Inc. v. Katzel, 260 U. S. 689 (1923)—the only case in Oppenheim under his sub-heading Use on Genuine Goods. But see also Prestonettes, Inc. v. Coty, 264 U. S. 359 (1924), in Oppenheim, 256 under the caption Repacking, rebottling, and resale of bulk goods.

35. For a discussion of the vacillation of the Supreme Court as to the basis of trademark protection and the "delusive exactness" (to use Justice Holmes' phrase) in merely labeling trade-marks as "property," see 1 Schecter, Historical Foundations of Trademark Law (Columbia Legal Studies, 1929) 155 et seq.; also the cases cited in his "Fog and Fiction in Trademark Protection, Part I (1936) 36 Col. L. Rev. 60, 68, note 13.
withstanding the commodity has been parted with.” The Court then states:

“There is nothing in the act to preclude the purchaser from removing the mark or brand from the commodity—thus separating the physical property, which he owns, from the good-will, which is the property of another—and then selling the commodity at his own price, provided he can do so without utilizing the good-will of the latter as an aid to that end.”

(2) An equally important development arising since Professor Oppenheim’s case book went to press, and distinctly less favorable to the protection of trade-marks generally than the decisions of the Supreme Court in the Fair Trade Act cases just discussed is the possible reinforcement of so-called “generic term” defenses through the “Cellophane” decision of the Circuit Court of Appeals,37 drastically modifying that decision of the trial court, extracts of which are included by Professor Oppenheim among his cases.38 If the Circuit Court’s opinion is intended


Significant of the rapidity of changes in the law in this field is the fact that in 1932 in Jantzen Knitting Mills v. A. Balmuth, Inc., 236 App. Div. 685 (2d Dep’t) counsel for the appellant, offering precisely the reasoning indicated in the decision of the Supreme Court just quoted, was interrupted by the Presiding Justice, who obviously doubted the seriousness of this contention,—remarking that the practice then sought to be enjoined was a common occurrence among the department stores in New York. The Court, however, ultimately sustained this contention of counsel for the appellant and reversed the decision of the lower Court which had granted the motion to dismiss the complaint for insufficiency. It was said by the Appellate Division per curiam, ibid.,

“By advertising the sale of plaintiff’s swimming suits and by removing therefrom the distinctive label before offering them for sale, defendant provided itself with an opportunity, if it were so disposed, of selling goods of another and perhaps inferior make under its representation that it was selling plaintiff’s goods. It thus created the possibility not only of unfair competition, but of the perpetration of a fraud on the buying public.”

The Jantzen decision was evidently based on the necessity for the prevention of the deception of the consuming public, rather than upon the protection of the good will of trademarks as a property right, adopted by the Supreme Court in December 1936, in the “Fair Trade Acts” cases.


The reasoning of this “Cellophane” decision should be carefully studied in connection with that of the Circuit Court of Appeals for the Fifth Circuit in Hanna Mfg. Co. v. Hillerich & Bradsby Co., 78 F. (2d) 765 (1935) cert. denied 396 U. S. 645 (1936). In view of the wealth of material that Professor Oppenheim has given us, it will, we hope, not be regarded as an ungracious suggestion that it is a pity that this Hanna Mfg. Co. decision which he found important enough to cite three times (OPPENHEIM, pp. 165, 302, 377) should not have been quoted on the “generic term” point. It has been dissected in various law reviews, e.g., (1936) 49 HARV. L. REV. 496; (1936) 36 COL. L. REV. 592; (1936) 21 CORN. L. Q. 849; (1936) 20 MINN. L. REV. 449.

