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CIVIL RIGHTS AND THE ANTI-TRUST LAWS

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STORIES of civil rights and accounts of anti-trust prosecutions sometimes make the same front page. Rarely, if ever, is a connection made between the two. John Doe, whose life, liberty, or social and economic status becomes the subject of legal controversy is not readily identified with John Doe, the curtailment of whose liberty of action becomes the occasion for an anti-trust suit. But neither are those who invoke the Bill of Rights to protect their civil rights readily identified with those who invoke the Bill of Rights as a defense to an anti-trust prosecution.

As will be seen from the discussion throughout this article, the term "civil rights" is being used in a broader sense than rights which the courts have thus far found in the Constitution. The "civil rights" referred to here consist generally of the opportunities and protections by which social, political, and economic success or well-being are made available to more than a preferred few.

It is the purpose of this article to examine generally to what extent, if any, the anti-trust laws may be made available for the protection of civil rights. It is then proposed to explore the problem in several fields specifically.¹

I. THE SCOPE OF THE ANTI-TRUST LAWS

Mankind's concern over monopolies and restraints of trade and attempts to prohibit them go back to ancient times.² The right to be protected against monopolies and unreasonable restraints was one successful-

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¹ The application of the anti-trust laws to restraints on the dissemination of information has been discussed elsewhere. Marcus, *Anti-trust Laws and the Right To Know*, 24 *Ind. L.J.* 513 (1949).

² Shelton, *Unlawful Trade Combinations in History*, 12 *A.B.A.J.* 123 (1926).

ly fought for in England and deeply cherished in this country.³ It was a right of immediate concern to many persons, to whom it meant either the ability to obtain their needs or their ability to enter trade. Considerable attention was paid to preventing a growing society from being shackled by monopoly and restraints in the early history of this country.⁴

That restraints of trade and monopolies are wrongs which give rise to rights under the common law is not likely to be denied. Dispute is more likely to arise over the question of whether statutory and common law protect civil rights not wholly or directly concerned with making a living, or, conversely, whether action not immediately intended, or not at all intended, to affect a business enterprise or commercial transaction comes within the ban of the anti-trust laws. More simply, when, if at all, do the anti-trust laws become applicable to an act of social discrimination?

The Report of the President's Committee on Civil Rights emphasized four basic rights⁵ and recognized that many serious restrictions on the exercise of these rights stem from private rather than government action. It is, of course, within the field of private restraints that the anti-trust laws have peculiar applicability. It is the thesis of this article that the anti-trust laws are applicable to many of the rights referred to in the Report of the President's Committee, especially "The Right to Equal Opportunity." Advocacy of this position does not mean that the language of anti-trust statutes compels its acceptance. Judicial recognition of this thesis has been infrequent. But we shall show that here and there civil rights have received strong support from the anti-trust laws; here and there a connection between the two has been recognized. We think we can demonstrate that the anti-trust laws can be made available, in many instances, for the promotion and protection of civil rights. For the most part, anti-trust cases do not use the language of civil rights. Yet some of the most eloquent discussions of civil rights have stemmed from concern over monopolies and restraints of trade.⁶ Not uncommonly, moreover, the

³ Jones, *Historical Development of the Law of Business Competition*, 35 *Yale L.J.* 905 (1926); Jones, *ibid.*, 36 *Yale L.J.* 42, 207, 351 (1926, 1927).

⁴ Jones, *Historical Development of the Law of Business Competition*, 36 *Yale L.J.* 42 (1926).

⁵ President's Committee on Civil Rights 6-9 (1947). For an even broader enumeration of economic and social rights, see Merriam, *The Content of an International Bill of Rights*, 243 *Annals* 11, 13-15 (1946). See the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations in 1948.

⁶ In *Butchers' Union Co. v. Crescent City Co.*, 111 U.S. 746 (1884), the Court affirmed the right of a state to terminate a monopoly it had previously granted. This was a sequel to the *Slaughter-House Cases*, 16 Wall. (U.S.) 36 (1872), where a monopoly had been protected against the reach of the 13th, 14th and 15th Amendments. In a concurring opinion, Field, J., referred to the Declaration of Independence and said, at 757:

"Among these inalienable rights, as proclaimed in that great document, is the right of men

Declaration of Independence is invoked in restraint cases.⁷

The relationship between personal liberties and freedom of trade is not one of recent recognition.⁸ The common law tainted combinations to lower or raise wages, or to diminish the length of the working day, with the same illegality as combinations to raise prices.⁹

The primary concern of the anti-trust laws is, of course, the protection of economic rights. But these "economic rights" are themselves generally "civil rights." The anti-trust laws do not cease to apply when the immediate effect of their application is more apparent in fields other than that of anti-trust, in fields other than economic. In the world in which we live social discrimination is intimately connected with economic discrimination and a repression of "social" liberties is likely to have important economic consequences. Gunnar Myrdal has pointed out that "[t]here is a fundamental flaw in that distinction between what is purely social and all

to pursue their happiness, by which is meant the right to pursue any lawful business or vocation, in any manner not inconsistent with the equal rights of others, which may increase their prosperity or develop their faculties, so as to give to them their highest enjoyment.

"The common business and callings of life, the ordinary trades and pursuits, which are innocuous in themselves, and have been followed in all communities from time immemorial, must, therefore, be free in this country to all alike upon the same conditions. The right to pursue them, without let or hindrance, except that which is applied to all persons of the same age, sex and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright."

In the same case three judges concurred, at 762, in the statement that the Case of Monopolies and the Act of 21 James I (Statute of Monopolies), "form one of the constitutional landmarks of British liberty, like the Petition of Right, the Habeas Corpus act and other great constitutional acts of Parliament. They established and declared one of the inalienable rights of free-men which our ancestors brought with them to this country. The right to follow any of the common occupations of life is an inalienable right; it was formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence, which commenced with the fundamental proposition that, 'all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty, and the pursuit of happiness.' This right is a large ingredient in the civil liberty of the citizen. To deny it to all but a few favored individuals by investing the latter with a monopoly is to invade one of the fundamental privileges of the citizen, contrary not only to common right, but, as I think, to the express words of the Constitution."

⁷ *Butchers' Union Co. v. Crescent City Co.*, 111 U.S. 746 (1884); *Frazer v. Shelton*, 320 Ill. 253, 265, 150 N.E. 696, 701 (1926).

⁸ "The principle that trade should be free from arbitrary restraints is implied in the clauses of Magna Charta which relate to the liberty of the subject, and to trade; and the medieval judges favoured the principle, just as they favoured the principle of freedom of alienation, because they were hostile to all arbitrary restrictions on personal liberty, or rights of property, for which no legal justification could be shown." Holdsworth, *Industrial Combinations and the Law in the Eighteenth Century*, 18 Minn. L. Rev. 369, 371-72 (1934).

⁹ *Ibid.*, at 373-74. Holdsworth was of the opinion that, historically, combinations of workers or masters aimed at controlling wages and hours were bad at common law as restraints of trade. *Ibid.*, at 377 ff. Compare Cohen, *The Canadian Anti-trust Laws—Doctrinal and Legislative Beginnings*, 16 Can. Bar Rev. 439, 441-46 (1938).

the rest of discrimination against Negroes. *Social discrimination is powerful as a means of keeping the Negroes down in all other respects. . . . The interrelations between social status and economic activity are particularly important.*"¹⁰ Social and economic liberties are part of our best known single definitions of liberty.¹¹

In applying the anti-trust laws, the courts generally have looked to the economic effect, intended or actual, of a restraint or monopoly upon the persons against whom the restraint or monopoly was directed. Increasingly, however, the overriding consideration in determining whether the anti-trust laws have been violated has been the likelihood of detriment to the public,¹² so that courts today consider both harm to the individual and harm to society as a whole. We argue here that a restraint which is concerned with, and generally understood as, a "social" wrong should not be immune from the anti-trust laws if it has economic significance. Normally, the anti-trust laws apply to group activity, and much of the continuing force of discrimination rests in its promotion or support by a group.¹³ The important factors to be considered are whether the subject matter comes within the anti-trust laws, and, with respect to the Sherman Act, whether the requisite interstate commerce is involved.

The Sherman Act,¹⁴ under which most of our anti-trust law has been developed, prohibits contracts, combinations or conspiracies in restraint of trade or commerce among the states or foreign nations.¹⁵ Its prohibitions extend to those who monopolize, attempt to monopolize, or combine and conspire to monopolize any part of interstate or foreign trade or

¹⁰ Myrdal, *An American Dilemma* 642 (1944). And see Ellington, *The Right To Work*, 243 *Annals* 27, 31 (1946): "In fact, all the essential rights are interdependent." See also Evatt, *Economic Rights in the United Nations Charter*, 243 *Annals* 4, 5 (1946).

¹¹ "The liberty mentioned in that amendment [14th] means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned." *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897). See *Property—Restrictive Covenants—Racial Discrimination in New York*, 22 *N.Y.U.L.Q. Rev.* 301, 307-8 (1947), arguing that civil rights include property rights.

¹² See page 175 *infra*.

¹³ Compare Berger, *The Supreme Court and Group Discrimination since 1937*, 49 *Col. L. Rev.* 201 (1949).

¹⁴ 26 Stat. 209 (1890), 15 U.S.C.A. §§ 1, 2, 3 (1941). The Clayton Act, 15 U.S.C.A. § 14 (1941), supplements the Sherman Act but is more limited in subject matter (commodities). However, it has been applied to patent-licensing royalty agreements. *Hartford Empire Co. v. United States*, 323 U.S. 386 (1945).

¹⁵ 26 Stat. 209 (1890), 15 U.S.C.A. § 1 (1941).

commerce.¹⁶ Section 3 declares illegal contracts, combinations or conspiracies in restraint of trade or commerce within the District of Columbia and within the territories.¹⁷

Of the Sherman Act it has been said, "As a charter of freedom, the Act has a generality comparable to that found to be desirable in constitutional provisions."¹⁸ It is the standard of harm to the common good and to the economic freedom of the individual that should set bounds within which the statute is to operate.¹⁹ The reach of the anti-trust laws is measured by the breadth of mind of the judges who interpret them, as well as the zeal of those who enforce them. For the most part the phrase "trade and commerce" in the Sherman Act has been liberally construed. It has been said that "there has been an apparent reluctance to place a limitation on the meaning of those words as used in the Act."²⁰ Its ambit has been gradually and perceptibly widened by the Supreme Court.

Although the Sherman Act was occasioned by concern over the growth of huge aggregations of capital, its scope, in view of the breadth of its language, has not been so limited.²¹ The early days of the Sherman Act were marked by its use to break strikes.²² It has been used against German agents and others fomenting labor unrest and employing other means to obstruct the production of arms for use abroad,²³ such as blowing up plants.²⁴

Although anti-trust provisions are found in the constitutions and statutes of many states, state governments have for the most part shown little disposition to invoke them.²⁵ Moreover, the scope of state anti-trust statutes is often very difficult to ascertain. Some relate merely to commodities, to articles of manufacture, or to produce of the soil. Others

¹⁶ 26 Stat. 209 (1890), 15 U.S.C.A. § 2 (1941).

¹⁷ 26 Stat. 209 (1890), 15 U.S.C.A. § 3 (1941).

¹⁸ *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359-60 (1933).

¹⁹ *United States v. American Tobacco Co.*, 221 U.S. 106, 183 (1911).

²⁰ *Diener Cleaners, Inc. v. Vogue D.C. Co.*, 11 F.A.D. 479, 480 (D.C., 1930). See also page 186 *infra*. But see note 77 *infra*.

²¹ In *United States v. Debs*, 64 Fed. 724, 746-47 (C.C. Ill., 1894), the court expressly rejected the contention that the Sherman Act was aimed only at vast aggregations of capital.

²² *Ibid.*

²³ *United States v. Rintelen*, 233 Fed. 793 (D.C. N.Y., 1916); *Lamar v. United States*, 260 Fed. 561 (C.A. 2d, 1919), cert. den. 250 U.S. 673 (1919).

²⁴ *United States v. Bopp*, 237 Fed. 283 (D.C. Cal., 1916).

²⁵ Compare Nutting, *The Texas Anti-trust Law: A Post Mortem*, 14 Tex. L. Rev. 293, 299-300 (1936); *The Illinois Anti-trust Law Disinterred*, 43 Ill. L. Rev. 205 (1948).

relate to articles in common use²⁶ or to commodities which are the subject of commerce. Still others refer in one section to trade and commerce in general and in another to manufactured or grown products.²⁷ It is difficult to determine in any one statute whether it is merely an adoption of the provisions of other statutes, or whether it represents a deliberate attempt on the part of the legislature to limit its scope.

Although some courts have held that combinations and restraints in service enterprises are not within the anti-trust laws, the more widely

²⁶ Theatre tickets have been assumed to come under such statutes. *Foster v. Shubert Holding Co.*, 316 Mass. 470, 55 N.E. 2d 772 (1944).

²⁷ See A Collection and Survey of State Anti-trust Laws, 32 Col. L. Rev. 347 (1932), 43 Ill. L. Rev. 205, 221 (1948). Some courts have emasculated the general language by confining its scope to specific definitions of prohibited acts. *Schow Bros. v. Adva Talks Co.*, 232 S.W. 883 (Tex. Civ. App., 1921). In *Duggan Abstract Co. v. Moore*, 139 S.W. 2d 198 (Tex. Civ. App., 1940), the court held restrictions on the abstract business not unlawful by strictly construing the state statute to refer only to merchandise, produce and commodities. See also *Nassman v. Bank of New York*, 49 N.Y.S. 2d 181 (1944), in which bidding on real estate was held not within the local anti-trust statute which, the court said, related basically to necessities in the form of vendible tangibles. This seems a narrow construction. In *Hotel Edison Corp. v. Taylor*, 268 N.Y. App. Div. 1029 (1944), it was held that the act did not apply to a combination creating a monopoly in copyrighted musical compositions. This decision was by the same judges who decided the *Nassman* case. That case was affirmed without opinion by both New York appellate courts, 268 N.Y. App. Div. 1080, 295 N.Y. 581, 64 N.E. 2d 284 (1945), but its rationale was rejected by another judge of the same court. *Leader Theatre Corp. v. Randforce*, 186 N.Y. Misc. 280, 58 N.Y.S. 2d 304 (1945). The *Duggan* case is to be compared with an Opinion of the Attorney General of Texas, Sept. 10, 1942, Trade Reg. Serv. ¶52, 841, holding that an agreement among all the banks of a city to set minimum-average balances violated the state anti-trust laws. In *Speegle Co. v. Board of Fire Underwriters*, 29 Cal. 2d 34, 172 P. 2d 867 (1946), insurance was held to be a commodity. Compare *Application of Richardson*, 184 P. 2d 642 (1947).

Some states' anti-trust statutes follow the language of the Sherman Act, e.g., 2 Me. Rev. Stats. (1944) c. 124, §§ 37-42. Others seem more narrow than the Sherman Act, e.g., Ill. Rev. Stat. (1949) c. 38, § 569. In a number of states the anti-trust statutes are in terms broader than the federal statutes. Compare Ind. Stats. Ann. (Baldwin, 1934) c. 24, § 4767-99. In Louisiana a constitutional anti-trust provision refers to trade, commerce or business. La. Const. Art. 19, § 14. Its statutes, however, refer to trade and commerce. La. Gen. Stats. (Dart, 1939) § 4906. Under these statutes the business of operating a laundry was held not to be "trade and commerce." *State v. McClellan*, 155 La. 495, 98 So. 748 (1924). A contrary result has been reached under the later constitutional provision which is self-executing. *Cleaners, Dyers & Pressers v. G.H.W. Cleaners & Dyers*, 200 La. 83, 7 So. 2d 623 (1942). The Louisiana statutes liberalize rules of evidence so as to facilitate proof of anti-trust violations. La. Gen. Stats. (Dart, 1939) § 4921. In Wisconsin, newspapers and advertising are expressly included as subjects of the state's anti-trust laws. Wisc. Stat. (Brossard, 1947) § 133.01. New York's anti-trust statutes include competition in, or free exercise of, any activity in manufacturing, production, transportation, marketing, service or supply, as well as the free pursuit of any lawful business, trade or occupation. N.Y. Gen. Bus. Law (McKinney, 1941) § 340. In Alabama, the State Constitution requires that the legislature provide for the protection of reasonable competition in any calling, trade or business. Ala. Const. § 103. Contracts restraining one from exercising a lawful profession, trade or business are void. Code of Ala. (Michie, 1940) tit. 9, § 22. In Montana there is a similar statute. Mont. Rev. Code (1947) tit. 13, § 807.

In Arizona, a trust is defined, among other things, as a combination of capital, skills, or acts by two or more persons, to create or carry out restrictions in trade or commerce or aids to commerce, or to carry out restrictions in the full and free pursuit of any business authorized

adopted rule is that at common law, as well as under state and federal statutes, they are.²⁸

Rules of law have been developed which determine the application of²⁹ the anti-trust laws to varied situations. An anti-trust case is made out by proof of the fact of conspiracy, although overt acts need not be proved.²⁹ Nor is actual success in impeding competition a necessary condition.³⁰ If the necessary consequence of a conspiracy is to produce a result which the anti-trust laws are designed to prevent, the conspirators are "in legal contemplation chargeable with intending that result."³¹ What one may legally do alone may be illegal if done in concert with another; a series of contracts may have illegal consequences which would not exist were there only a single contract.³² An unlawful agreement or conspiracy may be implied from a concert of action, which, in turn, may be inferred from similarity of action.³³ Acts innocent by themselves may properly be enjoined if they appear to be steps in a conspiracy, and agreements which

or permitted by law. *Ariz. Code Ann.* (1939) §§ 74-101. Florida and Texas have like statutory provisions. *Fla. Stats.* (1949) § 542.01; *Tex. Civ. Stat.* (Vernon, 1925) Art. 7426; *Tex. Pen. Code* (Vernon, 1925) Art. 1632. See also *Kan. Gen. Stats.* (Corrick, 1935), § 50.101, expressly condemning arrangements tending to fix attorneys' or doctors' fees. *Ibid.*, § 50.112. Michigan has a somewhat similar but more limited definition (aids to commerce and "business" omitted). *Mich. Stats. Ann.* (1942) §§ 6624, 6625. In Arkansas, the anti-trust laws apply to restrictions on the price or quantity of commodities, convenience or repair or anything whatsoever. Monopolies include combinations of property, customs, skill or acts by or between persons or associations of persons for such purposes. *Ark. Stats.* (1948) § 70-105. See also *S.C. Civ. Code* (1942) §§ 6624, 6625. But the narrowness of a court's approach may substantially curtail the breadth of such statute. Compare *State v. Frank*, 111 Ark. 47, 169 S.W. 333 (1914), in which an agreement fixing the price of laundering was held not within the statute. In Michigan it is illegal to contract not to engage in any association, employment, pursuit, trade, profession or business, and a combination to effect a monopoly in one of these is also forbidden, with a few exceptions. In Oklahoma a duty to render service or offer commodities without discrimination has been imposed on a business which, by reason of its nature, extent, or virtual monopoly, the public must use. *Okla. Stat.* (1941) tit. 79, § 4.

