HANDICRAFT AND HANDCUFFS—THE ANATOMY OF AN INDUSTRY

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The number one national mystery today involves neither sex, crime nor violence, but merely the vital question of why we do not have enough houses to shelter our people. By way of solving the mystery nearly everyone concerned has made a public nomination for the villain of the piece. Business claims it's labor, labor says it's business, Republicans blame it on the government, and harassed government officials swear that it's all due to an unkind providence. Best of all, everyone has some evidence to support his viewpoint, for no one seems to be wholly innocent in the affair. However, not every fault of everyone connected with the building industry necessarily contributes to the housing shortage. Realism compels recognition that morality and efficiency are not always related. The inescapable facts about housing, detailed in other articles in this symposium, are that there is not now, and has not been for many years past, enough livable housing in this country to provide decently for the needs of the whole population. The unanimous conclusion of competent investigators regarding the cause of this condition is, as stated by the T. N. E. C.: "Inadequate housing in this and other countries is largely a result of the excessive cost of building. . . . By far the most effective way to provide adequate housing for all income groups, and without which it cannot be provided, is through the substantial reduction of building costs."¹ Since housing is unavailable to the masses of the people because it costs more than they can pay, any significant inquiry into practices and policies in the construction industry must search not for examples of wickedness, but for the causes of the high costs.

It might appear superficially that the easiest way to find the reasons for high costs in building would be to begin with an analysis of all the costs, and then to proceed to a more detailed examination of those that were the largest. There are two objections to this approach. To begin with, the ultimate cost of any building is made up of so many items that—unless the grouping is artificially broad—no single item represents any very large proportion of the total. A greater difficulty is the fact that the comparative size of the cost items themselves will depend upon the nature of the analysis. Thus a conventional breakdown of construction costs may show

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¹ TEMPORARY NATIONAL ECONOMIC COMMITTEE, TOWARD MORE HOUSING (MONOGRAPH No. 8, 1940) 123-124. Hereinafter cited as T. N. E. C. MONOGRAPH 8.

that labor represents 30 per cent of the costs, materials 60 per cent, and profit and overhead 10 per cent.² In this analysis, the breakdown is vertical, and the labor considered is that involved in actual construction work at the site. However, it is obvious that labor is also involved in the manufacture of the materials which go into the building. If an analysis is made which attempts to determine the total labor cost involved in the whole process, from the original extraction of the materials to the final construction job, the result is quite different. On such a horizontal basis the labor cost may be estimated between 70 per cent and 90 per cent.³ So there is this fundamental difficulty in any theoretical approach to the problem: that the significant practices are those which contribute unduly to costs, but that one cannot tell which practices contribute unduly to costs without knowing which ones are significant. The nature of this dilemma should serve as a warning against too ready acceptance of all the glib explanations of the housing "crisis" now appearing in newspapers and popular magazines. However, the lesson of this dilemma is not that an investigation of the problem is impossible, but that no investigation can safely neglect any phase of the entire process.

THE LABOR UNIONS

The aspect of the building business which receives the greatest attention in most discussions of high construction costs is the activity of the building trades labor unions. Exactly what proportion of the labor engaged in construction work is unionized is difficult to determine precisely. The T. N. E. C. reported that in 1936 about 57 per cent of the labor engaged in residential building was organized, and that the percentage was about 72 per cent in nonresidential building.⁴ Undoubtedly the proportion of organized workers has risen since then. In many of the larger cities the A. F. of L. building trades unions dominate the field to a degree that makes it difficult or impossible to get any work done except by members of those unions. This is one field in which the C. I. O. has been unable to compete to any significant extent. The complete dominance of the A. F. of L. is illustrated by the fact that when the C. I. O.'s United Electrical Workers bought an old New York mansion for a national headquarters, they had their fluorescent lighting installed by members of their rival union, the A. F. of L.'s Brotherhood of Electrical Workers. The multitude of building trades unions which dominate labor in the construction field is in turn dominated by a few strong labor groups. The largest and strongest of all the building trades organizations is the Carpenters' union.⁵ This is easily understood when it is realized that more than one third (about 36 per cent) of all the workers employed in construction are carpenters.⁶ Another third of the workers is made up of painters and of laborers and helpers; three more groups—plumbers, bricklayers and masons, and electricians—comprise another 20 per cent of the total.⁷

² *Id.* at 44.