38. OPPENHEIM, 132.
to be limited in effect to the state of facts as found by the Circuit Court in that particular case, the rights of others than that particular complainant should not be disturbed. The Circuit Court specifically found that:

"The course of conduct of the complainant and its predecessors, and especially complainant's advertising campaign, tended to make cellophane a generic term descriptive of the product rather than of its origin, and, in our opinion, made it so to at least a very large part of the trade."39

But the Circuit Court was not satisfied with penalizing the complainant for what the Court adjudged to be an inconsistent trade-mark policy conducted contrary to long and well-established principles of trade-mark law. The Court went further, and seemingly quite gratuitously gave utterance to a doctrine that,—especially since certiorari was denied,—will, unless speedily clarified, undoubtedly be piously invoked in "generic term" defenses to trade-mark misappropriation suits. Especially noteworthy is the statement:

"That District Court erred in concluding that 'the trade-mark cellophane does not depend upon what was in the customer's mind' and in deciding the case on the theory that the public understanding as to the meaning of the word was immaterial. Such a theory is out of accord with the essence of the law of trade-marks. The rights of the complainant must be based upon a wrong which the defendant has done to it by misleading customers as to the origin of the goods sold and thus taking away its trade. Such rights are not founded on a bare title to a word or symbol but on a cause of action to prevent deception. It, therefore, makes no difference what efforts or money the Du Pont Company expended in order to persuade the public that 'cellophane' means an article of Du Pont manufacture. So far as it did not succeed in actually converting the world to its gospel it can have no relief."40

Space will not permit an extended analysis here of the language just quoted: if that language be taken literally as furnishing the basis of current trade-mark law, there is actually no sound foundation for the protection of trade-marks.41 Just how, under modern conditions of

40. Id. at 81. Italics supplied.
41. In discussing this problem we cannot assume that the courts deliberately ignore the broader social implications of the whole question of advertising and of trade-mark protection, for the pros and cons of which controversy see, e.g., various papers in 15 AMER. ECON. REV., (Supp., March 1925); the diversity of views expressed by Wells, Tono-Bungay (Modern Library ed.) 256; contra is his, 1 THE WORLD OF WILLIAM CLISSOLD, 237, quoted (1927) 40 HARV. L. REV. 818, n. 21; Veblen, THE THEORY OF BUSINESS ENTERPRISE (1910) 55-56; S. AND B. WEBB, INDUSTRIAL DEMOCRACY (1920) 683-685; RUSSELL, ICARUS (1924) 52; CHASE, THE TRAGEDY OF WASTE (reprint 1935) 108; ROTTY, OUR MASTER'S VOICE (1934); cf. Symposium in CURRENT CONTROVERSY (March 1936) 24 ff.

The dilemma of the courts may be gleaned from the remark of Judge Learned Hand in
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production, advertising and distribution, any complainant could "succeed in actually converting the world to its gospel" so that it can obtain relief from trade-mark piracy is not clear. We are confronted with this

the Shredded Wheat Case, cited infra note 42, at 962, that "the art of advertising spuriousy reinforced a genuine demand by the power of reiterated suggestion." But even if from the standpoint of ultimate social utility, the court should take an adverse view of advertising, the answer to any attempt to rely thereon as a defense to trade piracy was implied by Judge Learned Hand himself in that very decision, and was subsequently crisply stated by Justice Holmes: "... the defects of a plaintiff do not offer a very broad ground for allowing another to swindle him." Coca-Cola Co. v. Koke Co., 254 U. S. 143, 145 (1920).

For a recent consideration of "the obvious advantages of a system of mass production ... by a distribution of goods on a national scale ...", requiring "a system of national advertising ..." see Premier-Pabst Corp. v. Elm City Brewing Co., 9 F. Supp. 754, 758 (D. C. Conn. 1935). The most recent judicial view appears to be that advertising and trade-marks need not inherently and inevitably constitute a menace to social or economic welfare. On the contrary, advertising and trade-marks have been held to create "economic advantages," which are not merely "lawfully ... acquired and possessed ... but which have been generally commended and fostered." Borden's Farm Products v. Baldwin, 295 U. S. 194, 204-207 (1934). Cf Cardozo, J., dissenting, in Stewart Dry Goods Co. v. Lewis, 294 U. S. 550, 575 (1935) and cases cited in Fog and Fiction ... Part I, (1936) 36 Col. L. Rev. 88-89. Under a "competitive economy" the remedy for the fraudulent exploitation of trade-marks and for unfair advertising generally would not, on the one hand, seem to lie in a judicial or legislative toleration of the "more exuberant, ... and misdirective aspects" thereof (F. H. Knight, Supp. to [1936] 26 ECONOMIC REV., 265) nor, on the other hand, in an acquiescence in any counter-piracy of trade-marks or good will. The trends toward control would appear to be:  

