[Fordham Law Review](https://ir.lawnet.fordham.edu/flr)

Volume 45 | Issue 6 Article 2

1977

Vertical Restraints After Repeal of Fair Trade

Richard A. Givens

Laura P. Worsinger

VERTICAL RESTRAINTS AFTER REPEAL OF FAIR TRADE

BY RICHARD A. GIVENS
*LAURA P. WORSINGER**

THE repeal of both state fair trade laws and the federal legislation enabling states to enact such statutes[1] has enhanced[2] interest in the question of the effect of vertical restraints on prices and distribution of products.[3]

The "fair trade" laws explicitly allowed manufacturers to agree with retailers on what the retailers would charge for the manufacturers' brand name product. The so-called "non-signer" clauses, in effect in a number of states, went further and allowed such agreements to be enforced against retailers who had notice of them but did not sign them.[4] A number of states repealed their fair trade laws in the early 1970s. Federal repeal of the antitrust exemptions under the Sherman Act and the Federal Trade Commission Act which allowed state fair trade laws soon followed.

One possible consequence of these developments may be more vigorous price competition. Some firms, however, may seek to continue resale price maintenance by other devices now that fair trade has been repealed. The following questions are raised as a result:

(1) What legal criteria will apply to vertical restraints in the post-fair trade era?

(2) What is the likelihood that one can successfully use methods which are legal and still effectively maintain resale prices?

---

* Although Richard A. Givens is Regional Director and Laura P. Worsinger a former Assistant Regional Director of the New York Regional Office of the Federal Trade Commission, the views expressed here are solely their own and are not attributable to any governmental agency.

1. Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801, repealing the Miller-Tydings Fair Trade Act, ch. 690, Title VIII, 50 Stat. 693 (1937) and the McGuire Act, ch. 745, 66 Stat. 631 (1952) (codified at 15 U.S.C. §§ 1, 45(a) (Supp. V, 1975)). For state repeals, see, e.g., N.Y. Gen. Bus. Law § 369-a (McKinney Supp. 1976).

2. See, e.g., Barmash, F.T.C. Adding Children's Apparel To an Investigation of Price Fixing, N.Y. Times, Nov. 12, 1976, at D12, col. 1; Maslow, Colgate Updated, 48 N.Y. St. B.J. 626 (1976).

3. Vertical agreements are those between firms at different levels in the processing and distribution of a product, such as between manufacturers and retailers. Horizontal agreements between direct competitors, such as various manufacturers of the same product, are distinct from vertical agreements for some purposes.

4. See McGuire Act, ch. 745, 66 Stat. 631 (1952). Compare Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951) with United States v. McKesson & Robbins, Inc., 351 U.S. 305 (1956).

(3) Why do manufacturers sometimes seek to control resale prices in the first place?

(4) Who benefits from the imposition or the elimination of resale price maintenance?

(5) What vertical restraints should be allowed—and disallowed—under the antitrust laws in the public interest?

With the repeal of fair trade, any method used to maintain resale prices becomes most hazardous. Under the Sherman Act, resale price agreements between manufacturers and retailers were held illegal even before a similar decision was made as to horizontal price fixing agreements between competitors.[5] In *United States v. Colgate & Co.*[6] in 1919, however, the Supreme Court held that a seller could unilaterally select customers, and could announce conditions (such as maintenance of resale prices) which a distributor would have to meet in order to avoid termination.

Subsequent Supreme Court and lower court cases held that the precise conduct described in the *Colgate*[7] opinion marked the *outer limits* of what can be done to induce dealers to maintain prices.[8] In *United States v. Parke, Davis & Co.*[9] the Court stated that when a supplier goes one step beyond mere announcement of a resale price maintenance policy and the simple refusal to deal, he has put together a combination in violation of the Sherman Act.[10] Thus, the presence of any additional ("plus") factors will bring about an antitrust violation. Among the "plus" factors often found are: obtaining assurances of compliance with pricing policies from dealers, monetary inducements, causing wholesalers to discipline discounting retailers, using coercive devices such as delayed shipments, withholding advertising allowances to induce adherence to prices, or establishing an elaborate policing system to assure compliance.[11]

5. Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911); as to horizontal price fixing, see United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); United States v. Trenton Potteries Co., 273 U.S. 392 (1927).

6. 250 U.S. 300 (1919).

7. The Colgate decision was based on a construction of the indictment by the district court which excluded the presence of an agreement. Id. at 304.