²⁸ *The Legality of Combinations To Restrain Competition in Services*, 25 Col. L. Rev. 647 (1925). But see *Carlton v. Manuel*, 64 Nev. 570, 187 P. 2d 558 (1947).

²⁹ *Nash v. United States*, 229 U.S. 373 (1913).

³⁰ *United States v. Timken Roller Bearing Co.*, 83 F. Supp. 284, 307 (Ohio, 1949).

³¹ *United States v. Patten*, 226 U.S. 525, 543 (1913).

³² *United States v. Line Material Co.*, 333 U.S. 287, 311 (1948); *United States v. United States Gypsum Co.*, 333 U.S. 364, 394 (1948); *United States v. Reading*, 226 U.S. 324, 357 (1912); *Northern Securities Co. v. United States*, 193 U.S. 197, 339-40 (1904); *United States v. Pullman Co.*, 50 F. Supp. 123, 127-28 (Pa., 1943); *United States Telephone Co. v. Central Union Telephone Co.*, 202 Fed. 66, 71 (C.A. 7th, 1912), cert. den. 229 U.S. 620 (1913); *American Equipment Co. v. Tuthill Bldg. Material Co.*, 69 F. 2d 406 (C.A. 7th, 1934).

³³ *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939); *American Tobacco Co. v. United States*, 328 U.S. 781 (1946); *Bigelow v. RKO Pictures, Inc.*, 150 F. 2d 877 (C.A. 7th, 1945), rev'd on other grounds 327 U.S. 251 (1946); *William Goldman Theatres, Inc. v. Loew's, Inc.*, 150 F. 2d 738 (C.A. 3d, 1945), cert. den. 334 U.S. 811 (1948).

might be legal standing alone may be stricken to enforce Sherman Act standards.³⁴

Anti-trust suits have been brought against individuals alone for activities concerning corporations with which they were associated.³⁵ It is common also to bring Sherman Act suits against both a corporation and its officers and directors.³⁶ Officers and directors may be held liable as principals where their acts are in furtherance of a conspiracy,³⁷ even though the overt acts are those of the corporation and even though the corporation itself is absolved.³⁸ Conversely, the corporation or organization charged with conspiring with individuals may be held liable while the individuals are exonerated.³⁹ Commonly, however, officers are found guilty of conspiring with their corporations in violation of the anti-trust acts.⁴⁰ The anti-trust laws include conspiracies between parent and subsidiary corporations⁴¹ and between corporations and individuals.⁴²

³⁴ *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944); *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436, 461 (1940); *Swift & Co. v. United States*, 196 U.S. 375 (1905).

³⁵ *United States v. Swift*, 188 Fed. 92 (D.C. Ill., 1911); *Patterson v. United States*, 222 Fed. 599 (C.A. 6th, 1915), cert. den. 238 U.S. 635 (1915); see *United States v. Atlantic Commission Co.*, 45 F. Supp. 187, 194 (N.C., 1942).

³⁶ For example, *United States v. MacAndrews & Forbes Co.*, 149 Fed. 823, 832 (D.C. N.Y., 1906), appeal dismissed 212 U.S. 585 (1908). "It is now well settled that officers and agents may be indicted with their corporations under the Sherman Act." *United States v. Atlantic Commission Co.*, 45 F. Supp. 187, 194 (N.C., 1942). Under Section 14 of the Clayton Act, directors, officers, and agents of a corporation who have been instrumental in a penal violation of the Sherman Act by the corporation are subject to a derivative liability.

It is well settled that "neither in the civil nor in the criminal law can an officer protect himself behind a corporation where he is the actual, present, and efficient actor." *United States v. Winslow*, 195 Fed. 578, 581 (D.C. Mass., 1912), aff'd on different grounds 227 U.S. 202 (1913). Accord: *Kelly v. United States*, 258 Fed. 392, 401 (C.A. 6th, 1919), cert. den. 249 U.S. 616 (1919). In *People v. Duke*, 19 N.Y. Misc. 292, 44 N.Y. Supp. 336 (1897), an indictment charged certain officers of the American Tobacco Co. with conspiracy in restraint of trade. Defendants advanced as a ground for demurrer the argument that the defendants' acts were the acts of the corporation, that the corporation was one person and therefore the indictment did not lie. Said the court: "I do not think that individuals can shield themselves from the consequences of wrongdoing by pleading that their wrongful acts were corporate acts."

³⁷ *United States v. MacAndrews & Forbes Co.*, 149 Fed. 823, 832 (D.C. N.Y., 1906), appeal dismissed 212 U.S. 585 (1908).

³⁸ *Tribolet v. United States*, 11 Ariz. 436 (1908).

³⁹ *United States v. General Motors Corp.*, 121 F. 2d 376 (C.A. 7th, 1941), cert. den. 314 U.S. 618 (1941); *American Medical Ass'n v. United States*, 130 F. 2d 233, 253 (App. D.C., 1942), aff'd 317 U.S. 519 (1943).

⁴⁰ This was true of the findings and judgment, as well as the opinions, in *United States v. Crescent Amusement Co.*, 323 U.S. 173 (1944), and *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110 (1948). But see *United States v. American Naval Stores Co.*, 172 Fed. 455, 463 (C.C. Ga., 1909).

⁴¹ *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110 (1948); *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947); *United States v. General Motors Corp.*, 121 F. 2d 376,

A conspiracy in restraint of trade is no less illegal because one or more of the conspirators is a non-profit organization.⁴³ Nor is it necessary under the Sherman Act to allege or to prove that the conspirators themselves are traders.⁴⁴ Rights of exclusion which appertain to ownership can be given only attenuated effect once the owner opens up his property to access for profit.⁴⁵

The Sherman Act applies, of course, only to unreasonable restraints. In determining what is an unreasonable restraint, a defendant's position in an industry may be the determining factor, where the law is not otherwise clear.⁴⁶ Monopoly power or dominant position may carry with it obligations ordinarily appertaining only to public utilities. Thus a number of courts have denied to the possessor of monopolistic power the right to discriminate or to impose upon persons dealing with it conditions designed to foster such power or position.⁴⁷ Moreover, monopoly or restraints

404 (C.A. 7th, 1941), cert. den. 314 U.S. 618 (1941). See also *Schenley Distillers Corp. v. United States*, 326 U.S. 432, 437 (1946). Agreements to deal exclusively with a third concern are not made legal because those who agree have a proprietary interest in the third company. *United States v. Terminal R.R. Ass'n of St. Louis*, 224 U.S. 383, 400 (1912); *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933); *National Harrow Co. v. Hench*, 83 Fed. 36 (C.A. 3d, 1897). It has been held that a conspiracy among affiliated companies to exclude a competitor from a source of supply by the conspirators' acquisition of the source and refusal to sell to him is within the Sherman Act. *Ronald Fabrics Co. v. Verney Brunswick Mills, Inc.* C.C.H. Trade Reg. Serv. ¶57,514 (D.C.N.Y., 1946).

⁴³ For example, *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110 (1948). An allegation to this effect is fairly frequent in federal anti-trust complaints. See note 36 supra.

⁴⁴ *Chamber of Commerce of Minneapolis v. FTC*, 13 F. 2d 673 (C.A. 8th, 1926).

⁴⁵ *Nash v. United States*, 229 U.S. 373 (1913). But some state statutes refer only to restraints by those in business.

⁴⁶ *Marsh v. Alabama*, 326 U.S. 501 (1946); *United States v. Klearflax Linen Looms, Inc.*, 63 F. Supp. 32 (Minn., 1945).

⁴⁷ *Sugar Institute, Inc. v. United States*, 297 U.S. 553, 600 (1936); *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911); *United States v. Terminal R.R. Ass'n of St. Louis*, 224 U.S. 383 (1912).

⁴⁸ *Tallassee Oil & Fertilizer Co. v. H.S. & J.L. Holloway*, 200 Ala. 492, 76 So. 434 (1917), injunction at behest of competitor lies where cotton-gin company having a monopoly refused to gin cotton unless cotton owners agree to sell their cotton seed to it. In *Greenleaf v. Brunswick-Balke-Collender Co.*, 79 F. Supp. 362 (Pa., 1947), a noted pool and billiard player brought suit under the Sherman Act, charging that as part of a plan to monopolize billiard equipment, defendant had failed to invite plaintiff to participate in the National Billiard Tournament, sponsored by defendant. In an exhibition Greenleaf had used equipment of another company and apparently aroused the ire of the defendant who customarily tied, or attempted to tie, the players to the use of its equipment. The court in denying a motion for summary judgment said: "Thus an illegal monopoly cannot discriminate against or refuse to deal with a person without sufficient cause." Compare *Associated Press v. United States*, 326 U.S. 1 (1945); *American Federation of Tobacco Growers, Inc. v. Neal*, 183 F. 2d 869 (C.A. 4th, 1950), C.C.H. Trade Reg. Serv. ¶62,675 (1950). As to the relation of monopoly power to the obligation of nondiscrimination imposed upon public utilities, see *Race Discrimination in Housing*, 57 Yale L.J. 426, n. 78 (1948).

with respect to essential needs have been the subject of particular concern to the law.⁴⁸ The courts, not infrequently, have shown a more marked readiness to find illegal monopoly or restraint where essential needs⁴⁹ or basic rights⁵⁰ have been involved. It has been pointed out that the Sherman Act embraces "every conceivable act which could possibly come within the spirit or purpose of the prohibitions of the law, without regard to the garb in which such acts [are] clothed."⁵¹ The fact that in a given situation the emphasis may be on an act of social discrimination should no more affect their application than when the emphasis shifts from a local engrosser of corn to an international cartel, from guilds to unions, from potatoes to newspapers.⁵²

The breadth of injunctive relief in civil anti-trust cases has been very broad, even including the relationship of an individual to a particular group or organization, negative and mandatory injunctions, and the dissolution of organizations. If the anti-trust laws apply to civil rights, remedies are clearly available to redress violations of these rights.⁵³

II. THE INTERSTATE PROBLEM

It may be doubted that the power of the federal government with respect to monopolies and restraints of trade is limited to its interstate and foreign commerce power. In time of war and preparedness for defense, it would seem clear that monopolies and restraints could be dealt with under

⁴⁸ In some states anti-trust statutes are confined to necessities of life, a distinction not made at common law. See *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 286-87 (C.A. 6th, 1898), modified on different grounds 175 U.S. 211 (1899). The Court noted a different view taken by some Massachusetts cases; see *Foster v. Shubert Holding Co.*, 316 Mass. 470, 55 N.E. 2d 772 (1944), involving theatre tickets.

⁴⁹ *United States v. Trans-Missouri Freight Association*, 166 U.S. 290, 333-34 (1896); *American Biscuit & Mfg. Co. v. Klotz*, 44 Fed. 721 (C.C. La., 1891), bread for the poor and the rich.

⁵⁰ *United States v. Associated Press*, 52 F. Supp. 362, 372 (N.Y., 1943); *Associated Press v. United States*, 326 U.S. 1, 28-29 (1945); *Inter-Ocean Pub. Co. v. Associated Press*, 184 Ill. 438, 453, 56 N.E. 822, 826 (1900). Compare *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948).

⁵¹ *United States v. American Tobacco Co.*, 221 U.S. 106, 181 (1911).

⁵² Compare the expansion of the state-action doctrine to protect civil liberties as described in *The Disintegration of a Concept—State Action under the 14th and 15th Amendments*, 96 U. of Pa. L. Rev. 402 (1948). The 13th Amendment has been made the source of a right to hold property, as against a conspiracy which was aimed at denying that right to Negroes. *United States v. Morris*, 125 Fed. 322 (D.C. Ark., 1903).

⁵³ Daniel, *Enforcement of the Sherman Act by Actions for Treble Damages*, 34 Va. L. Rev. 901 (1948); Marcus, *Patents, Antitrust Law and Antitrust Judgments through Hartford-Empire*, 34 Geo. L.J. 1, 36 ff. (1945); Standards Governing Relief under Section 4 of the Sherman Act, 97 U. of Pa. L. Rev. 231, 238 (1948).

the government's war powers.⁵⁴ It may well be that the carrying out of the government's other express powers could entail a broad treatment of monopolies and restraints. We have mentioned the attention paid by the courts in monopoly suits to the Declaration of Independence and the Preamble to the Constitution.⁵⁵

The Sherman Act, however, is based upon the commerce powers of Congress. It is enforced not only by the Anti-trust Division of the Department of Justice, but also by the Federal Trade Commission,⁵⁶ and by private litigants. In the latter case, neither the plaintiff⁵⁷ nor the defendant⁵⁸ in an anti-trust suit need be in interstate commerce. It has been said, repeatedly, by the Supreme Court that Congress meant to exercise its interstate powers to the fullest extent in the Sherman Act.⁵⁹ The courts, therefore, have generally been inclined to find the requisite interstate or foreign commerce for application of the Sherman Act where a challenge has been made on that score.⁶⁰ In approaching the question of whether

⁵⁴ Compare *Commonwealth v. Dyer*, 243 Mass. 472, 138 N.E. 296 (1922), cert. den. 262 U.S. 751 (1923). Indictment for common-law conspiracy to create a monopoly and enhance the price of fish. Violation of the state's anti-trust laws was alleged. The court doubted that at common law monopolizing was a crime, but thought that detriment to the public in time of war would support the proceeding. Broad regulation of intrastate prices, which is not possible under the interstate commerce power, is possible under the war powers.

⁵⁵ See notes 6 and 7 *supra*.

⁵⁶ *FTC v. Cement Institute*, 333 U.S. 683 (1948).

⁵⁷ *Chattanooga Foundry v. Atlanta*, 203 U.S. 390 (1906); *Ring v. Spina*, 148 F. 2d 647 (C.A. 2d, 1945); *Dowd v. United Mine Workers of America*, 235 Fed. 1 (C.A. 8th, 1916), appeal dismissed 241 U.S. 692 (1916).

⁵⁸ *United States v. Patten*, 226 U.S. 525, 541 (1913); *United States v. Mountain States Lumber Dealers Ass'n*, 40 F. Supp. 460 (Colo., 1941).

⁵⁹ *United States v. Frankfort Distilleries*, 324 U.S. 293, 298 (1945); *United States v. Southeastern Underwriters Ass'n*, 322 U.S. 533, 553, 558 (1944); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 495 (1940); *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 435 (1932).

⁶⁰ For example in *Ramsay Co. v. Bill Posters Ass'n*, 260 U.S. 501 (1923), solicitors of advertising in the business of posting bills could maintain suit. In *H.B. Marienelli v. United Booking Offices of America*, 227 Fed. 165 (D.C.N.Y., 1914), vaudeville owners agreed not to employ anyone not booked through a certain corporation, so as to blacklist players playing outside two circuits, and to blacklist players and theatres not exclusively dealing with them. Judge Learned Hand thought certain aspects of the business, such as the booking of contracts, the carrying of paraphernalia, and the sending of advertising matter were in interstate commerce. The court was concerned over the apparent attempt and power to monopolize the supply of first-class players. This case is to be compared with *Hart v. Keith Vaudeville Exchange*, 12 F. 2d 341 (C.A. 2d, 1926). In *Progress Tailoring Co. v. FTC*, 153 F. 2d 103 (C.A., 7th, 1946), it was held that advertisements were part of preliminary negotiations for a sale and are themselves a part of interstate commerce. Sales by wholesalers to retailers at the beginning and at the end of an interstate journey have been held to come within the Sherman Act. *FTC v. Pacific States Paper Ass'n*, 273 U.S. 52, 64 (1927); *United States v. Women's Sportswear Ass'n*, 336 U.S. 460 (1949); *Greater New York Live Poultry C. of C. v. United States*, 47 F. 2d 156, 159 (C.A. 2d, 1931), cert. den. 283 U.S. 837 (1931); *Gardella v. Chandler*,

facts alleged show interstate commerce sufficient to sustain a Sherman Act suit, the "collective effect of all the facts, if true," which are alleged must be considered.⁶¹ And it is clear that the transaction inveighed against need not itself be an interstate transaction. It is enough if it affects interstate commerce in a manner which is not *de minimis*.⁶² The interstate incident of a sale or other transaction may suffice to bring the transaction within the Sherman Act. So does the actual transportation of something.⁶³ It is well established that even if the primary object of a conspiracy is a local competitive situation it falls within the Sherman Act if interstate operations are necessary to carry out the conspiracy.⁶⁴ "Competitive practices which are wholly intrastate may be reached by the Sherman Act because of their injurious effect on interstate commerce."⁶⁵ The statement sometimes found in judicial opinions that the interference with interstate commerce must be direct and not incidental,⁶⁶ does not appear to be consistent with more recent holdings.⁶⁷ Occasionally the courts have refused to find the necessary interstate commerce on facts which might well have called for a different decision,⁶⁸ but for the most part they are decisions of an earlier date.

192 F. 2d 402 (C.A. 2d, 1949); *United States v. Chrysler Corp.*, 180 F. 2d 557 (C.A. 9th, 1950); *United States v. St. Louis Dairy Co.*, 77 F. Supp. 853 (Mo., 1948). See, *The Concept of Interstate Commerce as Defined By the Anti-trust Cases*, 35 Col. L. Rev. 1072 (1935).

⁶¹ *Swift & Co. v. United States*, 196 U.S. 375, 398 (1905). See *Musical Monopolies and Legislative Control*, 53 Harv. L. Rev. 458, 464 (1940).

⁶² *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219 (1948). *United States v. Universal Milk Bottle Service, Inc.*, 85 F. Supp. 622 (Ohio, 1949).

⁶³ *United States v. Southeastern Underwriters Ass'n*, 322 U.S. 533, 546-47 (1944); *Currin v. Wallace*, 306 U.S. 1, 10 (1939); *Binderup v. Pathe Exchange*, 263 U.S. 291, 309 (1923); *Swift & Co. v. United States*, 196 U.S. 375, 398, 399 (1905); *Montague & Co. v. Lowry*, 193 U.S. 38, 47-48 (1904); *Gibbs v. M'Neeley*, 118 Fed. 120, 123 (C.A. 9th, 1902).