1. More effective legislative and administrative repression accompanied by consumer-education (See CHASE and SCHILLING, YOUR MONEY'S WORTH (1927)); the excellent notes on The Consumer's Protection Under the Federal Pure Food and Drugs Act (1932) 32 Col. L. Rev. 720, and Statutory Standards (1931) 31 id. 372; Hearings on S. R. 2800 Goods, Drugs and Cosmetics SEc. REP. No. 2800 73rd Cong., 2nd Sess., (1934); HARDING, THE POPULAR PRACTICE OF FRAUD (1935); LAMID, AMERICAN CHAMBER OF HORRORS (1936). The Federal Trade Commission, instead of being "shorn of power" and limited to "inquiry" and "denunciation" should be given more scope to carry out its admirably effective, though handicapped, work and should be given "teeth" to enforce its "quasi-judicial" orders. Cf. A. L. A. Schechter Poultry Corp. v. United States, 295 U. S. 495, 532, 552-53 (1935) and cases there cited with BIAIISDF.Lr., THE FEDERAL TRADE COMMISSION (1932) c. VIII, and Handler, UNFAIR COMPETITION (1936) 26 IOWA L. REV. 175, 232.


The use of advertising and of trade-marks appears to have been regarded solely as phenomena of "a competitive economy." See the Premier-Pabst Corporation decision, 9 F. Supp. 758-759 (D. C. Conn. 1935). However, in Part II of Fog and Fiction ... the present writer hopes to present some data on the use of advertising and of trade-marks in a non-capitalistic system to educate the consumer and to increase national consumption "by the power of reiterated suggestion." This data may perhaps be of some use in considering the validity of prophecies made by DEWEY AND TUFTS, ETHICS (New York 1903) 541-542, as to the ethical gains to be made under a collective theory.
paradox that the very creation of any real hold on the public mind through trade-mark advertising and merchandising must, by such reasoning, in and through itself, automatically involve the self-destruction of the mark. After all, any appraisal of the soundness of the so-called "generic term" defense must be based upon the principle enunciated by the New York Court of Appeals over half a century ago when Judge Rapallo said:

"It cannot be true as a general proposition . . . that when a manufacturer has given to his products a new name invented by himself for the purpose of distinguishing them as his, and the article becomes generally known to the trade and to the public by that name, the name becomes public property and every one has a right to use it."

(3) Another notable indication of the "loose-leaf" speed with which the law of trade-marks is being developed is to be found in Oppenheim's

42. Almost twenty years ago the same Court pointed out, through Judge Learned Hand, that when the public has become accustomed to regard a product which it likes, "as emanating . . . from a single, though anonymous maker," then "the plaintiff still has a stake in that other motive for buying, i.e. that it comes from the accustomed maker." Shredded Wheat Co. v. Humphrey Cornell Co., 250 Fed. 960, 962 (C. A. 2d, 1918); Oppenheim, 174. In the "Cellophane" decision the Court, passing on the facts, would appear first to have held that the complainant, through its own faulty advertising and trade-mark policy generally, had not established this link with its customers; but the Court, in the language above quoted, went further and imposed on any plaintiff a burden of "actually converting the world to its gospel" so vague and undefined in weight and area as to render the proof of this link with its customers well-nigh impossible. What percentage and dispersion of the trade or the consuming public would have to be proved to have been "converted" before the plaintiff can protect its mark?