8. In order to rely successfully on Colgate it has been said that the arrangements of a seller would have to be "of such Doric simplicity as to be somewhat rare in this day of complex business enterprise." George W. Warner & Co. v. Black & Decker Mfg. Co., 277 F.2d 787, 790 (2d Cir. 1960).

9. 362 U.S. 29 (1960).

10. Id. at 46-47; see Tulkoff, Antitrust Implications of Suggested Retailers' Resale Prices, 175 N.Y.L.J., May 27, 1976, at 1, col. 1.

11. Simpson v. Union Oil Co., 377 U.S. 13 (1964); United States v. Parke, Davis & Co., 362 U.S. 29 (1960); FTC v. Beech-Nut Packing Co., 257 U.S. 441 (1922); Levi, The Parke, Davis-Colgate Doctrine: The Ban on Resale Price Maintenance, 1960 Sup. Ct. Rev. 258; see

There are cases in which sellers engaged in resale price maintenance have been successful in defending against antitrust attacks on the basis of *Colgate*. These cases, however, almost always involve private antitrust claims. The proof in such cases is frequently limited to a showing of an isolated cutoff rather than a showing of a systematic practice.[12] In Federal Trade Commission cases, where a broader investigation is invariably conducted, the *Colgate* defense has uniformly been found inapplicable. The reason for this result is that conduct going beyond that permitted by *Colgate*, as interpreted by subsequent cases, was consistently uncovered.[13]

It is permissible for a manufacturer to maintain resale prices, but only if he is willing to limit direct distribution of the product to a small number of retailers who he is sure will maintain those prices. The law, even after the repeal of fair trade and the limiting of *Colgate* by subsequent cases, does not treat every business as a public utility required to sell to all comers.[14] Few manufacturers in practice, however, are willing to forego the mass marketing of their product. The legal problem arises when an effort is made to "have one's cake and eat it, too" by selling to a large number of retailers, and at the same time trying to insist that each of them act as high price outlets. It is theoretically possible that prices can be maintained and discounting dealers cut off without agreements between dealers and manufacturers or their agents. It is also theoretically possible that there would be no surveillance or responses to complaints of other dealers. This, however, is just about as realistic as the possibility of running a tightrope wire from the Eiffel Tower to the top of the Parliament Building in London and crossing it by bicycle on a windy day. In cases like this, "Murphy's Law" is almost as binding as the law of gravity and "if it can go wrong, it will." For example, salesmen on commission will attempt to get reassurances from their customers that they will main-

---

Copper Liquor, Inc. v. Adolph Coors Co., 506 F.2d 934 (5th Cir. 1975); Greene v. General Foods Corp., 517 F.2d 635 (5th Cir. 1975), cert. denied, 424 U.S. 942 (1976); Sahm v. V-1 Oil Co., 402 F.2d 69 (10th Cir. 1968); George W. Warner & Co. v. Black & Decker Mfg. Co., 277 F.2d 787 (2d Cir. 1960); Mt. Vernon Sundat, Inc. v. Nissan Motor Corp., 1976-1 Trade Cas. ¶ 60,842 (E.D. Va. 1975). In Girardi v. Gates Rubber Co., 325 F.2d 196, 202 (9th Cir. 1963) the court stated: "The very act of complaining carries the meaning: 'I want you to do something about it.'"

12. E.g., Garrett's Inc. v. Farah Mfg. Co., 412 F. Supp. 656 (D.S.C. 1976).

13. Lenox, Inc., 73 F.T.C. 578 (1968), modified, 77 F.T.C. 860 (1970); Brown Shoe Co., 62 F.T.C. 679 (1963), modified, 70 F.T.C. 491 (1966); Luria Bros. & Co., 62 F.T.C. 243 (1963); Sandura Co., 61 F.T.C. 756 (1962), modified, 339 F.2d 847 (6th Cir. 1964); Roberts Co., 56 F.T.C. 1569 (1960); Columbus Coated Fabrics Corp., 55 F.T.C. 1500 (1959); Outboard, Marine & Mfg. Co., 52 F.T.C. 1553 (1956).

14. Compare (Britain) Resale Prices Act of 1964, 12 Eliz. II, c. 58, § 1.-(1); (Canada) Combines Investigation Act, Can. Rev. Stat. c. 314, § 34 (1952), as amended Can. Stats. c. 45, § 14 (1960); (Sweden) Act to Counteract Restraint of Competition in Certain Industries, s. 2 (1953), as amended (1956).

tain the price fixed by the manufacturer since a failure to do so by the customer would result in a loss of commission to the salesman.