⁶⁴ *Binderup v. Pathe Exchange*, 263 U.S. 291 (1923); *United States v. Frankfort Distilleries* 324 U.S. 293, 298 (1945). Speaking of an attempt to prevent a motion picture operator in Philadelphia from securing pictures on a first run showing, the court said: "We know of no authority which sanctions what would otherwise be an illegal monopoly simply because it operates in a single city or a particular part of the city and affects only a part of an industry involved." *William Goldman Theatres v. Loew's, Inc.*, 150 F. 2d 738, 744 (C.A. 3d, 1945), cert. den. 334 U.S. 811 (1948). See also *Indiana Farmers Guide Co. v. Prairie Co.*, 293 U.S. 268, 279 (1934); *Greater New York Live Poultry C. of C. v. United States*, 47 F. 2d 156, 159 (C.A. 2d, 1931), cert. den. 283 U.S. 837 (1931). *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 120 (1942).

⁶⁵ *Compare Food and Grocery Bureau of Southern California v. United States*, 139 F. 2d 973 (C.A. 9th, 1944).

⁶⁶ For example *Federal Baseball Club of Baltimore, Inc. v. National League*, 259 U.S. 200, 209 (1922).

⁶⁷ *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219 (1948).

⁶⁸ *Blumenstock Bros. v. Curtis Pub. Co.*, 252 U.S. 436 (1920), involved the making of contracts for insertion of advertising in periodicals of national circulation. Since the com-

In view of the scope of the interstate commerce power said by the courts to have been exercised by Congress in the Sherman Act, analogies under other acts resting on the commerce power would seem apposite. The National Labor Relations Act has been applied to companies operating the street railways and bus systems of Baltimore, Maryland. The court has taken into consideration that many passengers were engaged in the production of goods flowing in interstate commerce, that to run the buses, the company brought in large supplies of materials from out of the state, and that it transported passengers, mail, and newspapers moving in interstate commerce.⁶⁹ How substantial an effect on interstate commerce need be to invoke the Sherman Act may not be as clear as fifty years of litigation ought to have determined. It is clear that a conspiracy is not immune because the amount of commerce conspired to be restrained or monopolized is small.⁷⁰

plaint alleged the defendants acted to control the advertising which other competing periodicals could otherwise have had an opportunity to secure, the Court showed a lack of knowledge or disdain for the economic consequences of the conspiracy which present-day courts are hardly likely to be guilty of. The Court relied on insurance cases which have since been overruled. In that case and in some other cases the courts have not made clear whether they are deciding there is not interstate commerce involved or whether trade or commerce is lacking. For example *Federal Baseball Club of Baltimore, Inc. v. National League*, 259 U.S. 200, 209 (1922), conspiring to monopolize baseball business: "personal effort not related to production, is not a subject of commerce"; *Hart v. B.F. Keith Vaudeville Exchange*, 12 F. 2d 341 (C.A. 2d, 1926), cert. den. 273 U.S. 703, 704 (1926), booking vaudeville held merely personal service, interstate commerce with respect to moving paraphernalia, etc., is incidental and slight. *Utah-Idaho Sugar Co. v. FTC*, 22 F. 2d 122 (C.A. 8th, 1927); *Konecky v. Jewish Press*, 288 Fed. 179 (C.A. 8th, 1923); *Metropolitan Opera Co. v. Hammerstein*, 162 N.Y. App. Div. 691, 147 N.Y. Supp. 532 (1914), aff'd 221 N.Y. 507, 116 N.E. 1061 (1917), a covenant not to give grand opera in Boston or New York for 15 years. Held, producing an opera was not commerce or trade, and interstate commerce was not directly affected. Subsequent cases extending the scope of interstate commerce and the meaning of commerce make it extremely unlikely that these cases are still the law. In *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947), however, the Supreme Court refused to find the requisite interstate commerce in local Chicago taxicab operations, although such commerce was found with respect to two other aspects of the conspiracy charged in respect to the sale and interstation operations of the taxicabs. The government had stressed the last two aspects and had not attempted to spell out the indirect interstate commerce affected by the first aspect. But the case came up on a motion to dismiss and is a departure from the normal hesitation to dismiss because of doubts as to the interstate commerce alleged, if by any reasonable possibility an inquiry into the merits might show the necessary commerce. *Hart v. B.F. Keith Vaudeville Exchange*, 262 U.S. 271 (1923); *Binderup v. Pathe Exchange*, 263 U.S. 291, 305, 306 (1923); cf. *Davis v. A. Booth & Co.*, 131 Fed. 31 (C.A. 6th, 1904), cert. den. 195 U.S. 636 (1904).

⁶⁹ *NLRB v. Baltimore Transit Co.*, 140 F. 2d 51, 53 (C.A. 4th, 1944), cert. den. 321 U.S. 795 (1944). See also *NLRB v. Gluek Brewing Co.*, 144 F. 2d 847 (C.A. 8th, 1944); *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386 (1942); *NLRB v. Fainblatt*, 306 U.S. 601, 606 (1939); *Wickard v. Filburn*, 317 U.S. 111 (1942).

⁷⁰ *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219 (1948); *United States v. Yellow Cab Co.*, 332 U.S. 218, 224 (1947); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 225 n. 59 (1940); *NLRB v. Fainblatt*, 306 U.S. 601, 606 (1939); *O'Brien v.*

Recovery under a state anti-trust statute is not barred because interstate activity is involved. "Indeed the joint applicability of the Sherman Act and state anti-trust legislation has scarcely ever been questioned."⁷¹ Even though a state anti-trust statute may be more narrow than the Sherman Act, or altogether absent, since the Sherman Act is part of the law of the land, the state courts properly can and should test the validity of a transaction by the Sherman Act as well as its own local anti-trust rules.⁷² Because of the strength of the public policy of the common law against restraints of trade and monopoly, courts might conceivably resort to broader common-law principles when faced with a more narrow statute.⁷³

It is against the foregoing background of law that we proceed to sketch a scene of restraint and monopoly in which many of us play a part.

III. THE PROFESSIONS

It is somewhat odd to find it urged today that the learned professions are not within the anti-trust laws. Just why the "learned" should be free to employ economic restrictions, while the less learned may not, is not

United States, 290 Fed. 185 (C.A. 6th, 1923); *Steers v. United States*, 192 Fed. 1 (C.A. 6th, 1911); nor is a conspiracy to monopolize to be measured by the ratio of the defendant's business to that of the industry as a whole. *Oxford Varnish Corp. v. Ault & Wilborg Corp.*, 83 F. 2d 764 (C.A. 6th, 1936).

⁷¹ *Leader Theatre Corp. v. Randforce*, 186 N.Y. Misc. 280, 58 N.Y.S. 2d 304, 307 (1945). Accord: *Speegle v. Board of Fire Underwriters of the Pacific*, 29 Cal. 2d 34, 172 P. 2d 867 (1946); *Commonwealth v. McHugh*, 93 N.E. 2d 751 (Mass., 1950). Compare *Jack v. Kansas*, 199 U.S. 372 (1905); *James v. Marinsip Corp.*, 25 Cal. 2d 721, 735, 155 P. 2d 329, 341 (1945); *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28 (1948), noted in 36 Calif. L. Rev. 487 (1948).

⁷² *Schill v. Remington-Putnam*, 182 Md. 153, 31 A. 2d 467 (1943); *White Star Line v. Star Line of Steamers*, 141 Mich. 604, 105 N.W. 135 (1905); *Metropolitan Opera Co. v. Hammerstein*, 162 N.Y. App. Div. 691, 147 N.Y. Supp. 532 (1914), aff'd 221 N.Y. 507, 116 N.E. 1061 (1917); *American League Baseball Club of Chicago v. Chase*, 86 N.Y. Misc. 441, 149 N.Y. Supp. 6 (1914). Compare *MacGregor v. Westinghouse Electric & Mfg. Co.*, 329 U.S. 402 (1947); *Testa v. Katt*, 330 U.S. 386 (1947); *McCann v. Whitney*, 105 N.Y.L.J. 396, C.C.H. Trade Reg. Serv. ¶52,524 (Sup. Ct. N.Y., 1941), judgment for defendant in Sherman Act suit in federal court res judicata in subsequent action under New York anti-trust statutes on same set of facts; held, single cause of action split since in first action recovery could have been had under both acts. In *Ring v. Spina*, 148 F. 2d 647, 652 (C.A. 2d, 1945), cert. den. 335 U.S. 813 (1948), the court left open the question whether plaintiff could recover under the state anti-trust laws as well as under the Sherman Act.

⁷³ *Leonard v. Abner Drury Brewing Co.*, 25 App. D.C. 161 (1905); *Graf v. Master Horse-Shoers Protective Ass'n*, 1 Ohio N.P. (N.S.) 423 (1904); *Uvalde Const. Co. v. Shannon*, 165 S.W. 2d 512 (Tex. Civ. App., 1942); *Rogers v. Potet*, 355 Mo. 986, 199 S.W. 2d 378, 391 (1947), cert. den. 331 U.S. 847 (1947), both applied. In *Moore v. Duggan Abstract Co.*, 154 S.W. 2d 519 (Tex. Civ. App., 1941), even though the court in a previous decision had held the state anti-trust statute not applicable to abstract title business, yet it considered it necessary to test a restraint on the vendor by common-law principles of reasonableness.

clear. Much of our early common-law heritage of anti-trust policy had to do with restrictions concerning skilled callings.⁷⁴ The pursuit of a calling was protected from tortious interference,⁷⁵ and restraints on the practice of such callings have often been held invalid.⁷⁶ The right of an individual to choose his own vocation has been an evaluated factor in determining the existence of an anti-trust violation.⁷⁷ Generally, the courts in these cases have considered such restraints injurious to the community: the right of the individual to be unimpeded in the practice of his calling is overshadowed by the public interest in securing the benefit of the skills which, save for the restraints, might be available.⁷⁸

In our society the traditional professions rank high in prestige. Yet one rarely hears of a right to be a lawyer, doctor or engineer. But in this article we do talk in terms of rights, not so much of a right to be a member of a profession, but of a right to an opportunity to be a qualified "professional" man. Beyond that, we speak in terms of rights of the public in what the professions do.

We start with the "right to work," and we discuss, particularly, the medical and legal professions. We treat the cornerstone of professional life—our educational system. We focus upon restraints and monopoly practices, including those of discrimination, which attend both the attaining of a shingle to practice a profession and professional life itself.

A. THE RIGHT TO WORK⁷⁹

The right to work, a precept of the common law, by the 17th century had been declared to be above the King himself.⁸⁰ In the abstract, the right of an individual to follow "any of the known established trades and occupations of the country" has long been recognized.⁸¹ In this country,

⁷⁴ Exclusive privilege was the lifeblood of the guild merchant. Yet, in the *Case of the Tailors of Ipswich*, 11 Co. Rep. 53a (K.B., 1614), in spite of letters patent from the King, it was held that a qualified tailor who had not received the guild's blessing could not be kept from his occupation.

⁷⁵ "[H]e that hinders another in his trade or livelihood is liable to an action for so hindering him." *Keeble v. Hickeringill*, 11 East 574, 575n. (K.B., 1809).

⁷⁶ Note 80 *infra*.

⁷⁷ *United States v. Motion Picture Patents Co.*, 225 Fed. 800, 802 (D.C. Pa., 1915).

⁷⁸ *Pratt v. British Medical Ass'n* [1919] 1 K.B. 244; *Wyatt v. Kreglinger* [1933] 1 K.B. 793 (C.A.).

⁷⁹ For a legal survey of this problem along different lines, see Murray, *The Right to Equal Opportunity in Employment*, 33 Calif. L. Rev. 388 (1945).

⁸⁰ *Statute of Monopolies*, 21 Jac. 1, c. 3 (1623-24).

⁸¹ *Slaughter-House Cases*, 16 Wall. (U.S.) 36, 105 (1872); *Allgeyer v. Louisiana*, 165 U.S. 578, 589-90 (1897); *Dent v. West Virginia*, 129 U.S. 114, 121-22 (1889); *Pratt v. British*

with some qualifications, there is a right not to work.⁸² More recently, a right to work has become an international concept.⁸³ Despite varying rules in the states,⁸⁴ it seems clear that the common law and the Sherman Act reach the marketing of services as well as trade in goods.⁸⁵ The word "trade" certainly has a broader meaning in this field than the act of selling an article,⁸⁶ and the courts have not shied away from the concept of a monopoly of manpower.⁸⁷ We shall discuss restraints by and within unions later in this article. Here, we may point out that associations and their members are not free to restrict the employment opportunities either of their members or of others.⁸⁸ We shall also discuss certain types of

Medical Ass'n, [1919] 1 K.B. 244; *Frazer v. Shelton*, 320 Ill. 253, 265, 150 N.E. 696, 701 (1926): "The right to follow any of the common occupations of life is an inalienable right. That right is one of the blessings of liberty, and is accorded as a privilege to the citizens of the United States by the preamble to the Federal Constitution, and the Declaration of Independence, under the language 'pursuit of happiness.'" *Cook v. Mathis Co.*, 61 A. 2d 585 (Sup. Ct. N.J., 1948) (the right to work is a property right protected by a court of equity). But see *Louisville v. Sebree*, 308 Ky. 420, 214 S.W. 2d 248 (1948) (a license fee on the privilege of working).

⁸² *Pollock v. Williams*, 322 U.S. 4 (1944); *Hunt v. Crumboch*, 325 U.S. 821 (1945). Consult *Hoague, Brown and Marcus, Wartime Conscription and Control of Labor*, 54 Harv. L. Rev. 50, 85 (1940). In *Hutchinson v. McDonald*, Q.W.N. 23, 41 Q.J.P.R. 67 (1947), as noted in 21 Aust. L. J. 360 (1948), an apprentice agreed not to work for others. He intimated that he was going to another state. An injunction was obtained restraining him from working for another employer throughout the Commonwealth and New Zealand for the remainder of his period of service.

⁸³ "Everyone has the right to work, to free choice of employment. . . ." Art. 23, § 1 of the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations in 1948.

⁸⁴ Consult page 176 *supra*.

⁸⁵ See *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 491-93 (1940).

⁸⁶ In *Case of the Tailors of Ipswich*, 11 Co. Rep. 53a (K.B., 1614), the court said: "[A]t the common law, no man could be prohibited from working in any lawful trade, for the law abhors idleness, the mother of all evil . . . and especially in young men, who ought in their youth, (which is their seed time), to learn lawful sciences and trades, which are profitable to the commonwealth, and whereof they might reap the fruit in their old age, for idle in youth, poor in age; and therefore the common law abhors all monopolies, which prohibit any from working in any lawful trade." See *Jones, Historical Development of the Law of Business Competition*, 35 Yale L.J. 905, 922 ff. (1926). For statements that "trade" covers occupations as well as business, see *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427 (1932); *United States v. Nat'l Ass'n of Real Estate Boards*, 339 U.S. 485 (1950); *United States v. American Medical Ass'n*, 110 F. 2d 703 (App. D. C., 1940).

⁸⁷ See *LaChappell v. United Shoe Machinery Corp.*, C.C.H. Trade Reg. Serv. ¶62,657 (D.C. Mass., 1950); *Commonwealth v. McHugh*, C.C.H. Trade Reg. Serv. ¶62,678 (D.C. Mass., 1950).

⁸⁸ *Anderson v. Shipowners Ass'n*, 272 U.S. 359 (1926) (combination by an association and its members to control employment upon vessels engaged in foreign commerce of all seamen on Pacific Coast); *Martell v. White*, 185 Mass. 255, 69 N.E. 1085 (1904) (a nonmember whose business with a member of an association is interfered with by the association's fining the latter for dealing with him has a cause of action against the association); *United States v. King*,

group action which interfere with the right to work and which may come within the anti-trust laws.

Frigid silence, applause, posies, and orchids may be alternate rewards of the actor today. In a more robust yesteryear, he could also expect cat-calls and brickbats. But the law gave him some protection from organized expressions of disapproval. In the early nineteenth century, no less than a Duke took umbrage at an actor who had for some years been printing matter which the Duke thought was obscene, false, and libelous. When the actor was playing an unhappy Hamlet, the Duke and another arranged for organized groaning, hissing, and yelling. The actor brought suit on the theory of a conspiracy to deprive him of the benefits of appearing on the stage. It was held that the action would lie and that the alleged provocation was not a good defense.⁸⁹

In the early part of the twentieth century, a critic made himself obnoxious to certain theatrical managers in New York City, allegedly because of derogatory statements about them, including some marked by religious intolerance. The Theatre Managers Association agreed to bar him from the theatres of their members. Criminal suit was brought under the New York anti-trust laws. Relief was denied on the ground that the defendants' motive was not to prevent the plaintiff from exercising his calling, but dislike of his writings.⁹⁰ The case does not seem sound in view of the rule that if the necessary effect of a combination is to effect a restraint of trade, it falls within the anti-trust laws, whatever may be the intention of the parties.⁹¹

If two or more people do not like the way a third person thinks, if they think he is a Communist or a Communist follower, can they combine their economic power to bar him from making his customary livelihood? Two years ago, ten prominent screen writers were charged with contempt of Congress for refusing to answer questions which were designed by the Un-American Activities Committee to elicit whether they were Communists

229 Fed. 275 (D.C. Mass., 1915) (efforts of trade association to persuade third parties not to deal with one on its blacklist); *United States v. Alexander & Reid Co.*, 280 Fed. 924 (D.C. N.Y., 1922) (boycott by members of an association against third parties); *Dunkel v. McDonald*, 57 N.Y.S. 2d 211 (1945), *aff'd in part* 270 N.Y. App. Div. 757, 59 N.Y.S. 2d 921 (1946) (association of theatrical contractors having a monopoly status cannot require that its members work only with other members in good standing, and that producers be required to have all their work performed by such members).

⁸⁹ *Gregory v. Duke of Brunswick*, 6 Man. & G. 205, 1 Car. & K. 25 (C.P., 1843).

⁹⁰ *People v. Flynn*, 189 N.Y. 180, 82 N.E. 169 (1907).

⁹¹ *United States v. Patten*, 226 U.S. 525, 543 (1913); *Anderson v. Shipowners Ass'n*, 272 U.S. 359, 363 (1926).

or Communist sympathizers. Shortly thereafter it was reported that, "Members of the Association of Motion Picture Producers deplore the action of the 10 Hollywood men who have been cited for contempt by the House of Representatives. . . . We will forthwith discharge or suspend without compensation those in our employ and we will not re-employ any of the 10 until such time as he is acquitted or has purged himself of contempt and declares under oath that he is not a Communist."⁹²

This statement, issued by Eric Johnston, President of the Motion Picture Association of America, and joined in by Donald M. Nelson, then President of the Society of Independent Motion Picture Producers,⁹³ has closed off the film market to these writers, directors, and producers.⁹⁴

Although combined economic action designed to restrict one in his calling or business has had unauthoritative support where the purpose was to compel obedience to the law,⁹⁵ or to bring about a result which the doers

⁹² The Film Daily, p. 1 (November 26, 1947).