³ *Id.* at 189.

⁴ *Id.* at 50.

⁵ See *Boss Carpenter* (April, 1946) 33 FORTUNE 119

⁶ DEP'T OF COMM., MARKET RESEARCH SERIES NO. 101 (April, 1936) 30.

⁷ *Ibid.*

These six important groups of workers total approximately 90 per cent of all those employed in construction; the remaining 10 per cent being scattered among plasterers, tinsmiths and coppersmiths, structural iron workers, paperhangers, roofers, stonecutters, and others.

There is no doubt that the building trades unions do exert a powerful influence in opposition to the introduction of labor saving methods. Painters are permitted to use brushes of a certain width only—front page headlines report that Union Painters Stop Work on Veterans' Houses—because the brushes are half an inch too wide.⁸ The Painters' union also tries to prevent the use of sprayguns in painting woodwork and the installation of cabinets or other fixtures which have been painted at the factory rather than on the site.⁹ There are similar restrictions in nearly all other fields of construction labor. A cut stone contractor in New York complained to me recently that he could not get contracts on any jobs because his stone was cut to order at the quarry rather than at his own yard. The quarry employed members of the same union as he and the other stone contractors in New York, but local unions insisted that the work be done by local workers. The Department of Justice secured a consent decree some years ago forbidding this very practice¹⁰ but, at the present time, the Department apparently is unwilling to attempt enforcement of such decrees in view of recent decisions regarding the application of the Antitrust laws to labor.

Unions usually oppose the use of powered or mechanical equipment to do work which has previously been done by hand. Plumbers are often required to cut and thread pipe by hand on the job, although it could be finished more efficiently off the job; plasterers are restricted in the use of the plaster gun; and carpenters are limited in the use of power saws, mortisers and power planers.¹¹ These policies sometimes have ludicrous results from the viewpoint of industrial efficiency. In one city plumbers insisted on the right to cut the threads off prefabricated pipe lengths and cut new threads on the job.¹² In another case, the electricians refused to allow the installation of switchboards which had been wired at the factory, although it would have cost \$3,000 more to wire the switchboards at the site of installation.¹³ The result, I am informed, was that the purchasers of the switchboards hired two union electricians to sit around for a couple of days each time a switchboard was installed, even though these workers would have been unable to re-wire the switchboard had they been inclined to make the attempt.

Union opposition to such labor saving methods takes various forms. In some places the glaziers refuse to work on jobs which use windows with glass installed at the factory, demanding that sash and glass be delivered separately to the site and

⁸ St. Paul Pioneer Press, Aug. 20, 1946.

⁹ United States v. Painters Dist. Council, 44 F. (2d) 58 (N. D. Ill. 1930), aff'd 284 U. S. 582 (1931).

¹⁰ United States v. Journeymens Stone Cutters Assn., *et al.*, ANTITRUST BLUE BOOK No. 323.

¹¹ T. N. E. C., MONOGRAPH 8, p. 134.

¹² LASCH, BREAKING THE BUILDING BLOCKADE (1946) 98.

¹³ T. N. E. C., MONOGRAPH 8, p. 55.

each window be assembled by hand. Carpenters often refuse to install factory-fitted doors, windows or floor pieces.¹⁴ Plasterers insist on three coats of plaster over rock lath, although two are quite adequate; and they have refused to do any work on projects which proposed to eliminate plaster on ceilings by painting over concrete, a process both economical and efficient.¹⁵ Sometimes the restrictions are embodied in contracts with employers. Some such contracts provide that painters, rather than laborers, shall wipe up the paint on any job, that plumbing fixtures shall not be installed with the trimmings in place but the trimmings shall be removed and attached on the job,¹⁶ and that electricians shall be hired to "install" electrical refrigerators, where such installation consists of plugging an ordinary cord into a socket.¹⁷