If the purpose or effect of a supplier's selection of customers or system of distribution is to influence resale prices, such a system is *never* simply a unilateral act. There is always something more involved. The reason is obvious. Simple announcement of a policy and declination to deal are ineffective in achieving the goal of maintaining prices. The "something more" may take a variety of forms. Most frequently occurring are those listed earlier as "plus" factors, that is, devices to induce adherence to established prices such as coercion, monetary inducement (co-op advertising money—conditioned on maintaining prices) and surveillance systems.[15]

Aside from these illegal devices, other conduct by firms to effectuate resale price maintenance may be equally suspect and result in violations. Part of any effort to stop discounting is usually an attempt to prevent "authorized" dealers, to whom the manufacturer sells direct, from "transshipping" the product to "unauthorized" dealers. The latter may be discounters who do not deal directly with the manufacturer. Transshipping is difficult to prevent because dealers invariably find themselves overstocked with even the best selling product from time to time, and wish to dispose of it to another dealer. Dealers who obtain a product by means of such transshippment are often condemned by their competitors as "bootleggers" because they get the product without being authorized by the manufacturer. They are free to discount without fear of being cut off from their sources of supply. The presence of at least some discounters of this type is vital to the maintenance of price competition because of the very fact that such dealers cannot be disciplined by fear of a *Colgate* cutoff.

In an effort to stop transshipping, some firms have sought to impose restrictions on the ability of dealers to sell to other dealers or to sell outside assigned territories. This type of restriction was held illegal per se in *United States v. Arnold, Schwinn & Co.*[16] where the manufacturer has parted with the risk of loss. Other cases have indicated that a consignment system designed to retain dominion of the product cannot be used to circumvent price maintenance prohibitions where the consignees do not in substance act as mere employees of the manufacturer.[17]

The issue of whether or not *Schwinn* actually adopted a per se rule, or whether it should be reinterpreted or modified to strike down only "unreasonable" vertical territorial restraints has been a subject

15. See text accompanying note 11 supra.

16. 388 U.S. 365 (1967).

17. See Simpson v. Union Oil Co., 377 U.S. 13 (1964); United States v. General Elec. Co., 358 F. Supp. 731 (S.D.N.Y. 1973), distinguishing United States v. General Elec. Co., 272 U.S. 476 (1926).

of controversy.[18] There seems to be no disagreement, however, that restraints on resale of products which are designed to help enforce resale price maintenance fall within the area of per se illegality under any interpretation of *Schwinn*.[19] Blanket bans on reselling to unauthorized outlets seem most unlikely ever to pass antitrust muster. Based partly on the fact that the dealer was allowed to sell to anyone (including other dealers) from that location, the Ninth Circuit has held that "location clauses" limiting the place from which a dealer may sell a manufacturer's product can be valid in some circumstances.[20]

Fair trade was initiated in the 1930s. The movement to repeal the fair trade laws in the 1970s was based on a changed perception of economic conditions. In the 1930s, the problem was often felt to be that certain prices were so low as to drive many firms out of business. Whether this diagnosis and the fair trade remedy were logical or not, in the 1970s the situation was drastically different. Many factors were causing higher costs and higher prices, which in turn were pinching both consumers and business firms. One means of dealing with this problem was to remove existing restraints on competition. Consequently a number of states repealed their fair trade laws, followed by federal repeal of the antitrust exemption for such laws. This combined state-federal action with strong bipartisan support represents a powerful expression of national will. It should be interpreted in light of the Senate Committee report in connection with the federal repeal, which stated:

> The repeal of the fair trade laws does not affect the use of suggested prices by a manufacturer. However, the use of suggested prices in such a way as to coerce adherence to them would be illegal.[21]

If this statement were taken in its broadest sense, *Colgate* might be undermined on its own facts, because a generalized policy of refusals to deal based on an announced policy of not selling to discounters could be construed to be a form of coercion. This would still not mean that the principle underlying *Colgate*—ability of a seller to select

18. Compare Tripoli Co. v. Wella Corp., 425 F.2d 932 (3d Cir.), cert. denied, 400 U.S. 831 (1970) with Adolph Coors Co. v. FTC, 497 F.2d 1178 (10th Cir. 1974), cert. denied, 419 U.S. 1105 (1975).