⁹³ Ibid. "On the broader issue of alleged subversive and disloyal elements in Hollywood, our members are likewise prepared to take positive action.

"We will not knowingly employ a Communist or a member of any party or group which advocates the overthrow of the government of the United States by force or by any illegal or unconstitutional methods."

To the same effect, consult Variety, p. 3 (November 26, 1947). According to Variety's story, all the sessions of the industry's leaders were attended by James F. Byrnes as legal adviser. Variety raises the question of whether there might not be an anti-trust question involved.

⁹⁴ The ten brought suit in the California courts against the Association, the Society, and numerous members thereof, for damages and for an injunction. The suit was based upon wrongful interferences with contract of employment, a conspiracy not to employ and to induce others not to employ the ten, and a conspiracy to prevent them from exercising their political rights. The complaint is broad enough to rest upon restraint of trade, but does not expressly so allege, nor are any statutes referred to. *Cole v. Loew* (No. 541446, Superior Ct., L.A. County, Cal., 1947). The first trial under this complaint, which has been transferred to the federal courts, resulted in a verdict for one of the plaintiffs and severe criticism of Eric Johnston by the presiding judge. Earlier, the plaintiffs had dismissed the suit against the Society of Independent Motion Picture Producers. See *Motion Picture Herald*, p. 13 (Dec. 25, 1948). In May of last year, these ten brought suit under the Sherman Act against the Motion Picture Association of America, for damages and for injunction against a continued ban on their employment. One of the bases of that suit was the shelving by Fox of Albert Maltz's "The Journey of Simon McKeever." *Maltz v. Loew's, Inc.*, — F. Supp. — (Calif., 1950). See *Motion Picture Herald*, p. 20 (May 28, 1949). Anti-trust considerations are said to have dissuaded the motion picture industry from making Eric Johnston a "czar" with power to banish errant movie stars. Compare *Variety*, pp. 3, 20 (May 25, 1949).

⁹⁵ Compare Opinion of Att'y Gen. of Tex. (April 12, 1944), C.C.H. Trade Reg. Serv. ¶57,239, where dealer agreed not to sell liquor to retailer not authorized by federal law to purchase same, and distiller agreed not to sell to wholesalers against whom the Federal Alcoholic Tax Unit had brought proceedings to suspend or revoke a permit, or against whom criminal proceedings had been started. It was held that this did not violate the anti-trust laws. Compare Opinion of Att'y Gen. of Tex. (April 12, 1944), C.C.H. Trade Reg. Serv. ¶57,238, where the Texas Brewers Institute agreed not to sell to distributors violating OPA price ceilings (Institute set up its own tests to determine violations), nor to sell to any distributor who sold beer in violation of the law in dry areas of Texas. Opinion of Att'y Gen. of N.Mex. (Oct. 30, 1943), C.C.H. Trade Reg. Serv. ¶8,595, held that it was all right for a group of wholesalers to refuse to sell their products to retailers who violated criminal laws by serving liquor to minors after hours.

thought was morally good,⁹⁶ there is a great deal of authority to the effect that private persons cannot thus substitute their judgments as to what is lawful for that of governmental authorities.⁹⁷ The regular courts subsequently convicted the screen writers for contempt; but a private concert of action in effect created an extra-legal court by which a man's ability to obtain employment from any producer was denied by the sanction of a group boycott.⁹⁸ It is submitted that group action of this sort is in violation of the Sherman Act.⁹⁹

The film industry clearly operates in and affects interstate and foreign commerce. The producers and distributors engaged in the lockout distribute pictures everywhere in the country and on a far-flung scale abroad; these ten have had a substantial part in the making of a considerable number of such pictures.¹⁰⁰ Moreover, these producers and distributors produce pictures not only in California, but in other parts of this country and abroad.¹⁰¹ Their control of the production and distribution of films is such that there is no other appreciable market for the services of the ten writers. Since many of the writers had established reputations, it is almost certain that their works would have been produced and distributed in interstate commerce save for the boycott.

However unsympathetic one may be toward the ten screen writers, the danger of a group's using a boycott to enforce its views is highlighted by the attempts, in some cases successful, to force radio and television

⁹⁶ *Hughes Tool Co. v. Motion Picture Ass'n*, 66 F. Supp. 1006 (N.Y., 1946).

⁹⁷ *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600, 613 (1914); *Fashion Guild v. FTC*, 312 U.S. 457, 468 (1941); *American Medical Ass'n v. United States*, 130 F. 2d 233 (App. D.C., 1942); *United States v. Motion Picture Patents Co.*, 225 Fed. 800, 808 (D.C. Pa., 1915). The latest disapproving reference to intraindustry regulatory bodies is found in *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 400 (1948).

⁹⁸ Concerted boycotts have often been held illegal. *Chamber of Commerce v. FTC*, 13 F. 2d 673, 687 (C.A. 8th, 1926).

⁹⁹ See cases cited note 128 *infra*. Early in June 1948, the Screen Writers Guild and a number of writers brought an action in the District Court for the Southern District of New York, against the Motion Picture Association of America, the Association of Motion Picture Producers, the Society of Independent Motion Picture Producers, seven of the eight major film companies, and Eric Johnston. The suit was designed to relieve the writers from the threat to their freedom to write implicit in the type of concerted action by motion picture distributors which had resulted in the firing of the ten persons who were witnesses before the Un-American Activities Committee. The Sherman Act, the Clayton Act, the Civil Rights Law and relevant state laws were invoked. The background of the conspiracy was alleged to be a combination to impose censorship through the Hays and Johnston offices. Consult Marcus, *Anti-trust Laws and the Right To Know*, 24 Ind. L.J. 513, 538 (1949). The original complaint in this suit was dismissed with leave to amend in November, 1948. *Screen Writers' Guild v. Motion Picture Ass'n of America*, 8 F.R.D. 487 (N.Y., 1948). An amended complaint has been filed.

¹⁰⁰ The contracts of several of the ten provided that the positive prints which move around the United States and abroad would contain a credit reference to them.

¹⁰¹ Occasionally, pictures are produced in New York City. Not infrequently, the whole or part of a picture is "shot" at a locale outside of the state of California.

performers out of their jobs because they have been mentioned in the publication "Red Channels" as Communists or Communist sympathizers.¹⁰²

In certain industries and trades, Negroes are so systematically excluded that an agreement or concert of action might be inferred.¹⁰³ Social and economic discrimination has a direct relationship to monopoly practices in the pursuit of a livelihood. It has been pointed out that exclusion of Negro businessmen and professionals from certain general markets has enabled those excluded to monopolize the Negro markets.¹⁰⁴

Race discrimination has been used as a means of securing a white workers' monopoly.¹⁰⁵ Discrimination by unions, largely directed at Negroes, has in recent years been whittled down by the courts,¹⁰⁶ and is largely confined to certain AF of L unions.¹⁰⁷ Nevertheless, it was said in 1947 that about one-fifth of organized labor excludes Negroes.¹⁰⁸ Union

¹⁰² 56 Time, No. 11, at 27 (Sept. 11, 1950). It may be doubted that a concert of action to boycott a baseball player, exercised by a concert of baseball teams through one person designated as a "czar," meets the tests of the anti-trust laws, whether the boycott is designed to enforce lawful or unlawful contracts, lawful or unlawful regulations of private organizations. Compare *Gardella v. Chandler*, 172 F. 2d 402 (C.A. 2d, 1949). It is also doubtful that a major league ballplayer could be considered a member of an association which has the right to oust a member for infraction of its rules. Teams, not ballplayers, are members of the league, and in any event the boycott extends beyond the particular league in which the player was playing.

¹⁰³ Myrdal, *An American Dilemma* 284 ff., 304 (1944). See *Miller v. Brown Shipbuilding Co.*, 165 F. 2d 956 (C.A. 5th, 1948). Similarly, as to Mexicans, see *McWilliams, The Mexican Problem*, 8 *Common Ground*, No. 3, at 3, 10 (1948).

¹⁰⁴ Myrdal, *An American Dilemma* 305 (1944). "The Dilemma of the Negro business and professional class is that the segregation they are fighting against affords them the monopolistic basis of their economic existence." *Ibid.*, 629-30, 645. As of April, 1944, despite the stimulus of wartime activity, Negroes represented only 3.3 per cent of professional and semi-professional workers in the United States, 3.5 per cent of clerical workers, and 1.5 per cent of salespeople. 60 *Month. Lab. Rev.* 1, 13 (1945).

¹⁰⁵ "Some craft unions have discovered that the color bar is a convenient method of controlling the labor market. Hence the color bar results not only from race prejudice, but also from a desire to monopolize the available job opportunities for the unions' white membership." Northrup, *Unions and Negro Employment*, 244 *Annals* 42, 45 (1946).

¹⁰⁶ Compare *Steele v. Louisville & N. R. Co.*, 323 U.S. 192 (1944). *Summers, The Right To Join a Union*, 47 *Col. L. Rev.* 33 (1947); *Gerry, The Negro Worker and His Right To Demand Full Union Membership*, 20 *Rocky Mt. L. Rev.* 88 (1947). See also, *Korner, The Legal Protection of Civil Liberties within Unions*, [1948] *Wis. L. Rev.* 18.

¹⁰⁷ Discriminatory unions are named in *Negro Year Book* 147-48 (1947); *Davis and Lawson, Postwar Employment and the Negro Worker*, 6 *Common Ground*, No. 3, at 3, 8-10 (1946); *Summers, The Right To Join a Union*, 47 *Col. L. Rev.* 33, 34 (1947); *Myrdal, An American Dilemma* 1299-1300, 1303-4 (1944).

¹⁰⁸ *Summers, The Right To Join a Union*, 47 *Col. L. Rev.* 33, 34 (1947). The writer states that in the plumbing and electrical trades, Negroes are almost completely excluded. *Ibid.*, at 42. Discrimination by unions may take the form of provisions in their constitutions, their rituals, tacit agreement, etc. *Negro Year Book* 147-48 (1947). It is said that some AF of L affiliates bar Mexicans. *McWilliams, The Mexican Problem*, 8 *Common Ground*, No. 3, at 1, 10 (1948).

contracts with southern railroads which eliminate or restrict the number of Negroes the railroad will employ are said to have been common.¹⁰⁹

Labor unions have been largely immunized from the Sherman Act, when labor disputes are concerned, by the Clayton and Norris-La Guardia Acts.¹¹⁰ Nevertheless, they are subject to the Sherman Act when they combine with others to impose restraints and monopolies.¹¹¹ Under state statutes and common law, there is often a broader application to unions.¹¹²

The monopoly position of a union in a particular labor market has received recognition by the courts in denying to the union a right to restrict the work opportunities of persons against whom they discriminate.¹¹³ And even in the absence of monopoly, a union may be enjoined from interfering with the right to work of one to whom it denies membership except on discriminatory terms.¹¹⁴

We deal here, at length, with only two of the professions: medicine and law. The professions are not commonly thought of as subjects of the anti-trust laws. Lawyers, who seemingly write upon everything under the sun,

¹⁰⁹ Northrup, *Unions and Negro Employment*, 244 *Annals* 42, 46 (1946). In 1949, a House Labor Committee invited five railroad unions to explain racial restrictions on membership. *The Evening Star* (Wash., D.C.), p. A-36 (May 31, 1949).

¹¹⁰ *Pierce, Labor and the Antitrust Laws*, 18 So. Calif. L. Rev. 171 (1945). The last extreme immunity holding is *Hunt v. Crumboch*, 325 U.S. 821 (1945), a 5 to 4 decision. See *Schatte v. International Alliance*, 182 F. 2d 158 (C.A. 9th, 1950).

¹¹¹ *Brotherhood of Carpenters v. United States*, 330 U.S. 395 (1947); cf. *Bakery Sales Drivers Union v. Wagshal*, 333 U.S. 437 (1948).

¹¹² *Drivers Union v. Meadowmoor Dairies, Inc.*, 312 U.S. 287 (1941); *Carpenters Union v. Ritter's Cafe*, 315 U.S. 722 (1942); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949); *Rogers v. Poteet*, 355 Mo. 986, 1000, 199 S.W. 2d 378, 388 (1947), cert. den. 331 U.S. 847 (1947) (union members confederated to reject milk of contract haulers who refused to join union).

¹¹³ *James v. Marinship Corp.*, 25 Cal. 2d 721, 731, 737, 155 P. 2d 329, 335, 338 (1944). The union had obtained a monopoly of the supply of labor by a series of closed-shop agreements and other collective action. The union discriminated against Negroes, not giving them full membership privileges. A suit to enjoin discharge of Negroes because of their not belonging to the union was successful. The court said that the union's "asserted right to choose its own members does not merely relate to social relations; it affects the fundamental right to work for a living." It said further: "If a union may not directly exclude certain workers, it may not do so indirectly by prescribing intolerable or unfair conditions of membership for such persons." In *Wilson v. Newspaper and Mail Deliverers' Union*, 123 N.J. Eq. 347, 350, 351, 197 Atl. 720, 722 (1938), an employee of a firm was denied membership in a union because many of its members were unemployed. All except one firm in plaintiff's line in Newark employed union men. In holding for the plaintiff, the court said: "A monopoly raises duties which may be enforced against the possessors of the Monopoly . . . ; the holders of the monopoly must not exercise their power in an arbitrary, unreasonable manner so as to bring injury to others." As to right of a discriminatory union to negotiate a closed-shop contract, see *Murray, The Right to Equal Opportunity in Employment*, 33 Calif. L. Rev. 388, 406 ff., 425 ff. (1945).

¹¹⁴ *Williams v. International Brotherhood of Boilermakers*, 27 Cal. 2d 586, 165 P. 2d 903 (1946).

have abstained from writing about restraints in their own and kindred professions. But restraints and monopolistic practices in these professions are of sufficient breadth and significance to warrant consideration of the applicability of the anti-trust laws.

We start from the premise that the Sherman Act "has always been construed to apply to combinations of professions or services in restraint of trade in a proper case."¹¹⁵

Professional services are likely to have considerable impact on interstate trade and commerce. Not only are professional men wont to cross state boundaries in pursuit of their calling, but the affairs they deal with are likely to be in, or cause a substantial flow of, interstate commerce.

1) *Lawyers and the Anti-trust Laws*

We lawyers are not accustomed to hear about restraints and monopolies in the practice of law, except when we inveigh against the encroachment of trust companies and others in the field of law. Yet bar associations not infrequently assume they have a license to do what some of their members would be certain other organizations could not.

Thus, it is blandly announced that, "The State Bar Association of Wisconsin, on June 28, 1947, approved a new minimum fee schedule in the form submitted to it by its Fee Bill Committee of 1946-47. The prior schedule adopted in 1929 was declared by the committee to be obsolete in view of the great economic changes that have occurred since then."¹¹⁶ The Committee had before it minimum fee schedules of thirty-three local bar associations. Wisconsin lawyers, with keen awareness of how to ensure immunization for this sort of price fixing, have sought covert approval of minimum fee schedules from the courts.¹¹⁷ Bar associations in other states

¹¹⁵ *Rogers v. Poteet*, 355 Mo. 986, 1000, 199 S.W. 2d 378, 388 (1947), cert. den. 331 U.S. 847 (1947). In *American League Baseball Club of Chicago v. Chase*, 86 N.Y. Misc. 441, 149 N.Y. Supp. 6 (1914), the court had before it the validity of baseball players' contracts. It refused to hold that the business of baseball for profit was interstate commerce or trade under the Sherman Act. But it held that a monopoly existed as well as a combination to restrain and control the exercise of a profession or calling. It thought that a quasi-peonage was effected which was "contrary to the spirit of American institutions, and is contrary to the spirit of the Constitution of the United States." The court, therefore, denied relief on the ground that plaintiff came into court with unclean hands. Compare *American League Baseball Club of N.Y. v. Pasquel*, 188 N.Y. Misc. 102, 66 N.Y.S. 2d 743 (1946).

¹¹⁶ Zillmer, *The Minimum Fee Bill of the State Bar Association of Wisconsin*, [1948] Wis. L. Rev. 7.

¹¹⁷ *Ibid.*, at 8: "The report contains the following recommendations to local bar associations:

"It is suggested that where local bar associations are adopting new schedules they attempt to get not only the endorsement of the circuit, probate, and other courts to fees involving real estate litigation, probate matters, and any other matters where proper, but also the permission to quote the courts in this respect in the fee schedule. This was done by the Circuit and County Judges in Milwaukee County; for example, the County Judges of Milwaukee County permit

have also sought to encourage minimum fee schedules.¹¹⁸ Bar associations in the last decade, in various parts of the country, have done much to emasculate reciprocity of admission to the bar and to protect their own members from competition by succeeding in having admission fees greatly raised.¹¹⁹ In Maryland, until very recently, even members of the Maryland bar have not been allowed to practice in the courts of Montgomery County unless they were members of the bar of that county.¹²⁰

Trade and commerce are the lifeblood of an attorney's calling; the transactions he deals in often transcend state boundaries. It is not believed that fee fixing by lawyers is on a higher plane than price fixing by plumbers, nor less amenable to the anti-trust laws.¹²¹ If bar association activities in fixing fees may be brought within the anti-trust laws, so too should their activities in excluding members on a discriminatory basis. Bar associations have not been prominent in combating discrimination.¹²² Many of them exclude Negroes;¹²³ their membership blanks not infre-

the fee schedule to recite as follows: "The County Judges of Milwaukee County will apply the following fees involved in County Court (probate) matters."

"Every local association should endeavor to get this endorsement, for with it, some of the arguments against the desirability of minimum fee schedules will disappear."

¹¹⁸ See 27 Mich. St. B. J. 42, 49-50 (1948); 17 Detroit Lawyer 122 (1949); 18 Detroit Lawyer 73 (1950); 17 J. Bar A.D.C. 66 (1950).

¹¹⁹ In the last decade, the fee in the District of Columbia has gone from \$15 to \$125. For a lawyer admitted in Illinois to be admitted to practice in Montgomery County, Maryland, the fee is \$125. See Pennsylvania Bar Restrictions, 23 Temp. L.Q. 408 (1950).

¹²⁰ In 1943, the county-circuit court adopted a rule to this effect, with the qualification that other Maryland lawyers could appear if associated with a Montgomery County lawyer. The validity of this rule was attacked by a lawyer in May, 1949. Consult Evening Star (Wash., D.C.), p. 1-B (May 12, 1949); Washington Post, p. 11, col. 1 (June 29, 1949).