Closely allied to the resistance against labor saving methods is the strong insistence on keeping as much work as possible within the "jurisdiction" of each union—a policy which inevitably results in clashes between various unions. The details and evils of the "jurisdictional dispute" within the ranks of labor are much too well known to require any elaboration. To expatiate on them at any length is rather like inveighing against sin. It should be noted, however, that they grow out of the same attitude which impels the opposition to technical and mechanical labor saving—the belief that there is only a certain limited amount of work to be done, and that the function of each union is to get as much of it as possible for its members.¹⁸ The validity of this assumption should be examined separately, as it does not necessarily involve the justification for this attitude. The real objection to jurisdictional disputes is not their nature but the methods by which they are carried on. If the disputes were merely internal, within the A. F. of L., they probably would not affect the cost of building and the public would be unconcerned. However, when one union attempts to keep work to itself, or wrest it away from another union, by strike or boycott, that adds to the ultimate consumer's cost. In the long run, it also adds to labor's cost; for the public, even that portion of it most friendly to labor, can understand a strike against an hostile employer, but cannot understand a strike against an employer who is perfectly willing to hire union labor at union wages but is caught between the conflicting demands of two unions, each of which insists that its members shall get the job—as in the famous *Hutcheson* case.¹⁹

From the viewpoint of those who believe in the importance and value of labor unions (including the author), one of the most significant aspects of jurisdictional disputes is in their revelation of the short-sighted view and limited loyalty of too many labor leaders. It is, perhaps, understandable that the A. F. of L. should fight the rival C. I. O. Typical of this fight is the boycott which the Brotherhood of Electrical Workers has for some years carried on against goods manufactured in

¹⁴ *Id.* at 135; LASCH, *BREAKING THE BUILDING BLOCKADE* (1946) 98.

¹⁵ T. N. E. C., MONOGRAPH 8, p. 55; LASCH, *BREAKING THE BUILDING BLOCKADE* (1946) 99.

¹⁶ T. N. E. C., MONOGRAPH 8, p. 135.

¹⁷ LASCH, *BREAKING THE BUILDING BLOCKADE* (1946) 99.

¹⁸ T. N. E. C., MONOGRAPH 8, p. 134.

¹⁹ *United States v. Hutcheson*, 312 U. S. 219 (1941).

plants organized by the C. I. O.²⁰ During the war this campaign was not pushed actively, but it is beginning to be revived now. However, since the C. I. O. has now succeeded in organizing some of the mass production plants, such as Westinghouse and General Electric, it is obvious that a fight of this kind might disrupt the construction industry and do serious damage to the whole national economy. Nevertheless, this type of boycott seems to be increasing rather than diminishing. It is now reported that the Carpenters are threatening to refuse to install window frames made in C. I. O. organized plants. The wisdom of carrying on any inter-union fight in public is open to serious question. It would seem to be clear beyond any question that it is short-sighted and unwise to carry the fight to the point of inflicting serious damage upon the industry and the public. It is even less understandable and justifiable when jurisdictional disputes are carried on between supposedly allied unions, rather than between rivals. The Hutcheson case involved a dispute between the Carpenters and the Machinists unions—both at that time members of the A. F. of L. It may require a bricklayer, a carpenter and a plasterer to install a new type of acoustical tile, because the unions of all three insist on the right to do that kind of work.²¹ The whole matter reaches its most absurd extreme in the case of a few large urban locals of unions which refuse to handle materials that have been fabricated by members of the very same union if they belong to another local.

The consequences of such disputes are inefficiency, unnecessary expense, and a decrease in labor productivity. The situation is summarized in the words of the T. N. E. C.: "Division of work among the trades in the building industry is not determined upon the basis of efficiency, as in manufacturing, but according to superior bargaining position."²²

Wage rates in the building trades are generally reputed to be among the highest in any employment, and the statistics will bear this out. However, the conclusion does not automatically follow that these are a cause of high costs. On the contrary, there seems to be little relation. One of the principal reasons for the high hourly rates in the building trades is the fact that employment is seasonal and uncertain, and it is generally accepted in the trade that a worker must earn enough in a few summer months to live on during the entire year.²³ The annual earnings of construction workers are far from high in comparison with the annual income of those in other industries.^{23a} Also important is the fact that the proportion of skilled workers in building construction is probably higher than in any other industry.²⁴ In any event, the most significant factor in determining labor cost is not the wage rate but the productivity of labor. The T. N. E. C. found little relationship between wage

²⁰ See *United Electrical R. & M. Workers v. International B. of E. Workers*, 115 F. (2d) 488 (C. C. A. 2nd, 1940); cf. *Allen Bradley Co. v. Local No. 3, I. B. E. W.*, 325 U. S. 797 (1945); and see *RESTRAINTS OF TRADE AND BOYCOTTS*, pamphlet issued March 26, 1946 by National Electrical Manufacturers Assn., 155 East 44th St., New York, N. Y.