19. See GTE Sylvania Inc. v. Continental T.V., Inc., 537 F.2d 980 (9th Cir.), cert. granted, 97 S. Ct. 252 (1976); cf. Colorado Pump & Supply Co. v. Febco, Inc., 472 F.2d 637 (10th Cir.), cert. denied, 411 U.S. 987 (1973); Tripoli v. Wella Corp., 425 F.2d 932 (3d Cir.), cert. denied, 400 U.S. 831 (1970); Janel Sales Corp. v. Lanvin Parfums, Inc., 396 F.2d 398, 406-07 (2d Cir.), cert. denied, 393 U.S. 938 (1968); United States v. Glaxo Group Ltd., 302 F. Supp. 1 (D.D.C. 1969), rev'd, 410 U.S. 52 (1973). See generally Practising Law Institute, The Repeal of the Fair Trade Laws: Impact on Product Distribution (Course Handbook Series No. 147, 1976).

20. GTE Sylvania Inc. v. Continental T.V., Inc., 537 F.2d 980 (9th Cir.), cert. granted, 97 S. Ct. 252 (1976).

21. S. Rep. No. 94-466, 94th Cong., 1st Sess. 3 (1975).

customers—would be altered. It would merely indicate that an announced policy of not dealing with discounters would be illegal as a means of effecting a program of coercing resale price maintenance. Many activities which are not illegal in and of themselves, of course, are illegal if carried out in furtherance of an illegal objective, under the antitrust laws or otherwise.[22]

Given the antitrust risk involved, one might wonder why manufacturers would even consider attempting to continue resale price maintenance programs. Price competition at the retail level would seem to tend to increase sales of the product, thus boosting the manufacturer's volume of production at the same wholesale price, and consequently the manufacturer's profit.

This paradox was brilliantly explored by Professor Lester G. Telser[23] who outlined several possible motivations for manufacturers to control resale prices. Some of these include:

(1) To see that dealers have enough margins to maintain services necessary to high sales of the product or customer satisfaction, such as selling demonstrations and warranty fulfillment.

(2) To insure sufficient profit to retailers to enable them to advertise, and conversely to prevent discounters who don't advertise from getting a "free ride" on the promotion of the product by other retailers who do advertise the product.

(3) To insure the retailer sufficient margin to provide an incentive to push the sales of the product.

However, each of these reasons for resale price maintenance arises from a need on the part of the manufacturer which can be met in other ways:

(1) Warranty service is primarily the obligation of the manufacturer,[24] although retailers may also give warranties or be bound by implied warranties under the Uniform Commercial Code.[25] The manufacturer may include the cost of providing warranty service within the wholesale price charged by the manufacturer to all customers. This would compel all dealers, including discounters, "bootleggers" and others to pay their share of the cost of providing warranty fulfillment since it is embraced within whatever price they have to pay to get the product. Utilizing these funds, the manufacturer can in turn designate

22. See Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949). See also the patent misuse doctrine under the antitrust laws exemplified by, e.g., Sola Elec. Co. v. Jefferson Elec. Co., 317 U.S. 173 (1942); Morton Salt Co. v. G.S. Suppiger Co., 314 U.S. 488 (1942).

23. Telser, Why Should Manufacturers Want Fair Trade?, 3 J. Law & Econ. 86 (1960).

24. See generally Magnuson-Moss Warranty—FTC Improvement Act, 15 U.S.C. §§ 2301, et seq. (Supp. V, 1975).

25. See Uniform Commercial Code §§ 2-314, 2-315, protected against disclaimer under various circumstances by the Magnuson-Moss Warranty—FTC Improvement Act, 15 U.S.C. § 2308(c) (Supp. V, 1975).

certain authorized dealers or others to perform warranty work on behalf of, and at the expense of, the manufacturer.[26]

(2) Similarly, the manufacturer may include the cost of whatever local advertising is deemed necessary within the wholesale price charged for the product. The manufacturer may then offer to pay an appropriate portion of the cost of advertising incurred by dealers to whom the manufacturer is willing to sell directly, provided that the allowances are not limited to those who maintain prices, and that such advertising allowances are made available on proportionally equal terms to all customers of the manufacturer to the extent required by the Robinson-Patman Act.[27]

(3) In order to induce a dealer to "push" a manufacturer's product, a manufacturer may designate a dealer as the exclusive direct customer of the manufacturer in his given territory[28] and according to several courts, may also limit dealers to whom the manufacturer sells directly, to selling the manufacturer's product from a specific location in certain circumstances.[29]

(4) A retailer who provides demonstrations or other additional information to consumers acquires a certain degree of limited power to influence the consumer as a result of these efforts.[30] The fact that some benefits from this dissemination of information may escape is a general phenomenon characteristic of all forms of communication. Some people may get the information and use it for purposes other than those contemplated by the sender[31]—for example, by purchasing the

26. See Magnuson-Moss Warranty—FTC Improvement Act, 15 U.S.C. § 2307 (Supp. V, 1975).

27. 15 U.S.C. § 13 (1970). On the dangers of so-called "profit passover" clauses as a means of dealing with these problems, see Hibner, Territorial and Customer Limitations, 44 Antitrust L.J. 300, 309 (1975).