¹²¹ A covenant not to engage in the practice of law by a vendor of a law business has been tested by the reasonableness of the restraint. *Smalley v. Greene*, 52 Iowa 241 (1879).

¹²² The New York State Bar Association, the Association of the Bar of the City of New York, and other New York bar associations have expressed their opposition to the passage of the New York State Fair Employment Practice Act. See Spitz, *The New York State Law Against Discrimination*, 20 N.Y. St. B.A. Bull. 8 (1948).

¹²³ Exclusion of Negroes from bar associations in Northern California has been noted. Anti-Defamation League of B'nai B'rith, *Anti-Semitism in the United States in 1947* at 66 (1947). Such exclusion is a matter of common knowledge.

In November, 1947, a subcommittee of the Civil Rights Committee of the Bar Association of the District of Columbia filed a report that it was not advisable to consider or take any action with respect to matters of general policy pertaining to racial discrimination. The General Committee in 1948 sustained a motion declaring that proposing an amendment to the Association's by-laws, to remove the present restriction of membership to white persons was not valid in the purview of the Civil Rights Committee. See 15 J. Bar A.D.C. 331, 333 (1948).

In June of 1949, a plea was made for an integrated District of Columbia Bar with membership open regardless of race. The plea was made by a representative of the Washington Bar Association, an organization of Negro attorneys. Washington Post, p. 9, col. 6 (June 4, 1949). In June of 1950, by majority vote, this Bar Association continued its ban on Negroes. Wash-

quently contain racial questions which suggest discriminatory practices. Membership in a bar association often carries with it opportunities of professional and economic advantage of great significance. Exclusion may mean the difference between success and failure in the legal profession.¹²⁴ Such exclusion is a restraint of trade not only in the sense that it is a restriction on an individual's right to engage in a business or calling, but also in the sense that the public is deprived of the benefit of the services of competent lawyers. Thus it would seem that restraints upon a lawyer's activities of the sort here dealt with should be within the anti-trust laws.

2) *Doctors and the Anti-trust Laws: The Right to Health*¹²⁵

The medical profession has been singularly rife with restraints and monopoly practices. Many centuries ago, the College of Physicians of London adopted illegal by-laws limiting the number of College fellows to twenty.¹²⁶ A landmark in the creation of the rule against restraints is a case decided in 1610, involving a physician's calling.¹²⁷ In 1518 the Royal College of Physicians was granted a royal patent by which it was given the right to fine or imprison physicians who pursued their calling without having been admitted to the College. Despite a medical degree from Cambridge, Dr. Bonham was refused admittance, and when he continued to practice, the College caused him to be fined and imprisoned. He sued for false imprisonment and it was held by Lord Coke that the College's privilege to refuse membership was to apply only to physicians who were incompetent.

The generation to which this writer belongs has seen restraints in the

ington Post, p. 11, col. 7 (June 3, 1950). In September, 1950, the American Bar Association refused to amend its constitution to admit members without reference to race, creed or color. Washington Post, p. 1, col. 4 (Sept. 21, 1950).

¹²⁴ Lyman, On the Rewards of Bar Association Activity, 22 Conn. B. J. 53 (1948); Why You Should Be a Member of the Detroit Bar Association, 18 Detroit Lawyer 73 (1950); *ibid.*, at 33, a substantial numbers of lawyers serve on Bar Association Committees; cf. 33 J. Am. Jud. Soc. 183 (1950).

¹²⁵ There is no fully realized concept of a right to an opportunity to health in this country. But it is a growing concept. In 1944, President Roosevelt's Annual Message to Congress contained as part of an economic bill of rights, "The right to adequate medical care and the opportunity to achieve and enjoy good health." Zevin, Nothing to Fear, The Selected Addresses of Franklin D. Roosevelt 387, 396 (1946).

¹²⁶ See *Rex v. Doctor Askew*, 4 Burr. 2186 (K.B., 1768).

¹²⁷ *Dr. Bonham's Case*, 8 Coke *107a, 114a, 2 Brownl. 255 (C.P., 1610). As an outstanding case in common-law background of our own constitutional law, it has become a milestone along the road that led to the liberties guaranteed in the Constitution. See Plucknett, *Bonham's Case and Judicial Review*, 40 Harv. L. Rev. 30 (1926); Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 Harv. L. Rev. 365, 367 (1929); Thorne, *Dr. Bonham's Case*, 54 L.Q. Rev. 543 (1938).

medical field of surprising scope and ferocity which have not yet spent their force.¹²⁸

The Coventry Provident Dispensary was founded in England about 110 years ago to secure medical care for its members and their families. Some thirty-five years later, the British Medical Association was incorporated. Antagonism by the Association and various doctors against the practice of "contract" medicine by those connected with the Dispensary, erupted into organized persecution which set the pattern for similar conduct in this country at a later time. The Dispensary doctors were expelled from the Association, were prevented from consulting with other members of the Association, and were subjected to forms of pressure detrimental not only to themselves, but to their patients. An English court found that conduct of this nature entitled the plaintiff doctors to damages.¹²⁹

In this country, the American Medical Association and numerous local medical societies have ignored little in the way of restraints and monopoly practices to retard the growth of prepaid medical care plans.¹³⁰ They have either opposed successfully, or limited the scope of, group hospitalization plans.¹³¹ Because of this opposition, prepaid medical plans have had only a sporadic growth in this country. The last forty years have brought to light such plans sponsored by unions, fraternal organizations, co-operative

¹²⁸ During the first week in May, 1948, a meeting of the National Health Assembly in Washington, D.C., brought together numerous antagonistic groups which exchanged views at some length. To date this conference has not resulted in a lessening of the restraints in this field, but it is to be hoped that it is a step in the right direction. *Washington Post*, p. 11, col. 1 (May 9, 1948).

¹²⁹ *Pratt v. British Medical Association* [1919] 1 K.B. 244. Said one of the defendant's witnesses, at 273, "It is the lot of minorities to suffer." The court said, at 269, "Upon the words 'to maintain the honour and interests of the medical profession' has been created a powerful scheme and machinery throughout and beyond the United Kingdom. . . . It follows that the defendants claim to enforce by boycott and by the infliction of ruin, their own standard of medical honour and interest throughout the country." The court went on to say, at 272, "The plaintiffs were punished because they defeated the intended overthrow of the Coventry Dispensary."

¹³⁰ "Organized medicine has fought every manifestation of group practice, when combined with prepayment." *United States Medicine in Transition*, 30 *Fortune*, No. 6, at 156, 160 (Dec., 1944). See *The American Medical Association*, 18 *Fortune*, No. 5, at 89, 90 (Nov., 1938); *De Kruij, Kaiser Wakes the Doctors* (1943); *Group Practice Versus the American Medical Association*, 47 *Yale L. J.* 1193 (1938); see Mayer, *The Dogged Retreat of the Doctors*, 199 *Harpers*, 1194 (Dec., 1949).

¹³¹ See Porter, *Do We Want National Health Insurance?* 115 *Colliers*, No. 4, at 20 (Jan. 27, 1945). "The House of Delegates of the American Medical Association formulated certain principles for such plans. One of these principles stated that hospital contracts should not include medical services." Council on Medical Service, AMA, *Voluntary Prepayment Medical Care Plans* 8 (1949). Some state statutes prevent inclusion of medical services in hospital care. See Rorem, *Enabling Legislation for Non-Profit Hospital Service Plans*, 6 *Law & Contemp. Prob.* 528, 538-39 (1939).

groups, municipal employees, and organizations organized for profit.¹³² Some large businesses have had prepaid medical care for many years.¹³³ For the most part, medical groups have not strongly opposed employer sponsored plans,¹³⁴ but they have displayed virulent opposition to other prepaid plans.¹³⁵ In the last ten years, largely through fear of "socialized" medicine and in order to retard and eliminate lay sponsored prepaid medical care, prepaid plans sponsored by doctors have been increasingly encouraged by the American Medical Association and local medical societies.¹³⁶ By limitation of the scope of coverage, by geographical limitation, and by requiring medical society approval of such plans and not of others,¹³⁷ the doctor-sponsored plans, praiseworthy as they may be in other respects, show disturbing signs of monopoly and restraint.

Some ten years ago, in Washington, D.C., the Group Health Association was formed to provide low-cost prepaid medical care for its members, consisting largely of government employees. Opposition by the District Medical Society, supported by the American Medical Association, was immediate and violent. Doctors associated with the Association were intimidated to the point of resignation or were expelled from the District Medical Society. Hospitals cooperating with the Medical Society denied their facilities to doctors associated with Group Health. It was clear that the purpose of these restraints was to prevent competition with doctors in private practice. When brought to book under the anti-trust laws, the defendants justified their actions by their codes of ethics, and claimed the right to regulate the practice of medicine—a claim which the courts denied.¹³⁸

In 1938, a physician in Tampa, Florida, brought an action against the local hospital and the Hillsborough County Medical Society for preventing him from using hospital facilities for treating his patients. He was one

¹³² Klem, *Prepayment Medical Care Organizations* (Fed. Security Agency, Social Security Board, Bur. of Research and Statistics, Bur. Memo. No. 55, 2d ed., June, 1944); Klem and McKiever, *Program Developments and Benefit Trends in Voluntary Health Insurance*, 11 *Social Security Bull.* 3 (1948); Davis, *America Organizes Medicine* (1941).

¹³³ Consult Klem, *op. cit. supra* note 132.

¹³⁴ But see *Irwin v. Lorio*, 169 La. 1090, 126 So. 669 (1930).

¹³⁵ Notes 140, 162 *infra*.

¹³⁶ Council on Medical Service, AMA, *Voluntary Prepayment Medical Care Plans* (1946-1949).

¹³⁷ See *Porter v. King County Medical Soc.*, 186 Wash. 410, 58 P. 2d 367 (1936); Council of Medical Service, AMA, *op. cit. supra* note 136. This is one element in the complaint referred to in note 143 *infra*.

¹³⁸ The most comprehensive of several opinions written in this case is *AMA v. United States*, 130 F. 2d 233 (App. D.C., 1942).

of thirteen doctors whom the Society had denied membership because he had furnished medical service on a contract basis to Latin clubs in the city. The hospital had passed a resolution barring its facilities to nonmembers of the Hillsborough County Medical Society. A conspiracy in violation of the Sherman Act was alleged, and a temporary injunction was issued prohibiting the defendants from interfering with the physician's practicing in the hospital.¹³⁹

Other attempts to carry out group medical activities in various parts of the country have evoked similar restrictive action by doctors through their medical societies and hospitals.¹⁴⁰ Within the last decade, so-called enabling acts have been passed in a number of states under which state medical societies could control all prepaid medical care plans.¹⁴¹ The importance of medical society membership has been a potent weapon used by medical societies to control the economic relations of physicians with the public and with organizations concerned with health activities.¹⁴²

¹³⁹ Tampa Tribune (Nov. 5, 1938). The defendant medical society subsequently defaulted.

¹⁴⁰ As to Wisconsin, see *AMA v. United States*, 130 F. 2d 233, 250 n. 87 (App. D.C., 1942). As to New York City, see *N.Y. Times*, § 1, p. 30, col. 5 (May 20, 1949). As to other parts of the country, see Shadid, *A Doctor For The People* (1939); Garceau, *Organized Medicine Enforces Its "Party Line,"* 4 Pub. Op. Q. 408 (1940); Hearings before Senate Committee on Education and Labor on S. 1606, 79 Cong. 2d Sess. (1946); Davis, *America Organizes Medicine* 166 ff. (1941). Advocacy by the Milbank Fund of voluntary medical care insurance was followed by a boycott of Borden's products, see 18 *Fortune*, No. 5, at 160 (Nov., 1938). The opposition of organized medicine in Oklahoma to the prepaid medical care plan of the Elk City Hospital and Clinic has resulted in Oklahoma polio patients being denied the use of the Clinic's facilities. See *Elk City Journal*, p. 1 (June 30, 1949); *Elk City Daily News*, p. 1 (July 1, 1949); *Elk City Democrat*, p. 1 (July 2, 1949).

¹⁴¹ See Klem, *Recent State Legislation Concerning Prepayment Medical Care*, 10 Soc. Serv. Bull., No. 1, at 10 (Jan., 1947); see statement of Dr. Frederick D. Mott, Chief Medical Officer, Farm Security Administration, 6 Hearings, op. cit. supra note 140, at 1182: "Of course in certain States it has been most expedient for us to work out contractual arrangements with medical society plans. In some States it has been the only way in which we could bring any protection to our borrowers, because of State enabling . . . or we sometimes think of them as disabling acts . . . making it possible for a medical-care system at this time to exist only as one dominated by the organized profession." See Hansen, *Laws Affecting Group Health Plans*, 33 *Iowa L. Rev.* 209, 224 ff. (1950).

Wisconsin, however, recently expressly provided for cooperatively sponsored prepaid medical care plans. The Medical Care Section of the National Health Assembly, in which AMA representatives took part, concluded in 1948, that, "The people have the right to establish voluntary insurance plans on a cooperative basis, and legal restrictions upon such right (other than those necessary to assure proper standards and qualifications), now existing in a number of states, should be removed." *Washington Post*, § II, p. 5 B, col. 4 (May 9, 1949).

¹⁴² Medical Society membership is very important in obtaining malpractice insurance. It is also usually a condition to taking specialty board examinations.

In Georgia, at an early date, the by-laws of the Georgia Medical Society provided: "No member of this society shall consult with or recognize as a regular practitioner of medicine, any physician who shall have become a resident practitioner for two months and shall have failed to become a member of the society." *State v. Georgia Medical Society*, 39 Ga. 608, 615 (1869).

In the last two years, at least four anti-trust suits have been brought against medical societies.¹⁴³ It has been reported that the Department of Justice has had an investigation of medical societies under way.¹⁴⁴ It is the philosophy of the Sherman Act and of the anti-trust laws generally that the public interest is best served by competition. It follows that a right to experiment in the field of medical care should be protected by the anti-trust laws from private restraints and monopoly practices.¹⁴⁵

Understandings between physicians in a locality may reach the point of controlling the entry of new practitioners into the community, and of allocating posts in medical institutions.¹⁴⁶ Medical societies, as well as medical boards in many states, have made it difficult or impossible for refugee physicians to practice in various parts of this country. This has been accomplished by residence and citizenship requirements as well as by other devices.¹⁴⁷ Closed hospital staffs are common in this country. The denial of the use of hospital facilities to qualified doctors has become a recognized evil.¹⁴⁸ Discrimination because of race or color is widespread

¹⁴³ In October of 1948, the government filed an anti-trust suit against the Oregon State Medical Society and other Oregon medical groups and doctors, in the District Court of Oregon. The complaint alleged restraints against prepaid medical care plans not sponsored by the defendants, and attempted monopolization of the prepaid medical care field. The district court found that the groups sponsoring the plan were not engaged in trade or commerce and thus did not come within the Sherman Act. The government will in all probability appeal to the Supreme Court. During the same month, a prepaid medical care organization in San Diego, California, brought a private anti-trust suit against the local medical society. A case brought by the Group Health Cooperative of Puget Sound against the King County Medical Society was recently decided for the defendants. *Group Health Cooperative v. King County Medical Society* (Super. Ct. Wash., No. 414538). In August of this year a suit was filed in Oklahoma. *Farmers Union Hospital Ass'n v. Beckham County Medical Society* (Beckham Cty. Dist. Ct., Okla.).

¹⁴⁴ According to a United Press story in February of 1949, the Federal government was carrying on an investigation to determine whether the fight of organized doctors against prepaid medical care plans violated the anti-trust laws. *The Washington Post*, § I, p. 5, col. 5 (Feb. 28, 1949). "Justice Department investigators are reported active in New York City, Chicago, Oklahoma and elsewhere." *Medical Economics*, p. 99 (May, 1949). And see *Oregon Journal* (October 9, 1949).

¹⁴⁵ "The content of medicine is the physician's domain. But the circumstances under which he practices and his economic relation to society or to the individual patient are problems of organization, problems in the public domain in which the physician is only one among the many who are vitally interested." Falk, *An Introduction to National Problems in Medical Care*, 6 *Law & Contemp. Prob.* 497, 500 (1939).

¹⁴⁶ Hall, *The Stages of a Medical Career*, 53 *Am. J. Soc.* 327, 332 (1948). Hall goes on to state, at 336: "In conclusion, it would appear that specialized medicine is no longer an independent profession—a free lance occupation. It has become highly interdependent rather than independent, and it is carried on within the framework of elaborate social machinery rather than within a free competitive milieu."

¹⁴⁷ Compare Proceedings of the Annual Congress on Medical Education and Licensure, AMA, at 45 ff. (1940).

¹⁴⁸ See Ratcliff, *Give Young Doctors a Break*, *Woman's Home Companion* (Oct., 1948).

in the medical field. We will refer later to discrimination by educational institutions,¹⁴⁹ a discrimination recognized as an effective restraint on civil rights.¹⁵⁰ It has been pointed out that "[h]ospital appointments are crucial for successful medical practice,"¹⁵¹ and that *where* a doctor has served his internship is an economic factor of great importance.¹⁵² But hospital internships and appointments have not been freely made available to Jews¹⁵³ and have been largely barred to Negroes.¹⁵⁴ In the nation's capital and in most southern states, Negro doctors have been widely denied the use of hospital facilities.¹⁵⁵ In Washington, D.C., until very recently, there was only one hospital whose facilities were open to Negro physicians, and most are still closed to them.¹⁵⁶ Many hospitals, moreover, do not take Negro patients at all, or only on a segregated basis.¹⁵⁷

Until recently, Negro doctors in seventeen states and the District of Columbia were excluded from their county medical societies; this is still

¹⁴⁹ See pages 205-8 *infra*. See statement by Dr. W. Montague Cobb, as to Chicago, reported in PM, § I, p. 11, col. 2 (May 11, 1948).

¹⁵⁰ President's Committee on Civil Rights, *To Secure These Rights* 73 (1947).

¹⁵¹ Hall, *The Stages of a Medical Career*, 53 Am. J. Soc. 327, 330 (1948).

¹⁵² "The internship that a doctor has served is a distinctive badge; it is one of the most enduring criteria in the evaluation of his status." *Ibid*.

¹⁵³ Hall reports the following remarks from the head of a department of a hospital: "Another reason for not holding competitive examinations for internships is that there are a lot of Jews in medicine." *Ibid.*, at 331.

¹⁵⁴ President's Committee on Civil Rights, *To Secure These Rights* 73-74 (1947).