²¹ LASCH, *BREAKING THE BUILDING BLOCKADE* (1946) 99.

²² T. N. E. C., *MONOGRAPH 8*, p. 135.

²³ *Id.* at 53.

^{23a} See LASCH, *BREAKING THE BUILDING BLOCKADE* (1946) 94.

²⁴ T. N. E. C., *MONOGRAPH 8*, p. 51.

rate and labor cost.²⁵ Some cities with low wage rates had high labor costs, while other cities in which the wage rates were higher had lower relative labor costs. It is doubtful that the high hourly wage rates in the building trades bear any particular relation to costs in general. The important factor in determining labor costs is labor productivity, and the vice of resistance to labor saving methods and of jurisdictional disputes is that they seriously impair the productivity of labor.

Another factor in the situation which tends to be overemphasized because of its sensational character is the existence of so-called racketeering in unions. It is certainly true that there are racketeers—of the old time blackjack and six shooter variety—in some labor unions. Further, the building trades unions appear to have a disproportionate share of such characters.²⁶ However, in the very nature of the matter it is impossible to reach reliable conclusions about this, at least without a much more extensive investigation than has yet been made. One informant, who had spent many years in the building trades unions and claimed to have been present personally at many “payoffs,” stated that all the racketeers and gangsters he had known about in the labor movement had been subsidized by employers. The employers’ purpose, of course, was to keep the union in line and avoid trouble for themselves. The fact that union members might be swindled, or other employers made the victims of extortion, either was of no consequence or was actually thought desirable. The task of an employer who wishes to keep a particular man or faction in control of one of the building trades unions is made easier by the fact that many of them are relatively undemocratic in organization. The dominant Carpenters’ union is practically the personal property of its dictator, Big Bill Hutcheson.²⁷ Big Bill himself has been accused of some very unsavory practices by some of his own locals,²⁸ but he seems equally complacent about such charges whether they are made against himself or against other officials of his union.²⁹

Since it is impossible to know exactly how much racketeering there is in the building trades—as well as very difficult in some cases to draw the line between racketeering and simply hard-boiled politics—it is impossible to estimate just how significant such practices are in contributing to the cost of building. However, any secret racketeering which takes a substantial part of the building dollar is bound to be reflected somewhere in the known costs. There is nothing to indicate that ordinary racketeering is a significant factor. To the degree that it exists, it is probably more important in its indirect costs—in maintaining inefficient and unproductive methods, and fomenting short-sighted disputes over areas of craft jurisdiction.

THE BUSINESS UNITS

The various labor practices which seem to contribute to the high cost of construction all have origins or counterparts in business practices. Most of the members

²⁵ *Id.* at 49.

²⁶ See, e.g., story in N. Y. World-Telegram, June 24, 1946, p. 5, and N. Y. Post, same date.

²⁷ See FORTUNE, *supra* note 5, at 119; Victor Riesel, *Labor News and Comment*, N. Y. Post, April 30, 1946, p. 30.

²⁸ See N. Y. Times, April 28, 1946, p. 35.

²⁹ See FORTUNE, *supra* note 5, at 121.

of the industry are as convinced as labor that they are operating in a limited market, and that they can best serve their own interest by getting as much as possible out of that market for themselves, rather than by attempting to expand the market. As building trades unions frequently oppose labor saving devices and methods, so the building trade employers generally oppose any methods or materials that will save expense and threaten to reduce profit.