28. See Elder-Beerman Stores Corp. v. Federated Dep't Stores, Inc., 459 F.2d 138 (6th Cir. 1972); Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969), cert. denied, 396 U.S. 1062 (1970); Scanlan v. Anheuser-Busch, Inc., 388 F.2d 918 (9th Cir.), cert. denied, 391 U.S. 916 (1968); Walker Distrib. Co. v. Lucky Lager Brewing Co., 323 F.2d 1 (9th Cir. 1963); Ace Beer Distribs., Inc. v. Kohn, Inc., 318 F.2d 283 (6th Cir.), cert. denied, 375 U.S. 922 (1963); Packard Motor Car Co. v. Webster Motor Car Co., 243 F.2d 418 (D.C. Cir.), cert. denied, 355 U.S. 822 (1957); Interborough News Co. v. Curtis Publishing Co., 225 F.2d 289 (2d Cir. 1955); Naifeh v. Ronson Art Metal Works, Inc., 218 F.2d 202 (10th Cir. 1954); Bascom Launder Corp. v. Telecoin Corp., 204 F.2d 331 (2d Cir.), cert. denied, 345 U.S. 994 (1953); Fargo Glass & Paint Co. v. Globe Am. Corp., 201 F.2d 534 (7th Cir.), cert. denied, 345 U.S. 942 (1953).

29. See, e.g., GTE Sylvania Inc. v. Continental T.V., Inc., 537 F.2d 980 (9th Cir.), 97 S. Ct. 252 (1976); Salco Corp. v. General Motors Corp., 517 F.2d 567 (10th Cir. 1975); Kaiser v. General Motors Corp., 396 F. Supp. 33 (E.D. Pa. 1975), aff'd mem., 530 F.2d 964 (3d Cir. 1976).

30. See generally J. Nirenberg, Getting Through to People (1963); G. Nierenberg, The Art of Negotiating (1968).

31. See generally E. Goffman, Strategic Interaction (1969); F. Wellman, The Art of Cross Examination (4th ed. 1936).

goods from a competitor of the advertising retailer.

The argument is also often made that "mom and pop" stores cannot survive without resale price maintenance. This overlooks the advantages of convenience and personal ties which may enable such stores to compete successfully. It also overlooks the fact that in those cases where chains are in fact more efficient, they can use their margin to compete against local "mom and pop" stores in other ways even if prices are fixed, *e.g.*, through advertising, loss leaders, giveaway programs, trading stamps, etc. No statistics have been found even purporting to show that there have been more failures or fewer small retailers in states having no fair trade laws or having repealed them prior to the federal repeal.[32]

Telser pointed out some other possible motives for resale price maintenance:[33]

(a) If manufacturers have agreed among themselves to fix prices horizontally, resale price maintenance permits each manufacturer to determine accurately whether the others are adhering to the illegal agreement.[34] On the other hand, if each retailer is setting resale prices independently, a manufacturer has no ready way of knowing whether the discounting flows from concessions given by competing manufacturers or results from independent action of the retailer. It is well known that many manufacturers do give discounts to large buyers, some of which are cost-justified[35] or granted to meet competition, as well as some that may be illegal under the Robinson-Patman Act.[36]

(b) Retailers may get together to try to maintain their gross profit margins by inducing manufacturers to enforce adherence to such margins by all retailers. This can be accomplished by boycotting or threatening to boycott manufacturers who do not compel resale price maintenance by retailers dealing in the particular product.

These possible motives for resale price maintenance given by Telser describe conduct in aid of horizontal price fixing activity at the manufacturer or retailer levels or both. However, similar forces may be at work even where there is no actual horizontal agreement.

It has long been established that price-fixing agreements may be inferred from conduct that would not be likely to occur but for an agreement, even without direct proof of an exchange of mutual assurances.[37] Even absent such a "tacit" agreement, however, there

32. In fact, statistics have shown that states with fair trade laws had a 55% higher rate of firm failures than free trade states. S. Rep. No. 94-466, 94th Cong., 1st Sess. 3 (1975).