¹⁵⁵ "Until the Flint-Goodridge Hospital was built in New Orleans with the assistance of the Rosenwald Fund and the General Education Board, there was not a single modern hospital in Louisiana where a Negro physician could practice. In Mississippi . . . there are no modern hospitals where a Negro physician may take his patients. A corresponding situation prevails in most of the other southern states. North and South Carolina are an exception due mainly to the assistance of the Duke Endowment fund." Myrdal, *An American Dilemma* 323 (1944). There exist few opportunities in white hospitals for Negro doctors to acquire the experience necessary for good hospital practice. Negro Year Book 331-37 (1947). In the North, the choice of hospital facilities is much greater for white doctors than for Negro physicians or surgeons. Myrdal, *An American Dilemma* 323 (1944). In 1938, a report made by a committee of the Medico-Chirurgical Society of the District of Columbia stated: "At present there is no hospital in the United States which offers an opportunity for training of the Negro general practitioner in the early recognition and care of pulmonary tuberculosis." Cobb, *The First Negro Medical Society* 73 (1939). See Cornely, *Race Relations in Community Health Organization*, 36 Am. J. Pub. Health 984, 990 ff. (1946).

¹⁵⁶ Freedmens Hospital has regularly been open to Negroes. See Cobb, *The First Negro Medical Society* 85 (1939).

¹⁵⁷ Dr. W. Montague Cobb noted that in Chicago a large majority of the city's voluntary hospitals did not admit Negroes, Mexicans, Filipinos or Japanese. PM, § I, p. 11, col. 2 (May 11, 1948). See McWilliams, *Los Angeles: An Emerging Pattern*, 9 Common Ground No. 3, at 3, 8 (Spring, 1949). "The doctors said the county has no facilities for Negro patients. . . ." Prince Georges County Commissioners, voting against enlarging the Prince Georges Hospital at Cheverly, Md. Washington Post, § I, p. 14, col. 5 (May 11, 1949).

true in most of those states. This means they have been ineligible for membership in the American Medical Association, since membership in the former has been a prerequisite to membership in the latter.¹⁵⁸ More than in most fields, membership in these medical societies is an important factor in the economic success of a doctor, in his ability to maintain and advance his skills and in the kind of service he can render the public.¹⁵⁹ For the most part, one not a member of these societies is denied access to hospitals. Earning opportunities are often in the control of medical societies; in many states this is true of prepaid medical care plans provided for by the Farm Security Administration or other duly authorized government agency.¹⁶⁰ Denial by such associations of admission to Negro doctors has such serious economic consequences in the practice of a physician's calling,¹⁶¹ and is so injurious to the public, that anti-trust laws could properly be invoked to rectify the public and private wrongs involved.

¹⁵⁸ Cornely, *Race Relations in Community Health Organization*, 36 *Am. J. Pub. Health* 984, 990-91 (1946); *PM*, § I, p. 11, col. 1 (April 29, 1948). In *State v. Georgia Medical Society*, 38 Ga. 608 (1869), it appeared that the medical society had expelled a white doctor for becoming surety on the bond of certain colored persons, one of whom had been elected to public office. Negro nurses have been barred from membership in a number of the local chapters of the American Nurses' Association. That Association recently voted to allow colored nurses to join ANA directly in states where they are barred from local affiliated groups. They have been barred in the nation's capital by the District Association of Graduate Nurses. *Evening Star* (Wash., D.C.), p. A-5 (June 2, 1948).

¹⁵⁹ A Senate Committee, investigating the exclusionary policy of the District of Columbia Medical Society in 1870 found:

"1. That medical practitioners, above criticism in every respect, are refused admission to the society solely on account of color.

"2. That members of the society refuse to consult with medical practitioners, thus excluded on account of color, to the serious detriment of such practitioners.

"3. That medical practitioners are shut out from educational opportunities on account of color."—S. Rep. No. 29 (Ser. No. 1409), 41st Cong. 2d Sess. 5 (1870).

The N.Y.C. Medical Society in 1948, passed a resolution noting that the effect of this exclusion was to deny Negro doctors the right to apply for membership in other national professional societies where membership in AMA was a requisite. It was noted that, thereby, these physicians are "restrained in the legitimate pursuit and furtherance of their professional activities." *PM*, § I, p. 11, col. 1 (April 29, 1948). That society also passed a resolution urging that the Constitution of the AMA be changed to forbid exclusion of Negroes by component societies. *N.Y. Times*, § I, p. 1, col. 2 (May 19, 1948). The AMA has refused to compel its component societies to abandon such exclusion. See *N.Y. Times*, p. 28, col. 5 (June 24, 1948), and Davis, *America Organizes Medicine* 163 (1941). But it has been encouraging its component societies to do so. See 27 *Med. Econ.* 136 (Aug., 1950).

¹⁶⁰ See note 140 supra.

¹⁶¹ See Cobb, *The First Negro Medical Society* 2-3 (1939):

"The drives which create a strong and active medical society are both internal and external. The great subjective urge to organization is the desire for professional improvement. Ethically and actually this end always supersedes any others in a truly scientific group.

"Another internal urge for professional organization by physicians is the guild protection afforded by membership in the regular society. This at once confers on the ethical physician community prestige, protects both himself and the public from the pretensions of charlatans,

State courts sometimes have shown a reluctance to make hospitals open their doors to all qualified doctors for treatment of their patients; reference to the public interest has been absent or rare.¹⁶² The use of hospital facilities has a substantial bearing on commerce both intrastate and interstate. To the extent that a hospital bars Negro doctors, it cuts off from that hospital all the business transactions and transportation that Negro doctors might effect. It cuts off from Negro doctors the trade and commerce they could ordinarily expect; it cuts off the trade and commerce which medical suppliers and transportation agencies could expect; it cuts off the flow from medical schools to hospitals of Negro medical graduates who, save for their color, would take their internships in such hospitals; it destroys or restricts that trade and commerce which flows from group medical care plans, where because of difficulty of securing hospital service, Negro group medical plans are stillborn. It has a clear-cut relationship not only to the Negro doctor's professional competence, but also to his financial success.¹⁶³

The fixing of fees by doctors is a form of price fixing which would clearly seem to come under the anti-trust laws.¹⁶⁴ Fee and minimum fee

further his economic security by facilitating the establishment of just fees, and provides for the maintenance of professional standards by interfamilial methods.

"The major external stimulus to medical organization is the demand of the community, according to its degree of enlightenment, for the best possible service in respect to private therapy and the safe guarding of the public health.

"The condition of segregation renders incentive along all three of these lines deficient. It retards professional advancement by diminishing contracts and consultations, by decidedly limiting training from institutional sources and by fostering local professional crowding and inbreeding with consequent lowering of morale.

"The guild advantages are sustained only in part because the segregated organization is usually so handicapped in power that it cannot by itself enforce its proper regulations. It thus becomes possible for physicians to ignore the society altogether, with no practical loss to themselves." See also *N.Y. Star*, § I, p. 20, col. 1 (June 24, 1948).

¹⁶² Thus in *Levin v. Sinai Hospital of Baltimore City*, 46 A. 2d 298 (Md., 1946), the complaint alleged that the complainant had been a member of the visiting staff of the defendant, was denied courtesy privileges, refused private rooms for his patients; a courtesy staff was created to limit the privileges of the hospital to a small group of physicians. Plaintiff sought injunction against interfering with his right to treat patients in hospital. Held, for defendant on demurrer. The court, in a confused opinion, thought the hospital free to exclude any physician from practicing there. No restraint on interstate commerce was found. See also, *Hamilton County Hospital v. Andrews*, 81 N.E. 2d 699 (Ind. App., 1948). But in that case, the court did hold that it was improper for the hospital to impose as a condition, membership in the AMA.

¹⁶³ *Cornely, Race Relations in Community Health Organization*, 36 Am. J. Pub. Health 984, 990 (1946).

¹⁶⁴ *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150 (1940); *United States v. Nat'l Ass'n of Real Estate Boards*, 339 U.S. 485 (1950); *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427 (1932); *Pleaters Stitchers and Embroiderers Ass'n v. Jaffe Pleating Co.*, 176 N.Y. Misc. 411, 27 N.Y.S. 2d 615 (1941); *More v. Bennett*, 140 Ill. 69, 29 N.E. 888 (1892) (legal stenographers); *Graf v. Master Horse Shoers Protective Ass'n*, 1 Ohio N.P. (N.S.) 423 (1904) (blacksmiths); *Bailey v. Association of Master Plumbers*, 103 Tenn. 99, 52 S.W. 853

price fixing through group action is a common practice and one that is frequently quite open.¹⁶⁵ It would seem clear that the medical profession is a trade within the meaning of the common law and the anti-trust statutes,¹⁶⁶ in view of the nature and effect of the restraints employed, of *Dr. Bonham's Case*,¹⁶⁷ and of the numerous cases in which a doctor's covenant not to compete with the purchaser of his practice has been tested by the reasonableness of the restraint.¹⁶⁸ Whether doctors are engaged in a trade or

(1899) (plumbers); *Gatzow v. Buening*, 106 Wis. 1, 81 N.W. 1003 (1900) (liverymen); *Employing Printers Club v. Dr. Blosser Co.*, 122 Ga. 509, 50 S.E. 353 (1905) (printers); Chapter No. 768 v. *Gambino*, 27 North (C.P.Pa.) 6 (1939) (barbers); *People v. Medical Society of County of Erie*, 24 Barb. (N.Y.) 570 (1857). But see *Rohlf v. Kasemeier*, 140 Iowa 182, 118 N.W. 276 (1908).

¹⁶⁵ "Announcement

"Due to the increased cost of supplies and equipment, the following fee schedule has been adopted by the Mason County Medical Society, as recommended by the Michigan State Medical Society."

Five categories listed with stated fees for each category plus a 75¢ per mile charge from out of the city limits. *Luddington Daily News* (Feb. 4, 1946). Similar price fixing fees by the Ridgewood Medical Society of New Jersey is reported in the *Ridgewood (N.J.) Sunday News*, p. 14 (April 19, 1942); by five doctors in Eufaula, Alabama, reported in the *Eufaula (Ala.) Tribune* (Oct. 26, 1940); by six doctors in Newport, New Hampshire, reported in the *Newport (N.H.) Argus* (March 20, 1941); by the Columbia Medical Society of Richland County, S.C., reported in the *Columbia (S.C.) Record* (Feb. 2, 1948); by the Hanover Medical Society in Hanover, Pa., reported in the *Hanover (Pa.) Evening Sun* (July 7, 1945); by McDonough County, Ill., physicians, reported in the *Daily Journal, Macomb, Ill.* (Feb. 28, 1948). Fixing of minimum fees by the Medico-Chirurgical Society (District of Columbia Negro doctors' society), as well as the Medical Society of the District of Columbia, is referred to in *Cobb, The First Negro Medical Society* 56-58 (1939). See *Weyrens v. Scotts Bluff County Medical Society*, 133 Neb. 814, 277 N.W. 378 (1938). As to pressure of medical societies upon insurance companies to increase medical fees for insurance examinations, see *Minutes of Annual Session*, June 1948, 137 J.A.M.A., No. 10, at 872, 888 (July 3, 1948).

¹⁶⁶ The practice of medicine has been assumed to be a trade in an anti-trust suit, *Pratt v. British Medical Ass'n* [1919] 1 K.B. 244, and held to be a trade in *AMA v. United States*, 130 F. 2d 233 (App. D.C., 1942). See 18 Ind. L.J. 249 (1943). At common law, restraints upon the practice of medicine were classified as restraints of trade. *Davis v. Mason*, 5 T.R. 118 (1793); *Erickson v. Hawley*, 12 F. 2d 491 (App. D.C., 1926); *McCurry v. Gibson*, 108 Ala. 451, 18 So. 806 (1895); *Rowe v. Toon*, 185 Iowa 848, 169 N.W. 38 (1918). In early common law, the calling of surgeons was considered a public calling. See *Small, Antitrust Laws and Public Callings: The Associated Press Case*, 23 N.C. L. Rev. 1, 4 (1944). The operation of a hospital has been held to be an activity for commercial purposes within a treaty permitting Japanese aliens to lease land for such purposes. *Jordan v. Tashiro*, 278 U.S. 123 (1928); and in *AMA v. United States*, supra, the Court thought hospitals were engaged in trade and commerce within the Sherman Act and at common law. But in *Rohlf v. Kasemeier*, 140 Iowa 182, 118 N.W. 276 (1908), a combination of doctors to fix fees was held not forbidden under an anti-trust statute dealing with commodities.

¹⁶⁷ See page 194 supra.

¹⁶⁸ For example *Jenkins v. Reid*, [1948] 1 All E.R. 471 (Ch.), applying a strict rule. The government's brief in *United States v. AMA*, 110 F. 2d 703 (App. D.C., 1940), cited about 100 cases of this sort.

not, they are not outside the Sherman Act when they combine to interfere with the practice of medicine by others.¹⁶⁹

B. BELONGING TO AN ORGANIZATION

Often the very purpose of the creation of an association is to bring together persons of certain mental or physical characteristics. It is hardly likely that, without more, the anti-trust laws could apply to such organizations whatever their restrictions as to membership.¹⁷⁰

Many organizations, however, have either in the national or local scene, acquired an economic power of great significance. Membership in them will often be a determining factor in the success or failure in a calling or business.¹⁷¹ Some of these organizations, through their property holdings of places of assembly, may substantially affect trade and commerce by being able to determine who may use such property.¹⁷² Many of these organizations with monopoly power, moreover, have disciplinary bodies prone to assume the right to deal arbitrarily with a member so as to deny him a market for his services.¹⁷³

It would seem that the greater the economic significance which attaches to joining an organization, the less likely it is to fall outside the anti-trust laws when the organization engages in discriminatory or arbitrary limitation of membership.¹⁷⁴ Thus, as we have seen, courts have looked askance

¹⁶⁹ "Whether the conspiracy was aimed at restraining or destroying competition, or had as its purpose a restraint of the free availability of medical or hospital services in the market, the Apex case places it within the scope of the statute." *AMA v. United States*, 317 U.S. 519, 529 (1943). But see *Group Health Cooperative v. King County Medical Society* (Wash. Sup. Ct., July 14, 1950, No. 414538), where the court took the approach that defendants' actions were condonable because done for self-protection and in the public interest.

¹⁷⁰ Traditionally, the rule has been that the courts would not interfere with admission into voluntary associations. *Summers, The Right To Join a Union*, 47 Col. L. Rev. 33, 37 (1947).

¹⁷¹ "Negroes are materially hurt by not getting the advantages of membership in these bodies." Myrdal, *An American Dilemma* 639 (1944). The refusal of the National Press Club to allow William H. Hastie to dine in the club's dining room in Washington, D.C., [N.Y. Star, p. 13 (Dec. 20, 1948)] was the occasion for a correspondent to point out the handicap in their work to members of the press who are not able to get the benefit of talks which occur at luncheons at the club. See letter to the *Washington Post*, p. 15 (December 30, 1948).

¹⁷² Thus, The Daughters of the American Revolution own the only major public assembly hall (Constitution Hall) in the nation's capital. It has regularly refused to allow Negroes as an audience, although now permitting them as performers.

¹⁷³ See Lloyd, *The Disciplinary Powers of Professional Bodies*, 13 Mod. L. Rev. 281 (1950); cf. *Green v. Blake*, [1948] Ir. Rep. 242, 275, where one of the judges adverted to such bodies as "juntas of self-constituted inquisitors."

¹⁷⁴ Note 119 supra; cf. *American Federation of Tobacco Growers, Inc. v. Neal*, 183 F. 2d 869 (C.A. 4th, 1950).

at a union in a monopoly position restricting its membership,¹⁷⁵ or at a limitation on the number of fellows of the College of Physicians of London.¹⁷⁶ The economic significance of belonging to a medical society has led some courts to permit an expelled physician to use mandamus to reclaim his membership.¹⁷⁷ The monopoly position of a billiard company has influenced a court to deny to that company the right to exclude a billiard player, without lawful cause, from entering a tournament sponsored by it.¹⁷⁸ The monopoly position of the American Bowling Congress was an element in recent court attacks against that body because of its exclusion of Negroes and other non-whites.¹⁷⁹ Those attacks led to rescinding of the ban.¹⁸⁰ Where a golf organization, such as the PGA or other sport organization, is an essential avenue to a form of livelihood, it may be doubted that by discriminatory policies, it may block such avenue by racial and creed barriers.¹⁸¹ The economic detriment to the individual golfer who is denied membership in a professional organization is more apparent than likelihood of detriment to the public. Yet even in such case there is detriment to the public in that the public paying the entertainment dollar is denied the full dollar's value because, where restrictions exist, they can never expect to see certain potential contestants.

In some professions, such as law, joining clubs is a recognized method of making professional contacts. The path to success in some professions not infrequently leads to membership in some organization where social and fraternal contact may be important factors in securing clients. Lawyers are notorious "joiners" for that purpose.¹⁸² In various parts of this country, local Elks, Kiwanis, Rotary and Lions clubs have excluded Jews from membership,¹⁸³ and it may be doubted that such organizations have

¹⁷⁵ Page 191 *supra*.

¹⁷⁶ Page 194 *supra*.

¹⁷⁷ *People v. Medical Society of County of Erie*, 24 Barb. (N.Y.) 570 (1857). But cf. *Porter v. King County Medical Society*, 186 Wash. 410, 58 P. 2d 367 (1936); *Weyrens v. Scotts Bluff County Medical Society*, 133 Neb. 814, 277 N.W. 378 (1938).

¹⁷⁸ *Greenleaf v. Brunswick-Balke-Collender Co.*, 79 F. Supp. 362 (Pa., 1947).

¹⁷⁹ The written rules of the ABC contained such restrictions. See the *Official Bowling Guide* (1947-48). In 1949, ABC had a membership of 700,000. See Forster, *A Measure of Freedom* 177-78 (1950).

¹⁸⁰ *N.Y. Times*, p. 1 (May 13, 1950); *ibid.*, § 4, p. 8E (May 14, 1950).

¹⁸¹ See Forster, *A Measure of Freedom* 179-84 (1950).

¹⁸² In June of 1950, an attorney filed a suit in Montgomery County, Md., to restrain the Congressional Country Club from suspending his membership. It was announced in the Washington, D.C. papers that his complaint alleged injury to his "financial and proprietary interests, his business and professional reputation and the social reputation of himself and his family." *Washington Post*, p. 2 b (June 3, 1950).

¹⁸³ See *Anti-Defamation League of B'nai B'rith, Anti-Semitism in the United States in 1947* (1948); *McWilliams, Minneapolis: The Curious Twin*, 7 *Common Ground*, No. 1, at 61 (1946); *Weintraub, How Secure These Rights?* 38-41 (1949).

a welcome sign for Negroes. It remains to be seen whether their economic significance with respect to the effect of membership could be considered great enough to bring the anti-trust laws into play.