One of the greatest sources of inefficiency in the building industry is the incredible variety of sizes and designs in use for every part of any structure. The simple matter of an ordinary interior door is carried in 200 to 300 different sizes and varieties. There are 8 different combinations of wood and steel door jambs and frames, each one of which may be set for several different ways of opening and used for different thicknesses of door. Thus there are 192 possible variations of the door and jamb, each of which is subject to any one of 50 different finishes, and may be used with one of at least 20 different types of lock. There are several hundred different varieties of molding that may go around the door. Thus there are several *million* different ways of trimming and installing a door opening in an ordinary house.³⁰ Obviously there is not going to be any mass production of this item under these circumstances. On the other hand, it is extremely doubtful that the numerous minor differences in style are of any real importance to the inhabitant of the house. They do, however, require additional middlemen, larger stock inventories, higher prices, and therefore greater profits for some members of the industry.

The same thing is true of most of the items which go into an ordinary building. Even bricks come in different sizes—75 different sizes, in fact, before the Bureau of Standards recommended the reduction of this number.³¹ Similarly, there are more than 1,000 varieties of brass lavatory and sink traps; and more than 1,200 different sizes of slate roofing.³² There are 125 varieties of metal lath; more than 1,200 stock patterns of lock hardware; some 19,000 kinds of valves and fittings; 193 types of paint brush; and 150 strengths of window glass.³³

However, the greatest variety of all, and perhaps the most wasteful, is in the basic pattern of space arrangement. In the average construction job, each individual piece of wood is cut individually for one particular place in the structure. Plumbing, wiring, trimming, everything is done by hand on the job according to individual specifications for that one structure. Room heights, wall thickness, window and door openings, room lengths and widths, all vary from house to house, and often within a single house, by insignificant amounts, often a fraction of an inch. This use of fractional dimensions and unlimited variations in sizes does not add to the individuality of homes; it merely makes any approach to mass production of materials impossible and thus keeps the whole price structure on a high level.

The obvious alternative to these practices is the adoption of standards of dimensions and sizes for materials and basic design. Several proposals have been made

³⁰ T. N. E. C., MONOGRAPH 8, p. 61.

³² *Ibid.*

³¹ *Id.* at 138.

³³ LASCH, BREAKING THE BUILDING BLOCKADE (1946) 160.

for the adoption of a basic modular unit to serve such purpose. If four inches were adopted as the smallest unit of measurement (instead of the fractions now in use) and four feet as the smallest unit of length for room measurement, the man designing his own home would still have a literally infinite variety of possibilities open to him. However, the savings in costs of materials would reduce the total cost of his home by 10 per cent or more.³⁴ The American Standards Association is making an effort to secure the adoption and use of some such modular units in this field, but so far its attempt has met with little success.

One of the most important reasons for the lack of success in securing any agreement on such a matter is the opposition to every attempt by one or more of the numerous groups which taken together are said to compose the "construction industry." Actually this so-called industry is made up of numerous small separate enterprises, independent of one another in the performance of their work. In fact, the number of different enterprises which enter into the construction of an ordinary house is almost as great as the variety of materials and fixtures. Without going back to the extractive industries, nor including the collateral, but necessary functions such as real estate title transfer, gas, electric, telephone, sewage and water service, these are some of the businesses participating in the actual construction of your house.³⁵

Manufacturers of—	Wholesale and retail distributors of—	Contractors for—
Dressed lumber	Lumber and millwork	General construction
Flooring	Brick	Excavating
Laths	Structural steel	Concreting
Sash, doors and blinds	Hardware	Masonry
Wall board	Heating equipment	Carpentering
Insulation	Plumbing equipment	Plumbing
Wall paper	Paint and glass	Heating
Building brick	Wall paper	Electrical installations
Roofing tile	Electrical supplies	Plastering
Sewer pipe	Gas appliances	Sheet metal work
Fire brick	Construction equipment	Tile-setting
Cut stone	Building supplies	Painting
Cement		Paperhanging
Wall plaster		Floor-finishing
Window glass		Linoleum
Lime		Landscaping and sodding
Gypsum board		
Wrought iron		
Cast iron		
Plumbing fixtures		
Paint		
Copper wire		
Lighting fixtures		
Hardware		
Screen		

³⁴ T. N. E. C., MONOGRAPH 8, p. 139.

³⁵ *Id.*, from various tables.