33. Telser, Why Should Manufacturers Want Fair Trade, 3 J. Law & Econ. 86, 96-105 (1960).

34. Cf. K. Pribram, Cartel Problems 76-84 (1935).

35. See generally H. Taggart, Cost Justification (1959); Rowe, Cost Justification of Price Differentials Under the Robinson-Patman Act, 59 Colum. L. Rev. 584 (1959).

36. 15 U.S.C. § 13 (1970).

37. Compare American Tobacco Co. v. United States, 328 U.S. 781, 809-10 (1946) and

is inevitably a force or influence at work when each competitor acts based on what he expects other competitors to do if the firm in question cuts prices or fails to raise prices when others are doing so. One part of this influence is based on the competitor's assessment of whether the others will similarly cut prices or fail to raise them. This portion of the influence reflects the operation of the market itself.[38]

A second component of force operating on any given competitor is the anticipated pressures *outside* the primary market itself which others may bring to bear in retaliation for price cutting or rejection of price increases. Folklore as well as sociology confirm that any member of an industry or any other social group is somewhat vulnerable to the opinion of the peer group and is reluctant to be viewed as the "traitor" acting contrary to the interest of the group.[39] Nevertheless, this is only partially based on purely social pressures, significant as these may be.

There are various ways in which any industry can discipline an unpopular member. Usually, industry members share common sources of supply of goods and services needed for operation, such as raw materials, intermediate manufacturing services, credit, wholesale and retail outlets. Also shared are cooperation with or toleration by various outside public and private institutions that can sometimes be influenced.[40] A word by the president of competitor *A* to raw material supplier *B* that "We place some pretty big orders with you, and we are rather sore at *X* who has really knifed the industry on prices," might make it harder for *X* to get supplies from *B*. Shipping schedules may be disrupted or "unavoidable" scheduling errors may develop when the next delivery is due.

The potential for this type of pressure by industry members has an effect even when such pressure is never actually applied. Accordingly, a manufacturer will always have to give at least some thought to the

---

Interstate Circuit, Inc. v. United States, 306 U.S. 208, 225 (1939) with Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 540-41 (1954). See also Givens, Parallel Business Conduct Under the Sherman Act, 5 Antitrust Bull. 273 (1960); Nye, Can Conduct Oriented Enforcement Inhibit Conscious Parallelism?, 44 Antitrust L.J. 204, 206 (1975); Phillips, Policy Implications of The Theory of Interfirm Organization, 51 Am. Econ. Rev. No. 2, at 245 (1961); Phillips & Hall, The Salk Vaccine Case: Parallelism, Conspiracy and Other Hypotheses, 46 Va. L. Rev. 717 (1960); Sorkin, Conscious Parallelism, 2 Antitrust Bull. 281 (1957).

38. E. Chamberlin, The Theory of Monopolistic Competition 46-47 (6th ed. 1948); Turner, The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal, 75 Harv. L. Rev. 655, 658-70 (1962).

39. See American Column & Lumber Co. v. United States, 257 U.S. 377, 411 (1921). See generally S. Asch, Social Psychology 450-501 (1952); Asch, Effects of Group Pressure upon the Modification and Distortion of Judgments, in Readings in Social Psychology 2 (rev. ed. 1952); Lewin, Group Decision and Social Change, in id. at 459.

40. See California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972); Eastern R. R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); L.G. Balfour Co. v. FTC, 442 F.2d 1 (7th Cir. 1971); Givens, Litigation as a Means of Economic Competition, 27 Record of N.Y.C.B.A. 572 (1972).

tender feelings of its competitors when it comes to the delicate question of cutting prices.

Thus, the myth that inter-brand competition is best stimulated by stifling intra-brand competition[41] overlooks these considerations as well as those pointed out by Telser.[42] On the other hand, with the repeal of fair trade, a manufacturer can legitimately say in response to a frown over gin rummy after the golf game: "By the way, you realize we have absolutely no control over the prices charged by our dealers. Since fair trade has been repealed, those antitrust enforcement people will jump on us immediately if we try to tell them what to do." This enables the manufacturer to avoid pressures by competitors as far as price cutting is concerned and partially offsets the peer pressure against discounting. The argument is similar to that attempted by John L. Lewis at the time of the coal strike at the end of World War II: "If the miners don't want to work without a contract, don't look at me—I have absolutely nothing to do with it."[43]

If a manufacturer is urged to adopt a resale price maintenance program today, it can muster some persuasive arguments against such a policy:

(1) The contemporary expression of popular will manifested by many state legislatures as well as by Congress and the Executive in the form of fair trade repeal strengthens the long-standing judicial declaration that resale price agreements are illegal per se. This has the highest relevance in construing any ambiguous aspects of current law.[44]