In this connection it may be well to note that by a strange twist of legal history several New York courts would appear to have adopted as the rational basis of trade-mark protection [via (1927) 40 HARV. L. REV. 813, 832] the test laid down in 1924 by a German court—the Landesgericht of Elberfeld—in the "Odol" case. In that case involving the same mark on such far removed articles as mouth-wash and steel ties, the court found that it was the "dilution" of a mark and the impairment of its selling-power or drawing-power that must be enjoined. For the most recent discussion of the "Odol" decision and the German trade-mark law with respect to non-competing goods, see Wolff, Non-Competing Goods in Trade-Mark Law (1937) 37 COL. L. REV. 583, 588. See the "Tiffany" litigation in 147 Misc. 679, 682-683 (Sup. Ct. 1932), aff'd, 237 App. Div. 801, aff'd, 262 N. Y. 482 (1933) [cited in OPPENHEIM, at 276, n. 64; "Tiffany" decision approved in Wayne County Produce Co. v. Gordon-O'Neill Co., 291 N. Y. Supp. 641, 642 (App. Div. 2d Dep't 1936)] see also Malson Prunier v. Prunier's Restaurant and Cafe, Inc., 159 Misc. 551, 288 N. Y. Supp. 529 (Sup. Ct. 1936) and article thereon in (1936) 5 FORDHAM L. REV. 516; Russeks Fifth Ave., Inc. v. Maryln Jr. Dress Shop, N. Y. L. J., Oct. 31, 1936, p. 1469; also in 27 T. M. REP. 114 (1937); for a parallel English development see present writer's Fog and Fiction . . . Part I, (1936) 36 COL. L. REV. 65-66, at note 14.

discussion of the oft-mooted question, "To what extent is protection dependent upon the uniqueness or distinctiveness of the mark?" As recently as July, 1936, Judge Learned Hand, dealing with the problem of the right in the first user to an actual and potential extension of his trade field, thus analyzed and disposed of many of the decisions already painstakingly gathered by Oppenheim on this point:

"The suggestion has at times also been made that the doctrine does not apply to a mark which is not coined, and it is on this that the defendant apparently relies. Pabst Brewing Co. v. Decatur Brewing Co., 284 F. 110 (C. C. A. 7); France Milling Co. v. Washburn-Crosby Co., 7 F. (2d) 304 (C. C. A. 2); Treager v. Gordon-Allen, Ltd., 71 F. (2d) 766 (C. C. A. 9). We do not agree; so far as France v. Washburn-Crosby Co., supra, says anything to the contrary, it was obiter. It is quite true that, just as a coined word is easier to protect than a word of common speech upon goods on which the owner has used it, so it is easier to prevent its use upon other kinds of goods. The proprietary connotation,—'secondary meaning'—of a word of common speech is harder to create and easier to lose, and its fringe of penumbra does not usually extend so far as that of a coined word. But that is matter of proof and of that alone; if the owner can in fact show that the fringe does not extend to other goods there is no reason why his interest should not be recognized. His interest is exactly the same as though the mark were a coined word (his reputation and his chance to extend his sales); . . . It would therefore be wrong to make any absolute distinction between coined, and colloquial, names. . . ."

Here again, as in the problem presented in the "Cellophane" decision just discussed, we are confronted with the problem of proof by plaintiff of "converting the world to its gospel,"—the degree of conversion to be proven being left undefined. Especially in coined, fanciful or arbitrary words, the "anti-dilution" doctrine of the "Odol" decision already discussed would seem to offer a more realistic approach and a more

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44. See OPPENHEIM, 276-277, at note 63; id. at 109 et seq.
45. Landers, Frary & Clark v. Universal Cooler Corporation, 85 F. (2d) 46, 48 (C. C. A. 2d, 1936). This decision of Judge Learned Hand as to the trade-mark "Universal" should be compared with a decision of the same court involving the trade-mark "Imperial," rendered six months previously, in Penn-Maryland Corporation v. Hiram Walker & Sons, Inc., 79 F. (2d) 836, (C. C. A. 2d, 1933) which latter decision might have been quoted, or at least cited by Oppenheim. As to the relation of the originality of a trade-mark to the question of the degree of its protection, compare these cases with Burger Brewing Co. v. Maloney-Davidson Co., 86 F. (2d) 815, 817 (C. C. A. 6th, 1936) (involving the trade-mark "Buckeye" registered over 100 times from 1881 to 1932) and the instances given in the present writer's Rational Basis of Trade Mark Protection (1927) 40 HARV. L. REV. 813, 826; Robert Reis & Co. v. Manhattan Shirt Co., N. Y. L. J., March 5, 1937, p. 1116; Quaker State Oil Refining Co. v. Steinberg, 189 Atl. 473 (Sup. Ct. Pa. 1937); DENZINGER, TRADE MARK PROTECTION (1936) §§ 35-38. Wolff, Non-Competing Goods in Trade-Mark Law (1937) 37 COL. L. REV. 852, 859 ff.
46. See note 42, supra.
rational basis of trade-mark protection than the more nebulous method of proof of a right to protection indicated by the Court in the Landers Frary & Clark decision just quoted.

