

limited to this group, the author refers to the small and middle-sized law offices and states: "While it is difficult to distinguish the majority of these lawyers from individual practitioners in terms of social background, training and type of practice, it is likely that the middle-sized firms, at any rate, may constitute something like a middle class of the metropolitan bar."¹⁷ The only authority cited for this statement is a footnote that refers to a classification made by the author of random samples of type of law school attended; the number in the sample and method of selection is not discussed. This footnote may justify the author's statement as to training, assuming the validity of his statistical test, but there is no support for his statement that equates the social background and type of practice with that of the individual practitioner. The reader is left to conclude that the unfavorable picture drawn of the individual practitioners, as to these factors, applies to lawyers in small and middle-size firms. This leaves only the larger firms. They remain relatively unsullied until the conclusion when it appears that they are guilty of "unhealthy hypocrisy" and that they prefer to punish rather than to use their power to achieve reforms.

Placing to one side the gross misuse of the material that came out of the interviews, the author has produced information of value and importance. Although the lawyers interviewed are not a fair sample of the individual bar, they represent a group, perhaps a sizable group of practicing lawyers. The problems reflected by their experiences cannot be ignored. Unfortunately, this book will not advance the day of serious consideration and action.

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¹⁷ Pp. 18-19.

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Price Discrimination Under the Robinson-Patman Act. By FREDERICK M. ROWE. Boston: Little, Brown & Company, 1962. Pp. xxx, 675. \$22.50.

The watched pot sometimes does come to a boil, and Mr. Rowe's occasional essays, simmering in the law reviews these last ten years, plus his substantial contribution to the longest, the best, and the most reviled chapter of the Report of the Attorney-General's National Committee to Study the Antitrust Laws¹ are blended here into an antitrust classic. Little has been missed, and every issue touched is clarified. One can profitably pick it up for a case, a discussion, a list of citations and comments, but even the busiest practicing lawyer is best advised to read it through. Those to whom the book's always vigorously stated opinions are least congenial will benefit from it most. Mr. Rowe insists that for effective counseling and advocacy one needs to know the

¹ *Antitrust Policy in Distribution*, ATTY. GEN. NAT'L COMM. ANTITRUST REP. 129-221 (1955).

economic setting of a pricing practice, the origins and objectives of the act, and "above all, counsel must not only know where the cases stand today, but must also develop an understanding of how the law arrived where it is, and a sense of where it may be going in the future."² Easier to say than do, but most gratifying to see. The non-lawyer might as well confess a sneaking envy of the unity of theory and practice in legal scholarship. The teacher in class, the lawyer advising a client, both must convey that law never is, law always is about to be. Law is, as Holmes said, nothing more pretentious than a prediction of what the courts will do when a given set of facts is presented to them; hence the one purpose in plowing through cases and comments is to verify or disprove the hypothesis of the courts' action. But to make sense of the facts, give them meaning, and get them coherently stated and laid alongside the legal standard is economic analysis—done perforce on the run, but not to be evaded, on pain of losing your case. Mr. Rowe's eleven pages of the "elementary economics of Robinson-Patman" make his the best book on the subject, books by economists included.

There is no point in trying to summarize the work: Those not familiar with the subject can do better reading the detailed table of contents; those who are can rest assured it's all there. This review will try to indicate one substantial inadequacy of economic analysis, and a disagreement as to the policy conclusions.

It is almost inevitable that anyone familiar with Robinson-Patman develops an allergy to "cost" and denies that it has much to do with price in a competitive market: "[P]rice variations are *not* causally based on costs, but on the interplay of manifold economic pressures."³ But this is true only in the sense that price results from the interplay of both cost and demand, and expresses the point where they are equal—where to put any more on the market takes away more than it brings. There is no single "cause," but rather two acting together; cost is not sufficient to determine price, but it is necessary, it is not just one of those "manifold economic" things. Where cost is less than sales realization, there is a pressure to expand; where it is more, there is an inducement to contract. And where an apparent inducement is being resisted, the flag is up to show that there is some block to normal conduct. Thus price discrimination signals some temporary or permanent distortion in the competitive structure, and there is no point in talking it away by arguing, even if truly, that it is a Good or Bad Thing. Hence, the real "critique of cost justification"⁴ is not that prices are determined by a lot of forces⁵ but rather that the lengthy and confusing rigmarole prescribed by Robinson-Patman has nothing to do with costs as they exist in the real world and influence business conduct. If a group of businessmen systematically followed the same discriminatory pattern, it

² P. xii.

⁴ Ch. 10, § C.

³ P. 31.