41. Cf. A. Neale, The Antitrust Laws of the United States of America 272 (2d ed. 1970).

42. Telser may have laid the cornerstone for a "political science of distribution" comparable to the proposal of Professor Kurt Hanslowe, On the Need for a Political Science of Collective Bargaining, Symposium on Labor Relations Law 59 (R. Slovenko ed. 1961). See generally W. Hamilton, Price and Price Policies (1938); J. Palamountain, The Politics of Distribution (1955); K. Pribram, Cartel Problems (1935). A similar "political science" may be needed with regard to the internal functioning of large organizations. See generally P. Drucker, The Concept of the Corporation (1972); J. Jacobs, The Economy of Cities (1970); A. Jay, Management and Machiavelli (1967); C. Parkinson, Parkinson's Law (1957); Old, On the Mathematics of Committees, Boards, and Panels, 16 Record of N.Y.C.B.A. 161 (1961).

43. See United States v. United Mine Workers, 330 U.S. 258 (1947), aff'g and modifying 70 F. Supp. 42 (D.D.C. 1946). This may be called the "Who, Me?" reaction, exemplified by the Lute Pease Pulitzer Prize Cartoon of 1949. G. Johnson, The Lines are Drawn 169 (1958). Thomas C. Schelling has offered other examples of the advantages of having no choice in certain situations in his landmark study, T. Schelling, The Strategy of Conflict (1960). Among his examples are the edge enjoyed by a car racing for an intersection if the competing driver knows that the first driver's brakes are on the blink, and the protection available to a prospective extortion victim who is able to convince the extortionist that his money is beyond his own control so that there is no point in threats.

44. See Commissioner v. LoBue, 351 U.S. 243, 249 (1956); United States v. Hutcheson, 312 U.S. 219, 234-35 (1941); Electrolux Corp. v. Val-Worth, Inc., 6 N.Y.2d 556, 569, 161 N.E.2d 197, 204-05, 190 N.Y.S.2d 977, 987-88 (1959); Schuster v. City of New York, 5 N.Y.2d 75,

(2) *Colgate* no longer offers a practical or realistic means of enforcing resale price maintenance, if it ever did.[45]

(3) Resale price maintenance cannot be kept secret as price uniformity at the retail level is glaringly obvious. Once it is found, an investigation is likely to follow.

(4) Notwithstanding the uncertainty of all fact-finding,[46] illegal agreements or coercive methods involved in any resale price maintenance program are necessarily known by too many people to be readily concealed once an investigation is launched. The effective tool of cross-examination[47] and the certainty that unexpected documents will be uncovered[48] make avoidance of detection difficult. Evidence of false exculpatory statements[49] or destruction or falsification of records or the absence of records normally kept can also tend to support an inference of illegal activity.[50]

(5) Once a violation is found, remedial orders may go beyond mere prohibition of continuation of the conduct, and contain "fencing" provisions designed to reduce the likelihood of future violations[51] as

---

85-86, 154 N.E.2d 534, 540, 180 N.Y.S.2d 265, 273-74 (1958); Farnsworth, Implied Warranties of Quality in Non-Sales Cases, 57 Colum. L. Rev. 653, 654 (1957); Stone, The Common Law in the United States, 50 Harv. L. Rev. 4, 12-18 (1936); cf. Parker v. Brown, 317 U.S. 341, 367 (1943).

45. See text accompanying notes 7-15 supra.

46. See England v. Board of Medical Examiners, 375 U.S. 411, 417 (1964); Speiser v. Randall, 357 U.S. 513, 525 (1958); J. Frank, Courts on Trial 14-36 (1949); J. Frank & B. Frank, Not Guilty (1957); Cahn, Fact-Skepticism: An Unexpected Chapter, 38 N.Y.U.L. Rev. 1025 (1963).

47. Compare F. Wellman, The Art of Cross-Examination (4th ed. 1936) with E. Goffman, Strategic Interaction (1969).

48. See Hearing on Legal and Economic Impact of Foreign Banking Procedures on the United States Before the House Comm. on Banking & Currency, 90th Cong., 2d Sess. 68-83 (1968).

49. See United States v. Montalvo, 271 F.2d 922, 927 (2d Cir. 1959), cert. denied, 361 U.S. 961 (1960); United States v. Simone, 205 F.2d 480, 483 (2d Cir. 1953); United States v. Smolin, 182 F.2d 782, 785-86 (2d Cir. 1950); cf. United States v. Fabric Garment Co., 262 F.2d 631 (2d Cir. 1958), cert. denied, 359 U.S. 989 (1959).