(4) Embracing a field of advertising and sales ethics even broader than those we have discussed above, not necessarily involving any trade-mark use, is the question of the repression of the false advertising of "sensational sales" or "bargains" at prices which actually do not represent any saving to the customer. It is, the writer believes, not an overstatement that the very merchants and advertising men who would instinctively shrink from practicing, permitting or endorsing trade-mark infringement or passing off or similar unfair trade practices, would laugh off, as mere "business puffing," the overstatement of the value of goods offered for sale and the advertising of reductions from actually fictitious prices of goods, the true prices or values of which are perfectly well known to them. Less than fifteen years ago, an authoritative writer on the work of the Federal Trade Commission described this species of advertising as "a wide-spread practice."47

Even an exalted Federal Court has reversed the Federal Trade Commission's restraint of such practices on the ground that while "the falsehood about the usual salesprice was reprehensible, and an unworthy device to be employed in trade," nevertheless "it had no tendency to injure any competitor."48 However, irrespective of the practices of merchants or of advertising men,—even with the benediction of the most respectable newspapers49—it is no longer the law—if it ever was—that a practice ceased to become unfair because it may have become so widespread as to be taken for granted.50 For the next edition of Professor Oppenheim's Cases on Trade Regulation, it should be recorded that since his present volume went to press, this practice of offering fictitious values and fake bargains has been emphatically denounced in the courts. Judge Learned Hand, commenting upon the advertising of a price as "less than the usual price," has recently declared:


48. Chicago Portrait Company v. Federal Trade Comm., 4 F. (2d) 759, 763 (C. C. A. 7th, 1924) (rehearing denied 1925). For other early authorities on this point, see Handler, False and Misleading Advertising (1929) 39 Yale L. J. 22, 43, in footnote entitled Fictitious Price Reductions. It is difficult to understand this decision (in which one member of the court was unable to concur) when reading the decision of the same court in Sears Roebuck & Co. v. Federal Trade Comm., 258 Fed. 307 (C. C. A. 7th, 1919); reprinted in Oppenheim, pp. 487-490.

49. See the decision of Clancy, D. J., quoted note 51, infra.

“Little need be said about this; it was false and intended to deceive buyers upon a matter of fact. True, it is a very common device in selling, but it is to be discountenanced; morally it is not defensible and the Commission might hold it 'unfair'."

IV

But to return from the unavoidable lacunae in this first edition of Oppenheim's casebook to its actual contents, this bulky volume presents a kaleidoscopic view of American trade morals and of the more or less adequate devices for trade regulation. The late Professor Kales, himself an expert in both the casebook system and the subject of trade regulation, while extolling "the vitalizing features" of the casebook system, feared that "When the same casebooks have been used for many years—... students and teachers may become as lazy with casebooks as they did with the text-books..." Professor Oppenheim certainly cannot be accused of laziness; he has not merely been content with bringing up to date the predecessor "Trade Regulation" casebook of Professor Oliphant; he has reconstructed and revised that work—from his own "fresh formulation of principles." He has probed deeply and


"I am compelled to disagree with the construction of the advertisements made by the advertising managers who approved them, for, in my opinion, the plain meaning of the language employed in the newspaper advertisements is that B. V. D. suits of a value up to $5 were available to purchasers, and that the admitted failure of the defendants to supply B. V. D. suits of a value in excess of the manufacturer's suggested retail price of $3.95, makes the advertising to that extent deceptive and misleading. . . ."

"Without emphasizing the effect which the defendant's advertising tactics had on the consuming public who had actually entered the Davega stores in an attempt to purchase B. V. D. suits of a value regularly up to $5 and had met with disappointment, we must consider the effect of the newspaper advertising and the window displays upon the public who saw them and never entered the defendant's stores. All these persons might well conclude that the complainants could profitably sell their swim suits of a value 'Up to $5.00' at wholesale prices that permitted their retail sale for $2.74, and it cannot fairly be said that such a conclusion, apparently well founded, would not generate in the opinion of the consuming public a depreciated valuation of the merchandise of the complainants or would not divert business from the complainants as a result of such changed views of the value of their merchandise."