Perhaps, in a particular case, two or more of these functions will be performed by a single manufacturer, distributor or contractor. However, these enterprises represent the typical organization of the construction "industry." Except for a few manufacturers of materials, the business enterprises involved are small and limited in resources. When last counted, in 1939, there were over 215,000 construction contractors of various kinds in this country.³⁶ Of these, less than 15 per cent did a total annual business over \$25,000; more than 85 per cent did a total annual business under \$25,000.³⁷ The typical business unit in the construction field is small and limited in resources. Some, of course, are larger than others; but there is no such thing anywhere in the so-called housing industry as a big corporation manufacturing the end product—a house.³⁸

Thus on the business side, what is called the construction industry is made up of small units far outnumbering the numerous craft unions among the employees of the building trades. These units group themselves together into innumerable small functional segments, much like the craft unions, and each small segment guards its own small area of business jurisdiction as jealously as any of the unions. The jurisdictional disputes between business groups are usually not so well known as those between unions, for they are not usually carried on in public. Nevertheless, such business tactics are probably more important than the corresponding policies of labor so far as increasing the cost to the consumer is concerned. In the building business the established lines of distribution are rigidly maintained. In the plumbing segment, for instance, sales are from manufacturer to jobber to contractor. It is quite impossible for an ordinary consumer to buy plumbing equipment except from the contractor who will charge both for his markup on the sale of the goods and his charge for installation.³⁹ The only competition in the sale of such equipment has, in the past, been the mail order houses. However, this competition has been nullified by the practices of the contractors who increase their charges for installation sufficiently to swallow up any economy resulting from the cheaper purchase price.⁴⁰ Any jobber or retailer who attempts to sell direct to a consumer is quickly brought into line by the pressure of his suppliers who refuse to sell, or deny him trade discounts, so long as he does not respect the established jurisdictional lines.

These same practices apply to many other building supplies and materials. One professional engineer, a veteran of World War II, desired to make some necessary repairs to his house after release from the service. He wrote to a manufacturer of oil burners enclosing a check and requesting shipment when one became available. The company replied referring him to its local distributor. He called the local distributor and was told that it did not sell to anyone but authorized dealers. He then went to the dealer, who advised him that he could buy an oil burner, but only if he also bought all the controls and auxiliary equipment and paid for installation

³⁶ U. S. BUR. OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES, 1944-45 (1945) 902.

³⁷ *Ibid.*

³⁸ T. N. E. C., MONOGRAPH 8, p. 65.

³⁹ FORTUNE, *supra* note 5, at 102.

⁴⁰ *Ibid.*

by the dealer. Being fully qualified to make the installation himself, and desiring the economies that would result, the engineer went back to the distributor and asked to be listed as a dealer in order to qualify for the purchase of a burner without installation. He was firmly informed that the distributors had dealers in each part of the territory, that each dealer was permitted to operate in a certain area only, and that no new dealers were being added, as dealers were protected against competition. Investigation revealed these practices to be standard in the oil burner field. Similar experiences resulted from attempts to buy acoustical panels, and other materials for repairing his house.

Few consumers are engineers, or qualified to make their own repairs or installations. But such practices are extremely important in adding to the cost that all consumers must pay for housing, since the contractor who does do the construction or repair work faces the same situation as a home-owning engineer. Construction is unique in being the only *retail industry*. In no other industry does the producer buy his materials in small quantities and from retail distributors. In construction, the general contractors usually buy their materials just as any owner who wished to repair his own house would—from retailers or from installers who are combined retailers and subcontractors. Since the average retail markup on builders' supplies is approximately 50 per cent for the country as a whole,⁴¹ the distribution system from the manufacturer to the contractor at least doubles the cost of the materials that go into a building.⁴² Thus the established channels of distribution between the manufacturer of materials and the builder account for about one third of the cost of construction of dwellings. This is the cost of maintaining the established areas of business jurisdiction within the construction industry.

RESTRAINTS OF TRADE

The inefficiency in the construction industry arising from the lack of standardization of materials and arrangements may be due simply to indifference and lack of initiative (individual or other). But clearly the established channels of distribution and enterprise could not long be maintained without some organization or agreement among certain of the business units involved. This raises the question (perhaps "challenge" is the better word), What of the Antitrust Laws? Since the passage of the Sherman Act in 1890, it has been a principle of our law that every combination "in restraint of trade" is illegal. Are not such combinations in restraint of trade?