The professions have been fertile fields for restraints and monopoly practices. The range of these practices has been wide and has included discriminations based on race or color. Both the law and the spotlight of publicity are gradually making the areas of discrimination contract.¹⁸⁴ But sizable areas still exist, and it is believed that the anti-trust laws are one more weapon which may be used to end those restrictions which have a substantial economic effect.

C. THE RIGHT TO AN EDUCATION

In this country the right to an education at the primary school level is recognized. The source of that right lies in statute rather than in judge-made law. The further one travels from the primary school level, however, the less likely is education to be considered a matter of right.

The Universal Declaration of Human Rights, approved by the General Assembly of the United Nations in 1948, recognizes both a right to an education and a right to an opportunity to be educated.¹⁸⁵ Those rights can have little meaning when the opportunity of one class of persons is substantially unequal to that of other classes because of discriminatory action taken by groups in control of educational facilities. At the lower levels of our educational system this discrimination generally is initiated and maintained by a state, a lesser governmental unit, or persons acting under color of state law. At the higher levels such discrimination is prone to stem from private groups. Usually this inequality of opportunity results from discrimination based upon color, race, or creed. Primarily, it has operated against Jews and Negroes.¹⁸⁶

¹⁸⁴ It is said that the University of Illinois gave its assurance that its professional schools would remove potentially discriminatory questions from their 1949 application forms. Weintraub, *How Secure These Rights?* 55 (1949). See Berger, *The Supreme Court and Group Discrimination since 1937*, 49 *Col. L. Rev.* 201 (1949); Private Attorneys-General: Group Action in the Fight for Civil Liberties, 58 *Yale L.J.* 574 (1949); NAACP, *Civil Rights in the United States in 1948*; Berger, *New York State Law against Discrimination: Operation and Administration*, 35 *Corn. L.Q.* 747 (1950).

¹⁸⁵ See Article 27 of the Universal Declaration of Human Rights. The economic bill of rights formulated by President F. D. Roosevelt included "the right to a good education." Annual Message of the President to Congress, Jan. 11, 1944. The Selected Addresses of Franklin D. Roosevelt 387, 396 (1946).

¹⁸⁶ Forster, *A Measure of Freedom* 117 ff. (1950); Segregation and Discrimination in Higher Education, 10 *Lawyers' Guild Rev.* 209 (1950); Weintraub, *How Secure These Rights?* 10 (1949). See Levene, *The Negro in San Francisco*, 9 *Common Ground*, No. 3, at 16 (Spring, 1949). Discrimination in education as it has existed under state law is comprehensively discussed in Mangum, *The Legal Status of the Negro* c. IV (1940).

Such discrimination may take the form of acknowledged or unacknowledged outright prohibition. It may assume the guise of a quota system, for the most part operating in secrecy, but with a consistency of result which provides its own eloquence. It may take the form of abstaining from employing members of a class as teachers. It may be expressed in a policy of segregation.¹⁸⁷

Discrimination against Jews and Negroes in medical schools has been notorious.¹⁸⁸ But such exclusion or restriction has not been confined to medical schools. For the year 1947, it has been asserted that in the East, "A majority of application blanks used by colleges continued to include discriminatory questions which bore no relation to educational qualification."¹⁸⁹ For 1948, it has been asserted that 86 per cent of the application forms of public and private nondenominational colleges contained questions which could be used for discriminatory purposes.¹⁹⁰ It has been said that in 1947, in the District of Columbia, "Two of the larger universities and most of the smaller schools admit no colored students."¹⁹¹ American University admitted them to some of its schools and not to others.¹⁹² It has been asserted that Princeton traditionally has not had Negro students.¹⁹³ In 1950 it was claimed that in higher education, there is not a single first class graduate school for Negroes from Maryland to Florida and from Texas to Missouri.¹⁹⁴

The 1948 survey of the Anti-Defamation League presents a sorry picture of discrimination by colleges and universities against Jewish applicants.¹⁹⁵ The application blanks of the college placement agency, the American Schools and Colleges Association, has required a statement of one's religion,¹⁹⁶ as do most of the teacher placement agencies.¹⁹⁷ It is no

¹⁸⁷ See *Prevention of Discrimination in Private Educational Institutions*, 47 Col. L. Rev. 821 (1947).

¹⁸⁸ *Ibid.* See also *Private Attorneys-General: Group Action in the Fight for Civil Liberties*, 58 Yale L.J. 574, 590-91 (1948); 14 *The Key Reporter* 3 (1949); Forster, *A Measure of Freedom* 117 ff. (1950).

¹⁸⁹ *Anti-Defamation League of B'nai B'rith, Anti-Semitism in the United States in 1947*, at 28 (1948). For similar statements and examples in other parts of the country, see *ibid.*, at 35, 48, 60, 66, 68-69, 70, 84, 87. Compare 51 *Time*, No. 21, at 83 (May 24, 1948). As to the use of such forms by Columbia University appointments office, until a complaint was filed with the New York State Commission against discrimination, see 47 Col. L. Rev. 674 (1947).

¹⁹⁰ Weintraub, *How Secure These Rights?* 9, 48 ff. (1949).

¹⁹¹ *President's Committee on Civil Rights, To Secure These Rights* 9 (1947).

¹⁹² *Ibid.*

¹⁹³ Myrdal, *An American Dilemma* 633, 1367 (1944).

¹⁹⁴ 8 *Southern Patriot*, No. 4, at 3 (April, 1950).

¹⁹⁵ Weintraub, *How Secure These Rights?* 46-48 (1949).

¹⁹⁶ *Ibid.*, at 60-61.

¹⁹⁷ *Ibid.*

answer to say that somewhere there may be a school where an applicant might be admitted to take the course of study he desires. In some instances this is simply not so. In other instances, distance and expense make educational facilities beyond the reach of many. An applicant to one school, who after some time is given a polite rejection, may lose half a year or more before he can find a school of subsequent choice which will admit him. Future success, moreover, is often related to the prestige of the school from which one is graduated. As a matter of custom, certain large industrial companies regularly interview senior students of particular schools. At the lower school level, segregated schools not only cause poorer educational facilities to be available to white as well as Negro children, but results in inferior education being provided to Negro children than to white students. The general public is not only burdened with an inadequate, discriminatory lower school system, but it foots a higher tax bill in support of a dual school system. At the higher level, segregation means unequal educational opportunities with a consequent dearth of Negroes in the professions.¹⁹⁸

While the anti-trust laws, for the most part, are not concerned with the person who commits a restraint single handed, it is not often that one person by himself can accomplish a restraint of widespread significance. Decisions made by our educational institutions are wont to be more than the result of one man's acts. In almost every one of these forms of discriminations, group action and group agreement may be found. The policy may be one determined by the board of trustees, by faculty meetings, and the like. Subject to suit under the Sherman Act are parent and subsidiary who have combined to violate that Act.¹⁹⁹ It may be doubted that a school and its board should be able to escape the anti-trust laws on the basis of being a single entity;²⁰⁰ this is all the more so where a school may occupy a monopoly position.²⁰¹ It is possible, also, that certain national associations in the educational field have played their part in establishing and maintaining discriminatory practices.²⁰²

In some states legislation has been enacted designed to prevent such discrimination; more statutes of this nature may be expected.²⁰³ The

¹⁹⁸ Negro Year Book 55-59 (1947); 5 Southern Patriot, No. 10 (October, 1947).

¹⁹⁹ Schine Chain Theatres, Inc. v. United States, 334 U.S. 110 (1948).

²⁰⁰ Chamber of Commerce v. FTC, 13 F. 2d 673 (C.A. 8th, 1926).

²⁰¹ Dr. Bonham's Case, 8 Coke *107a; United States v. Klearflax Linen Looms, Inc., 63 F. Supp. 32 (Minn., 1945).

²⁰² See Weintraub, How Secure These Rights? 60-61 (1949).

²⁰³ 47 Col. L. Rev. 821, 823 ff. (1947); Forster, A Measure of Freedom 136 ff. (1950); Washington Post, p. 9 (March 30, 1949).

courts, on the other hand, have been reluctant to interfere with the discretion of private schools in admitting applicants.²⁰⁴ It is apparent that higher education is becoming increasingly important as the primary stepping stone to the making of a livelihood. The role of higher educational institutions and vocational schools in the professions and in business is such as to carry with it a great responsibility to those seeking an education. Educational institutions, because of their reputations, facilities, the courses they specialize in, their location, their economic value in the eyes of big business, may have as substantial a bearing on access to various fields of trade and commerce as the guilds of old with their restrictive apprenticeship practices. The right of a school to practice restraints, therefore, is not one which should enjoy sanctuary from the anti-trust laws.²⁰⁵

IV. THE RIGHT TO HAVE A HOME: RESTRICTIONS ON HOUSING

"Equality of opportunity to rent or buy a home should exist for every American."²⁰⁶ In recent years, the widespread use of restrictive covenants in the United States has highlighted the absence of such opportunity.²⁰⁷ Judicial enforcement of restrictive covenants based upon race has now been barred by the Supreme Court,²⁰⁸ and it is believed a similar ban would exist against restrictive covenants based upon creed. The question of validity of agreements or understandings not to rent or sell to Negroes,

²⁰⁴ *People v. Northwestern University*, 333 Ill. App. 224, 77 N.E. 2d 345 (1948), cert. den. 335 U.S. 829 (1948). Progress has recently been made in limiting discrimination and segregation on the graduate level by state universities. In *Sweatt v. Painter*, 339 U.S. 629 (1950), the Court held that the law school which Texas had provided for Negro students was "unequal" to the white school, but in so doing set up criteria determining equality which should knock out segregated graduate schools. In *Sipuel v. Board of Regents*, 332 U.S. 631 (1948), the Court had stated that when a Negro applied to the University of Oklahoma Law School, there being no other state law school, the state must provide for such other school in conformity with the equal protection clause of the Constitution. See Frank, *The United States Supreme Court: 1947-48*, 16 *Univ. Chi. L. Rev.* 1, 21 n. 83 (1948). *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950), held that after a Negro had been admitted to a graduate school he could not be segregated by special seating, dining, and library restrictions.

²⁰⁵ What has been said in another connection would seem applicable here. In *Alger v. Thacher*, 19 *Pick. (Mass.)* 51, 54 (1833), it was said that contracts of restraint: "tend to deprive the public of the services of men in the employments and capacities in which they may be most useful to the community. . . . They discourage industry and enterprise, and diminish the products of ingenuity and skill."

²⁰⁶ President's Committee on Civil Rights, *To Secure These Rights* 67 (1947).

²⁰⁷ *Ibid.*, at 67-70; Myrdal, *An American Dilemma* 624 (1944); *Current Legal Attacks on Racial Restrictive Covenants*, 15 *Univ. Chi. L. Rev.* 193 (1947); *Race Discrimination in Housing*, 57 *Yale L.J.* 426 (1948). It has been estimated that in 1947 there were more than 200 restrictive covenant cases pending before the courts. Vaughn, *Restrictive Covenants Based on Race*, 5 *Nat. Bar. J.* 381, 399 (1947).

²⁰⁸ *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Hurd v. Hodge*, 334 U.S. 24 (1948).

Jews, or other members of a class because of race, color, or creed²⁰⁹ has not been settled by the Supreme Court.²¹⁰ And in at least one jurisdiction, an action for damages for breach of a racial restrictive covenant still lies.²¹¹ It is believed, however, that such agreements are within the reach of the anti-trust laws.

The nation's capital furnishes a laboratory example to test the application of the anti-trust laws. "500 Attend Rally to Prevent Sale of Homes to Negroes." This was the headline of a news item on page 1 of the *Washington Post* of November 9, 1947. "The home owners were urged by speakers to sign cards,²¹² agreeing to a covenant restricting the sale of their homes to members of the Caucasian race. . . . Late yesterday afternoon Association President Liebrand reported that 800 signatures of homeowners were collected partly from the audience and partly through solicitation of volunteers during the past several days. . . .²¹³ 'If the white

²⁰⁹ For a suit to oust a Jewish homeowner on the basis of such a covenant, see complaint in *Garber v. Tushin* (Circuit Ct., Montgomery County, Md., No. 12,894 Equity, 1947). An aroused public opinion forced the plaintiffs to withdraw the suit.

²¹⁰ The former president of the Federation of Citizens' Associations in Washington, D.C., in 1948 proposed a plan as a substitute for restrictive real estate covenants. Property owners would grant provisional options to purchase to "square captains" living in each city square of a neighborhood. The captain would be appointed by his citizens' association. If an owner desired to sell, he would notify the captain who would ask his association for a report on the prospective buyer. If the association thought the latter undesirable, a new buyer would be found. The owner would then have a certain time within which he could decide whether to sell to the "unobjectionable" buyer, to another buyer approved by the association, or not at all. If the owner sold to an approved buyer, the captain would waive his option. Exercise of the option would prevent sales to undesirable purchasers. "Mr. Newell said he contrived this plan after conferring 'with Constitutional lawyers and the heads of organizations who are interested in protecting private property in the District. . . .' Mr. Newell had been asked by the Executive Committee of the Federation of Citizens' Associations to study and devise a means of protecting property which would not conflict with the decision of the Supreme Court." *Evening Star* (Wash., D.C.), p. 1 (June 4, 1948). There is at least one reported instance of a number of area residents combining to buy property to prevent its coming into Negro hands. *Washington Post*, p. 4 B (July 19, 1948); *The Guide* (Wash., D.C.), pp. 4, 8 (July 29, 1948). Whether enforcement of the option would be consistent with the Supreme Court's decisions in the restrictive covenant cases is doubtful. At any rate, it is believed that this scheme falls within the Sherman Act.

²¹¹ *Weiss v. Leason*, 359 Mo. 1054, 225 S.W. 2d 127 (1949). For devices used to circumvent the restrictive covenant decisions, see Ming, *Racial Restrictions and the Fourteenth Amendment: The Restrictive Covenant Cases*, 16 *Univ. Chi. L. Rev.* 203 (1949); *Use of Options To Purchase Land To Control Occupancy*, 15 *Mo. L. Rev.* 77 (1950).

²¹² The cards read as follows: "It being my desire to continue, as far as possible, the real idea of the founders of Congress Heights, to discourage the sale, rent, or occupancy, of any dwelling within the confines of Congress Heights, to any person not of the Caucasian race, I hereby agree, upon my word of honor, to carry out said purpose and agree to sign a covenant, when presented to me, which will forever forbid my property from being used by any person not of the Caucasian race, and will have same recorded in the Office of the Recorder of Deeds for the District of Columbia, to become a part of the deed which conveyed said property to me."

²¹³ The term "association" refers to Congress Heights Citizens' Association.

neighbors band together,' Newcomb asserted, 'we will keep them (the Negroes) out regardless of what the Supreme Court does and what Eleanor Roosevelt says.'²¹⁴ It is reported that in 1950 a Citizens' Protective Alliance was formed in the District of Columbia to protect the "environment" of certain neighborhoods from encroachment by Negroes.²¹⁵

Section 3 of the Sherman Act, which is applicable to the District of Columbia, prohibits agreements and conspiracies in restraint of trade and commerce.²¹⁶ There can be no doubt that the above recital shows a concert of action or agreement to restrict the sale of houses. Since the Supreme Court has said such restrictions are against national policy,²¹⁷ it would seem to follow that they could not be claimed to be "reasonable." We come, then, to the question of whether there is trade and commerce involved. That question we shall discuss in a larger context than the District of Columbia.

²¹⁴ The constitution of the Federation of Citizens' Associations limits its membership to white civic organizations. A recent amendment conditions membership upon officers and delegates not belonging to subversive organizations. *Washington Post* (D.C.), pp. 1, 12 (April 4, 1948). In view of the economic power of this federation, the validity of its exclusion of Negro organizations is not free from doubt. Branches of this Citizens' Association still continue to circumvent the Supreme Court's decisions on restrictive covenants. The following excerpt is taken from *The Guide*, September 30, 1948, a neighborhood newspaper which circulates in the Northeast section of Washington.

"Our neighbor, Fred Nerlich, general legman for the Woodridge Covenant Alliance, was in last evening to deliver his weekly report on the number of squares covered and volunteer block workers obtained in the current project of the Alliance to cover the Greater Woodridge area with pledges to keep this community white. To date Fred has volunteer helpers in a house-to-house canvass in 45 squares, and an even larger number of persons actually engages, as in the larger squares two or more workers are cooperating in getting everybody signed up.

"E. T. Deibel, 3400 22nd St., finished his entire square with 100 per cent compliance in less than two hours. He made only one call on each neighbor; he carried the pledge cards with him (and they really tell the whole story). As he handed one to each homeowner he said something like this: 'Here, this is important, please read it. It has the backing of your Citizens' Association. Do you want to continue to have white neighbors? If so, just sign this card.' The response was both prompt and satisfactory.

"One question that has sometimes been put to Mr. Nerlich concerns the 'constitutionality' of these pledges not to sell real estate in the Woodridge area to persons other than those of the white race. These questioners have misinterpreted the ruling of the Supreme Court on the validity of restrictive covenants. The court did not hold such covenants to be illegal; in fact, its decision plainly stated that 'so long as such agreements are voluntarily maintained they violate no law.'

"The Supreme Court's ruling only prohibits other courts from enforcing covenants that involve racial restrictions, and there is no question of constitutional or other legal rights involved in the maintenance of voluntary agreements. In fact, some lawyers believe that the question of recovering damages for depreciation of property values resulting from the sale of property in a covenanted area, in violation of a restrictive covenant, has not been affected by the Supreme Court's decision, and hold that this question still awaits determination."

²¹⁵ *Evening Star* (Wash., D.C.) (Sept. 8, 1950).

²¹⁶ 26 Stat. 209 (1890), 15 U.S.C.A. § 3 (1950).

²¹⁷ *Hurd v. Hodge*, 334 U.S. 24, 34 (1948).