52. E.g., his Cases on Contracts and Combinations in Restraint of Trade (1916); The Next Step in the Evolution of the Case-Book (1907) 21 Harv. L. Rev. 92; Kales, An Unsolicited Report on Legal Education (1918) 18 Col. L. Rev. 21.

53. Kales, supra note 52, at 24.

54. Kales, supra note 52, at 23. Professor Oppenheim has made a thorough re-
widely into not only the orthodox but the novel and the current categories of trade regulation.\textsuperscript{55} His avowed dual and inevitably somewhat irreconcilable objectives, \textit{i.e.}, his “desire to compile a volume for legal reference use by the student and practitioner, as well as for the immediate needs of class instruction,”\textsuperscript{56} have occasionally led him into the selection of materials perhaps less rigidly discriminating and fundamental to the tyro in this field than the work of his predecessor.\textsuperscript{57} But, on the other hand, what he justly describes as “the dynamic character of the subject matter,”\textsuperscript{58} and his realization of the importance of habituating the student to the use of administrative and statutory, as well as judicial sources,\textsuperscript{59} have impelled the editor to produce an admirably documented arrangement of materials according to his own plan. \textit{E.g.}, his section on \textit{Contracts Not to Compete} commences at p. 791, while Oliphant’s on this theme commences at p. 34. Oliphant’s scheme of arrangement is: Part I, \textit{Contracts Not to Compete}; Part II, \textit{Competitive Practices}; Part III, \textit{Combinations}; Oppenheim’s, on the other hand, is: Part I, \textit{Unfair Competition}; Part II, \textit{Combination and Monopoly}.

\textsuperscript{55} \textit{E.g.}, his materials on Federal Trade Commission Procedure (p. 542); Investors’ Remedies Against Misrepresentation (p. 452); Food and Drug Control (p. 447) with which \textit{cf.} U. \textit{S. Sen. Hearings on S. 2800, 73rd Cong., 2d Sess. (1934) and LAMPH, AMERICAN CHAMBER OF HORRORS (1936)}; also his Marketing Methods in the Petroleum Industry (p. 735); Price Differentials and the Patman-Robinson Act (p. 918); Chain Store Developments (p. 938); Trade Associations (p. 1113); Co-Operative Marketing Associations (p. 1268); Procedure and Remedies Under the Federal Anti-Trust Laws (p. 1312).

\textsuperscript{56} “There are perhaps as many variations in the ‘case method’ as there are in ‘case method teachers.’ At the same time, it is believed that the designation does suggest a fairly definite attitude towards teaching material. . . .” \textit{Report of Committee on Curriculum of Commercial Law Subjects}, 33 \textit{Proceedings Ass’n Amer. Law Schools} (1935) at 188. The technique used in the construction of a students’ casebook is necessarily vastly different from that employed in the preparation of a reference work for practitioners. To the student the simplification of a complicated subject, such as trade regulation, and the concentration on the main avenues of approach are all-important; to the practitioner, all-inclusiveness—the treading of not merely the main avenues but of unfrequented by-paths are the desiderata. \textit{Cf. Gray, Cases on Property} (2d ed. 1906) p. vii.

\textsuperscript{57} It has recently been pointed out by Dean Parkinson that, “Even Herman Oliphant, the great apostle of the factual approach and the expansion of the lawyers’ and the law teachers’ point of view beyond mere rules and words, who emphasized above all things the factual approach to a consideration of the law, when he came to prepare his casebook in trade regulations, produced simply a series of judicial opinions.” (1935) 8 \textit{Amer. Law School Rev.} 292-293.

In the end the casebook editor is doing the student no kindness by attempting “to relieve him of some of the drudgery of case-reading.” McCall, Book Review (1936) 36 \textit{Col. L. Rev.} 1019; after all, if the student is going to be a lawyer, he must learn how to read and analyze cases—long and dreary though these may be. See Shientag, \textit{The Education of a Lawyer}, in \textit{Proceedings . . . Alumni Ass’n, Law School, Columbia Univ.} (1935) 26; Dowling, Book Review (1933) 33 \textit{Col. L. Rev.} 386, 389; O’Reilly, Jr., Book Review (1936) 5 \textit{Fordham L. Rev.} 195, 198.