⁵ P. 305.

would be strong evidence of collusion, but no economic discrimination would ever be implied by violations of the act. Indeed, Mr. Rowe is not shocked by the idea that Robinson-Patman actually compels discrimination in the name of forbidding it.⁶ And if this merely expressed standard legislative hypocrisy, one might note it and go on. But it actually underlies a number of legal issues, whose understanding is incomplete without a better idea of cost: notably the "like grade and quality" and "meeting of competition in good faith." On the former, it is a continuing waste of time to discuss physical similarities and differences: What counts is that grade or quality A has had money spent on it to make it more attractive and hence recoup the added cost, and more. A brand built up by advertising is therefore worth more in the hands of the reseller, and under competition he pays more for it. But the additional value, or the difference, is only true within certain limits—the goods are not merely "different" and hence out of jurisdiction. It is the hope of making them so, thus taking them out of bounds, that leads a manufacturer to brand and differentiate where ordinary business judgment would not require it. And it is everybody's knowledge that this is so that explains the zigzagging of Commission and court doctrines.⁷

Similarly, if the law will not permit cheaper sales to some customers because it costs less to serve them—by blocking cost justification with procedural requirements and such economic novelties that investment in fixed plant is not a cost⁸—the avenue it leaves open is to find somebody reflecting the lower cost in lower prices, whether because his customers are not in competition, or are all of the same type, or because he is taking a calculated risk. In that case, one can meet his lower price, and we have gone from section 2(a) to section 2(b); but the latter would not have much importance if it were not for the roadblocks built into cost-"justification."

And finally, it is a fact that under active competition, it is in the interest of both buyer and seller to reflect cost difference in price difference. Where the law forbids this, there is an inducement to evasion, reflecting credit neither on the law which creates the temptation, nor on those who yield to it. But the peculiar pettifogging atmosphere that surrounds the act, and the simple lack of respect it has among businessmen, bench and bar is due, I think, to a half-realized understanding of the difference between pretense and fact.

The moral of this is that cost is not just one aspect, it pervades both the market and the law, and an attempt to grasp any fact situation as a prelude to counseling and advocacy has got to ask for the cost factors. For this purpose also, it may be noted, the treatment of joint costs and marginal (incremental) costs is quite inadequate largely because of failure to distinguish between short and long run. It may be impossible to distinguish the cost of a single product, but if the expansion of facilities will have different kinds of effects on

⁶ P. 31.

⁷ Pp. 62-76.

⁸ P. 283.

the costs of the various products—if in order to turn out more of A we must also, or need not, take more of B—and if the impact of the differentials can be ascertained, then incremental costs exist and can be measured approximately, even if total costs cannot; and the possibility of changing the production facilities and product mix, at a profit, will determine business conduct and possibly call for Robinson-Patman defense later on.

The disagreement on policy may be more briefly stated. Mr. Rowe sees little hope of legislative change and hence looks to judicial re-interpretation which will bring the Robinson-Patman Act closer to the policy of the Sherman Act. The reviewer was himself of this opinion at one time, but has to confess error. It is true that the bare language of the act could be re-interpreted, but the degree of Mr. Rowe's success is to be measured by the way he has reduced to intellectual order a vast body of judicial doctrine that has grown up around those words, and his very work now, I think, pleads against him. Judges, however intelligent and independent, cannot disregard precedent in all directions, and they cannot do much to change what is truly "a caricature of antitrust." What is important is that they realize that the act must be strictly limited within its own bounds and kept from infecting the Sherman Act enforcement. But the only way to reform the Patman Act itself is to repeal it.

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Narcotics and the Law: A Critique of the American Experiment in Narcotic Drug Control. By WILLIAM BUTLER ELDRIDGE. New York: New York University Press, 1962. Pp. xiv, 204. \$5.00.*

Narcotic Addiction in Britain and America: The Impact of Public Policy. By EDWIN M. SCHUR. Bloomington: Indiana University Press, 1962. Pp. 281. \$7.50.†

Opium is like the finger of God; it smites and it heals. When it heals it is the Gift of Heaven. When it smites it is the Curse of Hell. When it quiets the hacking cough of the tubercular, and stills the agonies of death caused by cancer, it is the kindly Dr. Jekyll; but when it merely satisfies the cravings of addiction, it becomes the hideously cruel monster, Mr. Hyde. It is a Simon Legree, a Slave Master which holds in its clutches a grim army of miserable unfortunates; and this army lends itself as docile prey for the ruthless miscreants who enrich themselves on the weakness and depravity of their brother. . . .

The Treasury Department eagerly awaits the time when an irate public

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