50. See Caminetti v. United States, 242 U.S. 470, 495 (1917); United States v. Sahadi, 292 F.2d 565, 568 (2d Cir. 1961); Dyson v. United States, 283 F.2d 636, 637 (9th Cir. 1960), cert. denied, 366 U.S. 974 (1961); United States v. Costello, 275 F.2d 355, 358 (2d Cir. 1960), aff'd, 365 U.S. 265 (1961); United States v. Walker Co., 152 F.2d 612, 613-14 (3d Cir. 1945); Haggerty v. United States, 5 F.2d 224, 225 (7th Cir. 1925); cf. Interstate Circuit, Inc. v. United States, 306 U.S. 208, 225-26 (1939); 3A J. Wigmore, Evidence § 1042 (Chadbourn rev. 1970).

51. See FTC v. Mandel Bros., Inc., 359 U.S. 385, 391-93 (1959); FTC v. Ruberoid Co., 343 U.S. 470 (1952); Corning Glass Works v. FTC, 509 F.2d 293, 303 (7th Cir. 1975); Rubbermaid, Inc., [1973-1976 Transfer Binder] Trade Reg. Rep. (FTC Complaints and Orders) ¶ 21,131, at 20,991 (FTC 1976); U.S. Pioneer Electronics Corp., C. 2755 (FTC 1975), in Worsinger, Restricted Distribution in the Wake of Fair Trade Repeal, in Practising Law Institute, The Repeal of the Fair Trade Laws: Impact on Product Distribution 9, 18 (Course Handbook Series No. 147, 1976).

well as provisions to overcome the consequences of past violations.[52]

Because of the forces discussed above, repeal of fair trade and antitrust enforcement to eliminate resale price maintenance will help to encourage horizontal price competition at both manufacturing and retail levels even where there is no actual cartel-type arrangement. This will have the following advantages:

(a) Manufacturers will have more freedom to set prices in their own interest without coercion by competitors.

(b) Retailers will similarly have more freedom to establish their own prices without dictation by manufacturers or retail competitors.

(c) The total sales of the manufacturer will be maximized by increased public interest and by wider markets due to price competition, as well as by lower retail prices in some cases.[53]

The only losers from this development will be those high-markup retailers who are unable to compete successfully by attracting customers through whatever additional services they may offer. In many instances, consumers may *prefer* a high-priced atmosphere, prestige, courtesy, ready acceptance of the return of merchandise, repair facilities, and other advantages. Retailers who are authorized by manufacturers to represent them in connection with warranty work, or with whom a manufacturer chooses to deal and who will thus be able to participate in cooperative advertising programs, are likely to earn additional profits as a result of these functions.

A balanced framework of rules may be emerging which prohibits practices that hinder competition while still protecting the legitimate needs that led to the desire for resale price maintenance. Opening up more of the channels of trade through elimination of vertical pricing restrictions should encourage greater variety and choice for the consumer, greater efficiency, and more activity for the business community. Lower prices for the consumer resulting in better performance of the economic system can form one part of an overall effort to deal with the economic demands confronted by our industrial society in the last part of the twentieth century.[54]

52. See Schine Chain Theatres, Inc. v. United States, 334 U.S. 110, 128 (1948); United States v. Crescent Amusement Co., 323 U.S. 173, 189 (1944).

53. Cf. Adams, The Automobile—A Luxury Becomes A Necessity, in W. Hamilton, Price and Price Policies 27-81 (1938). See also Commons, American Shoemakers, 1648-1895, in J. Commons, Labor and Administration 219 (1913); W. Thorp, Economic Institutions 115-30 (1928).

54. Dealing with the problem of lag in development of new technologies acceptable for current requirements may also be vital in this connection. See Boffey, Science Indicators: New Report Finds U.S. Performance Weakening, 191 Science 1031 (March 1976); Givens, The Future of "Consumerism," 29 Record of N.Y.C.B.A. 376, 385-87 (1974); Special Comm. on Consumer Affairs, A National Energy or Technology Development Bank, 29 Record of N.Y.C.B.A. 718 (1974); Worsinger, New Technologies and Antitrust, 47 N.Y. St. B.J. 651 (1975). See also S. 3111, 94th Cong., 2d Sess. (1976); H.R. 10259, 94th Cong., 1st Sess. (1975); O' Neill, Colonies in Orbit, N.Y. Times, Jan. 18, 1976, § 6 (Magazine), at 10.