\textsuperscript{58} OPPENHEIM, Preface, vii.

\textsuperscript{59} For the emphasis on the pedagogic importance of administrative sources, as distinguished from case law, see Landis, \textit{The Implications of Modern Legislation to Law}
"single compilation" that might almost "satiate the zealous avarice either of the scholar or of the advocate."

V

To the student of the history of trade morals and control, the American scene, forecast by our seventeenth century visitors to the colonists quoted above, and depicted in contemporary America in the richly varied materials of Professor Oppenheim, presents some profoundly interesting data and suggests a multiplicity of problems. Discarding the pleasant but fictional analogies of the athletic field, just what is "fair" and "unfair" trade? Judicial definitions do not always clarify the problem. The Supreme Court has recently declared the phrases "fair and open competition" and "unfair methods of trade" to be so "sufficiently definite... that no one need be misled as to their meaning..." But how does the Court itself define such terms? By "the gradual process of judicial inclusion and exclusion." In this process of "inclusion and

Teaching, 32 Proceedings Ass'n Amer. Law Schools (1934) 130; Handler, id., at 134; Annual Review of Legal Education for 1935, Amer. Bar Ass'n (ed. Shafroth) at 10; for a similar emphasis on statutes as a source of law, see Landis, Statutes and the Sources of Law, Harvard Legal Essays (1934) 213, at 234; Kales, supra, note 52, at 30.

McLaughlin, Cases on Federal Anti-Trust Laws (1933) 5. With thorough appreciation of the generous and exceedingly valuable labors of Professor Oppenheim, it may be remarked that occasionally the distention of his volume would seem to make it a trifle unhandy and to recall Dean Horack's objection to the case method "without providing adequate... furniture for its use," 27 Proceedings Ass'n of Amer. Law Schools (1929) 20. Quaere: Could not the material on Inventions of Employees (Oppenheim, pp. 404-431) some of that on Federal Registration of Trade Marks (id. at 185) and the Patent Office Rules for the Registration of Trade Marks (id. at 1433–1459) been considerably curtailed or even omitted and merely incorporated by reference to appropriate specialist text-books in those fields? For the relation of Unfair Competition in Equity to Trade Regulation Courses, cf. Oppenheim, at 4 with Patterson, The Place of Equity in the Law School Curriculum (1935) 8 Amer. Law School Rev. 385, 386.

As far as the materials contained in Oppenheim's "perspective" and "preview... of some fundamental economic and legal conceptions" (Oppenheim, at 8) are concerned, despite "his teaching experience both in economics and in law" (id. at 10) it is questionable whether the student of trade regulation will not find his economic "perspective" rather blurred and his "preview" rather out-moded in the light of realities. See Radin, 32 Proceedings Ass'n of Amer. Law Schools (1934) 221–222; Mitchell, Economists and the Depression, 2 The Social Frontier (1935) 215, 217; Lundberg, Economists Adrift, 2 id. at 147, 151; Hulvey, The Integration of Commercial Law With... Social Control (1931) 7 Amer. Law School Rev. 228, 230; Hadley, Economic Problems of Democracy (1923) 135, quoted by Freeman, 2 The Social Frontier (1935) 84. Cf. McLaughlin, supra, at 713.

61. Supra p. 194.
exclusion," unfair competition has been described as "a method of competition which casts upon one's competitors the burden of the loss of business unless they will descend to a practice which they are under a powerful moral compulsion not to adopt."65 "Unfairness in competition has been predicated of acts which lie outside the ordinary course of business and are tainted by fraud, or coercion, or conduct otherwise prohibited by law."66 Has not the Court itself, in grappling with the realities of a profit-making economy found it, on occasion, impossible not to exclude from "unfair competition" acts which traders would seem to be "under a powerful moral compulsion not to adopt," even though not banned by law? Is it, for instance, to the best interests of society that "the public always be entitled to get what it chooses, though the choice may be dictated by caprice or by fashion or perhaps by ignorance?"67