We have in these agreements, an agreement or conspiracy to restrict the market of each of the conspirators as sellers or landlords; conversely, there is a conspiracy to restrict the market of buyers and renters.²¹⁸ "Discrimination in housing results primarily from business practices."²¹⁹ "Housing segregation represents a deviation from free competition in the market for apartments and houses and curtails the supply available for Negroes."²²⁰ Restrictions limit the supply of housing to Negroes and thus enhance prices.²²¹

"Housing is a necessary of life."²²² Real property is sold and rented every day; it is an item of trade and commerce of significant size in number of transactions and dollar volume.²²³ Offers to enter into such transactions fill pages daily in newspapers all over the country.²²⁴ With respect to cities near state lines, and in the larger cities, there is a direct, substantial flow of interstate commerce involved in the lease or sale of property within the city or its suburbs. Washington residents are constantly in transit to and from Virginia or Maryland, looking for homes or business in those states near Washington, and residents of those states are constantly going to and from Washington for similar purposes. The Wash-

²¹⁸ The effect of these restrictions on the landowners' market was noted by Judge Edgerton in *Hurd v. Hodge*, 162 F. 2d 233, 242 (App. D.C., 1947), rev'd 334 U.S. 24 (1948).

²¹⁹ President's Committee on Civil Rights, *To Secure These Rights* 67 (1947). The report goes on to say: "These practices may arise from special interests of business groups, such as the profits to be derived from confining minorities to slum areas, or they may reflect community prejudice. One of the common practices is the policy of landlords and real estate agents to prevent Negroes from renting outside of designated areas. Again, it is 'good business' to develop exclusive 'restricted' suburban developments which are barred to all but white gentiles."

²²⁰ Myrdal, *An American Dilemma* 618 (1944). "Covenants prevent free competition for a short supply of housing and curtail the supply available to Negroes." Dissenting opinion in *Hurd v. Hodge*, 162 F. 2d 233, 244 (App. D.C., 1947), rev'd 334 U.S. 24 (1948).

"The really distinctive factor underlying these problems stems from the fact that, among the basic consumer goods, only for housing are Negroes (and certain other minorities) traditionally excluded from freely competing in the open market." Weaver, *Housing in a Democracy*, 244 *Annals* 95, 97 (1946). Myrdal points up the effect of this discrimination by his observation that "housing segregation is a factor which generally helps Negro business." Myrdal, *An American Dilemma* 308 (1944).

²²¹ *Mays v. Burgess*, 147 F. 2d 869, 877 (App. D.C., 1945), cert. den. 325 U.S. 868 (1945).

²²² *Block v. Hirsh*, 256 U.S. 135, 156 (1921).

²²³ Judge Edgerton, dissenting in *Mays v. Burgess*, 147 F. 2d 869 (App. D.C., 1945), remarked, at 875: "Since housing is a necessity of life, as an original question a contract of 32 property-owners that they and their successors will not sell houses to Negroes would seem to stand on much the same plane as a contract of 32 grocers that they and their successors will not sell to Negroes. The ultimate purpose of the combination was the advantage of its members, but its immediate purpose was to withhold a necessity from many persons by limiting the capacity of owners to transfer their property."

²²⁴ Not uncommonly, newspapers of one state carry advertisements for the sale or rent of realty in another; for instance, advertisements of property in Florida, or advertisements of property for summer residence.

ington newspapers carry considerable advertising for the sale or rent of realty in nearby states. The indirect effect of a transfer of occupancy or sale of real property on trade and commerce is very great. Businesses are founded on the process of effecting a sale or rental of realty; real estate brokers are legion; the builder, the painter, the electrical worker, and the rise of a residential district which gives birth to a new center of commerce for the grocer, the butcher, and others are all activated by the transfer of realty.²²⁵

Discriminatory housing practices have a distinct effect upon businesses, employment, and interstate transportation.²²⁶ The making of restrictive agreements would therefore seem to come within the anti-trust laws under established conceptions of conspiracy,²²⁷ and the monopolistic effect of a series of restrictive covenants would surely seem to merit the concern of the anti-trust laws.²²⁸

Discrimination in housing is still prevalent.²²⁹ Apart from restrictive covenants, neighborhood associations have acted as organized extra-legal agencies to keep Negro and white residences separated by devices ranging from persuasion to bombing.²³⁰ Myrdal mentions, as one such association, the Washington Park Court Improvement Association in Chicago.²³¹ The Seven-Mile Road Fenelon Improvement Association and the National Workers League are said to have engaged in a variety of activities, designed to prevent occupancy by Negroes of the Sojourner Truth Hous-

²²⁵ Disturbances in social relations because of segregation to the extent of violence, and existence of slums, have been widely noted. See *Mays v. Burgess*, 147 F. 2d 869, 876 ff. (App. D.C., 1945), cert. den. 325 U.S. 868 (1945); *Racial Restrictive Covenants—The Functional Approach*, 7 *Lawyers Guild Rev.* 260 (1948). And, of course, such disturbances and the existence of substandard conditions, have a marked economic effect on trade and commerce. The interference of restrictions with transactions involving inheritance, tax sales, foreclosures, and mechanics liens has been noted, Vaughn, *Restrictive Covenants Based on Race*, 5 *Nat. Bar J.* 381, 394-96 (1947). The economic consequences of the 1947 riots in Detroit are noted in *Negro Year Book* 241 (1947). For the effect of racial restrictive covenants on public housing as well as upon the economic and social condition of the restricted, see letter of Raymond M. Foley, Administrator, Housing and Home Finance Agency, to the Department of Justice, Nov. 4, 1947, contained in the government's brief in *Shelley v. Kraemer*, 334 U.S. 1 (1948).

²²⁶ A letter from the Secretary of the Interior to the Department of Justice, contained in the government's brief in *Shelley v. Kraemer*, 334 U.S. 1 (1948), pointed out that restrictive covenants against Indians, with the consequent difficulty of getting housing for them, have made it difficult for them to take employment outside reservations. See note 244 *infra*.

²²⁷ *Nash v. United States*, 229 U.S. 373, 378 (1913).

²²⁸ Compare *Hershey Chocolate Corp. v. FTC*, 121 F. 2d 968 (C.A. 3d, 1940). Concerns which enjoy greater consumer demand than others may not agree to limit their sales to a limited number of specified purchasers. See page 211 *supra*.

²²⁹ Forster, *A Measure of Freedom* 201 (1950).

²³⁰ Myrdal, *An American Dilemma* 624 (1944).

²³¹ *Ibid.*

ing Project in Detroit.²³² It has been said that in 1947, in the LaJolla, California, area "[t]he Emerald Bay (Cal.) Community Association refused to sell property in that area to Jews."²³³

Another important bar is illustrated by Stuyvesant Town in New York, of which the Metropolitan Life Insurance Company is the developer. Until very recently, Negroes were barred from the development.²³⁴ Veterans' Housing Committees have screened applications on a racial basis.²³⁵ If this sort of discrimination can be shown to have been the result of agreement, express or implied, between parent and subsidiary corporations, between individual entrepreneurs or between them and corporations, the anti-trust laws would seem applicable.²³⁶

A primary factor in the use of restrictive covenants and in the maintenance of segregated neighborhoods is the real estate broker. Real estate associations often use standard restrictive agreements and realtors often unite to effect restrictions or keep "objectionable" people out of unobjectionable neighborhoods.²³⁷ The Code of Ethics of the National Association of Real Estate Boards provides: "A Realtor should never be instrumental in introducing into a neighborhood a character of property or occupancy, members of any race or nationality, or any individual whose presence will be clearly detrimental to property values in that neighborhood."²³⁸ The Code of Ethics of the Washington, D.C., Real Estate Board is more blunt: "No property in a white section should ever be sold, rented, advertised, or offered to colored people. In a doubtful case advice from the Public Affairs Committee should be obtained."²³⁹

²³² These included circulating petitions, distributing inflammatory handbills and picketing. *Negro Year Book* 233 (1947). It is said that the President and Secretary of the National Workers League were indicted for conspiracy but did not come to trial on the charges. *Ibid.*

²³³ Anti-Defamation League of B'nai B'rith, *Anti-Semitism in the United States in 1947*, at 61 (1948). The El Monte (Cal.) Chamber of Commerce has been reported as active in 1947 to revive restrictive covenants. *Ibid.*

²³⁴ *Race Discrimination in Housing*, 57 *Yale L.J.* 426, 437-44 (1948); *Daily Compass*, p. 4 (August 25, 1950).

²³⁵ *Seawell v. MacWithey*, 2 N.J. 563, 67 A. 2d 309 (1949).

²³⁶ Pages 178-79 *supra*.

²³⁷ *Race Discrimination in Housing*, 57 *Yale L.J.* 426, 431 n. 23 (1948).

²³⁸ Article 34. The Portland, Oregon, Realty Board has a similar provision in its Code of Ethics. It has been said that this Board has made it very difficult for the Negro population to expand normally. *Negro Year Book* 214 (1947).

²³⁹ Number 15. It has been remarked that this policy of the Washington realtors has been supported by nonmember dealers, banks and loan companies. *Race Discrimination in Housing*, 57 *Yale L.J.* 426, 454 n. 131 (1948); National Committee on Segregation in the Nation's Capital, *Segregation in Washington* 30 ff. (1948). Compare advertisement in *The Guide* (Wash., D.C.), p. 7 (July 29, 1948): "If you want to sell your house, I deal only with the Caucasian race. . . ."

It is believed that the anti-trust laws may properly be applied to all of the foregoing types of restrictions.²⁴⁰ It is true that some courts have narrowly construed their state statutes to find realty not within the scope of their acts.²⁴¹ But as we already have pointed out, the transfer of real estate is a business activity and constantly comprises or initiates a significant part of the trade and commerce which goes on daily in every community.²⁴² And many activities with respect to realty have been held to be within the anti-trust laws.²⁴³

V. RIGHT TO TAKE CONCERTED ACTION AGAINST RESTRICTIONS

The instinct to combat restraint by some form of group action is strong in those who feel the whip lash of the restraint or by those who sympathize with their less fortunate brethren. The 1947 Actors Equity contract with the League of New York Theatres prohibited Equity members from ap-

²⁴⁰ Compare *United States v. Nat'l Ass'n of Real Estate Boards*, 339 U.S. 485 (1950), applying anti-trust laws to the fixing of brokers' commissions.

²⁴¹ See note 27 *supra*.

²⁴² In *Block v. Hirsh*, 256 U.S. 135, 156 (1921), the Court said: "The space in Washington is necessarily monopolized in comparatively few hands, and letting portions of it is as much a business as any other."

²⁴³ The rights of an owner who has thrown open his premises for commercial purposes to discriminate against those who seek access to occupiers of the premises are limited. See *Federal Waste Paper Corp. v. Garment Cent. Capitol*, 268 App. Div. 230, 51 N.Y.S. 2d 26 (1944), *aff'd* 294 N.Y. 714, 61 N.E. 2d 451 (1945) (waste paper collector could maintain injunctive action). An agreement between stone-mason contractors to restrain competition in supplying foundations for buildings, was construed to concern a "commodity of common use" so as to come within the New York anti-trust laws. *People v. Amanna*, 203 App. Div. 548, 196 N.Y. Supp. 606 (1922). In *United States v. Mortgage Conference of New York* (S.D.N.Y., Civ. No. 37-247, 1946), a suit against most of the leading banks in New York, the complaint alleged, among other things that, "defendants prepared, published, kept current, and distributed maps of each section of New York City showing blocks on which Negroes and Spanish speaking persons resided; refrained from making mortgage loans on properties in such blocks; and induced owners of real estate in certain sections of New York City to refuse to permit Negroes and Spanish speaking persons to move into such sections." A consent decree entered into in June, 1948, enjoins concerted action to refrain from competing for mortgages or leases because of the race or nationality of the owner or occupant.

The common-law rule prohibiting an agreement interfering with a person's right to exercise his trade, applies to an interference with his right to engage in the real estate brokerage business. An owner of a theatre leased to another has been held entitled to maintain a Sherman Act action for injury to his business and property where his lessee had given up because of restraints by motion-picture distributors. *Roy v. Bolduc*, 140 Me. 103, 34 A. 2d 479 (1943); *Kislak v. Muller*, 100 N.J. Eq. 110, 135 Atl. 673 (1927); *Kislak v. Artof*, 13 N.J. Misc. 129, 176 Atl. 899 (1934); see *Roush v. Gesman Bros. & Grant*, 126 Iowa 493, 102 N.W. 495 (1905); *Steinfeld v. Hausen*, 180 N.Y. Misc. 295, 40 N.Y.S. 2d 683 (1943), modified 269 App. Div. 336, 55 N.Y.S. 2d 722 (1945); cf. *Application of Richardson*, 184 P. 2d 642 (Okla., 1947); *East Orange Amusement Co. v. Vitagraph, Inc.*, C.C.H. Trade Reg. Serv. ¶52,965 (D.C.N.J., 1943).

pearing at the National Theatre in Washington, D.C., after May 31, 1948, unless the National's anti-Negro rule was ended. Many of the Theatre Guild's members were said to have signed a pledge not to permit their plays to be presented in the National while that discriminatory rule was in effect.²⁴⁴ Not long ago, it was reported that the Robert T. Freeman Dental Society had boycotted two dental supply houses until an agreement was procured from the latter not to effect segregation at professional demonstrations or educational programs.²⁴⁵

As we have seen, good motives are not considered a justification for the imposition of restrictions.²⁴⁶ It is not clear, therefore, at what point organized pressure, which itself restricts the carrying on of trade and commerce, but which is designed to remove a broader restriction, comes within the Sherman Act. It has been argued that picketing to remove discrimination is not for an unlawful purpose and should be upheld.²⁴⁷ It has been held that picketing by non-employees to encourage boycott of stores which did not employ Negroes involved in a labor dispute, was within the Norris-La Guardia Act and not enjoinable.²⁴⁸ Concert of action to remove a restriction is more likely to be favored by the courts than concert of action to impose restrictions.²⁴⁹ It might also be argued that there is sufficient public policy against racial discrimination,²⁵⁰ that the courts would not lend their processes to one seeking to enforce discrimination through an anti-trust suit.²⁵¹

²⁴⁴ Variety, p. 49 (March 3, 1948). It is said that most of the leading playwrights signed. Ibid. In June, 1948 the National announced that it would cease showing plays in August and would be converted into a motion picture theatre. Evening Star (Wash., D.C.), p. 1 (June 3, 1948). The National has still not returned to legitimate shows.

²⁴⁵ Evening Star (Wash., D.C.), p. A-7 (May 2, 1948). For other examples of concerted action against discrimination, see Myrdal, *An American Dilemma* 1261 (1944).

²⁴⁶ See page 189 supra.

²⁴⁷ Murray, *The Right to Equal Opportunity in Employment*, 33 Calif. L. Rev. 388 (1945). See Mangum, *The Legal Status of the Negro* 178-80 (1940).

²⁴⁸ *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938). The picketers carried signs which read: "Do your part! Buy Where You Can Work! No Negroes Employed Here." Said the Court at 561: "The desire for fair and equitable conditions of employment on the part of persons of any race, color, or persuasion, and the removal of discriminations against them by reason of their race or religious beliefs is quite as important to those concerned as fairness and equity in terms and conditions of employment can be to trade or craft unions or any form of labor organization or association."

²⁴⁹ Compare *Eubank v. Richmond*, 226 U.S. 137 (1912) with *Cusack Co. v. Chicago*, 242 U.S. 526 (1917). See *Hughes v. Superior Court*, 339 U.S. 460 (1950).

²⁵⁰ *Hurd v. Hodge*, 334 U.S. 24 (1948).

²⁵¹ Compare *Maltz v. Sax*, 134 F. 2d 2 (C.A. 7th, 1943), cert. den. 319 U.S. 772 (1943); *Moore v. Mead Service Co.*, C.C.H. Trade Reg. Serv. ¶62,674 (C.A. 10th, 1950).

CONCLUSION

The law is not an omnipresent panacea for restrictions on civil rights. But, despite the Jeremiahs who deny all efficacy to efforts through laws to efface discrimination, and whose favorite cure is "time," eradication of discrimination through law has been an important and successful means of attacking this problem.²⁵² Some discrimination has been eliminated through civil-rights laws in various states; more is in the process of erasure through anti-discrimination laws of the states; and the law, speaking through the Supreme Court, has recently struck a substantial blow against discrimination through its decision upon restrictive covenants.²⁵³

We may hope that the anti-trust laws in the future may be increasingly applied to eliminate restraints upon our civil rights. The approach of government authorities in this field is likely to be slow. Not only is the state of the law largely untried, but traditional forms of anti-trust violations such as price fixing, agreements not to compete, cartels and patent agreements are numerous enough to keep limited enforcement staffs fully occupied.²⁵⁴ In some states where civil liberties are most likely to be impaired in accordance with local sentiment, it is hardly likely that state authorities would invoke their anti-trust acts, however broad they may be. Yet an occasional use of the anti-trust laws by the public authorities to effect a social as well as an economic purpose has occurred in the past and may occur in the future.

It may well be the private litigant who will make law in this field. Prior to 1914, private litigants could not, under the court decisions, obtain injunctive relief against Sherman Act violations.²⁵⁵ But by statute,²⁵⁶ injunctive as well as treble damage relief is available to private litigants.²⁵⁷ Failure to make out a case for damage does not necessarily require denial of an injunction to a private suitor.²⁵⁸ And through injunctive relief pri-

²⁵² See Spitz, *The New York State Law Against Discrimination*, 20 N.Y. St. B.A. Bull. 8 (1948); Maslow, *The Law and Race*, 244 *Annals* 75 (1946).

²⁵³ See note 208 *supra*.

²⁵⁴ Compare Chafee, *Government Control of Mass Communication* 584 ff. (1947).

²⁵⁵ *Paine Lumber Co. v. Neal*, 244 U.S. 459 (1917).

²⁵⁶ Section 16 of the Clayton Act. 38 Stat. 737 (1914), 15 U.S.C.A. § 26 (1941).

²⁵⁷ *Tigner v. Texas*, 310 U.S. 141, 148 (1940).

²⁵⁸ *Mid-West Theatres Co. v. Co-operative Theatre*, 43 F. Supp. 216 (Mich., 1941). A plaintiff who has been deprived of an opportunity to compete need not be in the same business as the defendant. *Roseland v. Phister Mfg. Co.*, 125 F. 2d 417 (C.A. 7th, 1942).

vate litigants have, in recent years, helped expand the scope of the anti-trust laws.²⁵⁹

Restraints by private persons upon civil liberties and especially racial discrimination are under attack from many quarters. But today and tomorrow men will suffer deeply, and the course of their lives will be changed by contact with social and economic restraint on their civil rights, on what they would desire to do today, and on what they would hope to be tomorrow. To them, the passage of time is no answer, nor is the applicability of some law protecting someone else from what they have experienced. The anti-trust laws in one form or another exist across the nation and in every state. It is thought they are available to correct many of the wrongs we have discussed. It is hoped that their application will be one more means "To Secure These Rights."

²⁵⁹ *Bigelow v. RKO Radio Pictures, Inc.*, 162 F. 2d 520 (C.A. 7th, 1947), cert. den. 332 U.S. 817 (1947).