What then is "the ordinary course of business" that is sanctioned by the Court as "fair competition" or "fair trade"? The answer was rather cynically given to Robert Louis Stevenson by Old Tembinok, the royal trader of the South Seas, who classified captains and super-cargoes with whom he had done business under three heads: "He cheat a litty"—"He cheat aplenty"—and "I think he cheat too much." "For the first two classes," says Stevenson, "he expressed perfect toleration; sometimes, but not always, for the third."68 The general applicability of this primitive appraisal of trade morals and the bases of trade regulation may be tested by the difficulties of our own Supreme Court in the problems of "inclusion and exclusion" just discussed and by the materials gathered by Professor Oppenheim from so many sources and directions of modern American trade regulation. To attempt an adequate definition of "the ordinary course of business,"—especially in or during the emergence from a depression69 is beyond our province here. But the more

68. Quoted in the present writer's The Law and Morals of Primitive Trade, supra, note 1, at 595.
69. For the relation of the decline in American trade ethics to depressions, see Hearings on Amendment of Federal Trade Commission Act S. 2626, 72nd Cong., 1st Sess., (1932) 128, 87, 260; WARREN, BANKRUPTCY IN UNITED STATES HISTORY (1935) Index, s.v., Depressions; HEERMANCE, CAN BUSINESS GOVERN ITSELF? (1933) 52. For analyses—making rather unedifying reading—of the "incentives" that kept committees of business men in
we study the comparative morals and regulation of competition, the more
we are impressed with the soundness of the remark that “competition
never did look like its picture. The authentic portrait is a glorified
abstract of petty trade.” Or, as was well said by Professor Oliphant
in introducing the predecessor to Professor Oppenheim’s casebook, al-
most fifteen years ago,

“... Standards of conduct in trade prescribed by the law today have an event-
fual, but nevertheless unbroken, line of development reaching farther back than
the Black Death. Most of our current philosophical notions as to the problem
of the proper relation of government to business have been bidding for accept-
ance throughout the centuries. Probably most important is the fact, easily
overlooked, that current trade, the thing to be regulated, and mediaeval trade,
are cross-sections of the same organism and display more likenesses than
differences in basic matters of structure. Finally, it should be seen that our
earliest and latest recorded experiments in trade control are really contemporary
when viewed in proper perspective.”

Washington for weeks and months in the heyday of the N.R.A. “for the privilege of
increasing their costs by raising wages and reducing hours of work” see LYN, THE
NATIONAL RECOVERY ADMINISTRATION (1935) 91. Cf. statement of Dr. T. C. Bhuller,
of Food Products, Pursuant to S. 374, 73rd Cong., 3rd Ses. (1931) 98, 116, 225, 310.

70. Hamilton, Book Review (July 25, 1936) THE NATION 105. Veblen’s singularly
romantic notion that “the pecuniary scheme of right conduct is of recent growth,” ESSAYS
IN OUR CHANGING ORDER (1934) p. 217 may well be compared with a tomb inscription
of the Fourth Egyptian Dynasty (ca. 2900-2750 B. C.) “As for every man who has done
this for me (that is, has worked on this tomb), he was never dissatisfied: whether crafts-
man or quarryman, I satisfied him.” BREASTED, THE DAWN OF CONSCIENCE (1933) 123.
See also: “I did not diminish the grain measure ... I did not load the weight of the bal-
ances. I did not deflect the index of the scales.” (BREASTED, id. at 256).

It is singularly appropriate that Charles and Mary Beard in their chapter on The
Triumph of Business Enterprise, in THE RISE OF AMERICAN CIVILIZATION (one vol. ed.
(1930) II, 167] quote the grimly penetrating remark of an eminent authority on ancient
history as to what they term “a powerful rôle that can be discerned through the thick layers
of clerical and classical tradition.” Commenting on Alma Tadema’s famous painting,
A Reading from Homer, Professor W. L. Westermann finds that the conception would be
equally applicable to the ancient Hellenes “if the roll from which the rhapsodist is read-
ing were a business document; if the subject of rapt attention were the possibility of
a profit of twenty-five per cent a year instead of the deep-sounding harmonies of Homeric
hexameter.” Cf. supra note 17.

71. OLIPHANT, CASES ON TRADE REGULATION (1923) 1.