To understand this problem it is necessary to rearrange the terms. The statute says that every combination in restraint of trade is illegal. Like all other statutes, this requires application to specific cases, which involves interpretation by the courts. The Supreme Court in its application of this statute has reasoned that the cooperation of any two persons in a business enterprise is a combination, and that any contract or other arrangement that limits, in any way, the economic activity of any-

⁴¹ *Id.* at 66.

⁴² LASCH, *BREAKING THE BUILDING BLOCKADE* (1946) 85.

one, to the degree that it limits also restrains trade. Since, in general, these things are legal, the Court says, they become illegal only when they are of such a nature that the courts may regard them as "unreasonable."⁴³ Therefore, the most nearly accurate statement of the law is that every combination which is illegal is in restraint of trade.

It is no mere play upon words to insist on this statement of the principle. There is no physical or economic phenomenon which can be identified as "restraint of trade." The phrase has a purely legal significance. Even those who are most insistent on the transcendental validity of certain moral principles concede that such statutory provisions as this mean only what the courts say they mean. Consequently it is easier to define "restraint of trade" by those actual combinations which the courts have declared to be illegal, than it is to set a standard of legality by reference to the purely verbal formula "restraint of trade." Naturally, this leaves the definition somewhat vague. However, the vagueness is not created by the definition, but by the facts; the definition merely recognizes the actual state of the law.

Thus, in the construction industry, as in all other industrial fields, there are certain practices which are clearly restraints of trade, there are other practices of doubtful legality, and there are a large number of practices which seem to be economically unjustifiable but are quite legal under present law.

The construction industry is distinguished by the disproportionately large number of restrictive practices in all three categories which flourish within it. Thurman Arnold as Assistant Attorney General stated: "There is no one industry that has suffered more under a multiplicity of restraints of trade than the building industry."⁴⁴ This conclusion is underlined by the statistics. During the past thirty years about 675 cases have been brought by the government under the Antitrust Laws. Of this number, 160, or approximately 24 per cent, have involved the construction industry.⁴⁵ No economic analysis is needed to demonstrate that this is a far greater proportion than the size and importance of that industry in the general economy would warrant.

However, in spite of the large number of cases in which particular restraints have been prosecuted, there is relatively little variety in the general forms in which the restraints of trade appear. There are probably less than a dozen generic types of restraint that have been important enough to receive judicial attention. Within these types, of course, there is tremendous variety of detail; as in negligence actions, each case presents some individual circumstances, but the general principles keep repeating. The principal restraints of trade found in the building trades are boycotts, price fixing in various forms, limitations on sales or production, and the use of patents to control the sale or use of products.

⁴³ *Standard Oil Co. v. United States*, 221 U. S. 1 (1911); *United States v. American Tobacco Co.*, 221 U. S. 106 (1911). There is a large body of literature in legal periodicals discussing this doctrine, which is usually referred to as the "Rule of reason."

⁴⁴ ARNOLD, *THE BOTTLENECKS OF BUSINESS* (1940) 35.

⁴⁵ SEN. COMMITTEE PRINT No. 12, 79th Cong., 2d Sess. ("Antitrust Cases in the Construction Industry," September 12, 1946).

Thus, although the system of distribution for building materials is wasteful and uneconomic, it is not inherently in restraint of trade. There is nothing to prevent a manufacturer from selling, or promising to sell, his entire output to a jobber. In turn, there is nothing to prevent a jobber from dealing exclusively with one, or a few wholesalers; and it is perfectly legal for the wholesalers to refuse to sell to anyone except retailers. Of course, the retailers can, generally speaking, sell upon whatever terms they choose. (Even O.P.A. has had no authority to require sales at economically justifiable prices, but only to keep prices from rising more than a certain amount above previously established levels.) A restraint of trade arises only when a number of business units combine, either vertically or horizontally, to require the adoption or maintenance of such practices. Such an agreement, usually expressly, sometimes by implication, contains the threat of a boycott against the businessman who steps out of line. Such a combination is in restraint of trade whether it is composed of a group who are pledged to deal only with each other, and to boycott outsiders,⁴⁶ or of a group who attempt to force outsiders to observe established lines of business interest by threat of a boycott against, for example, manufacturers who sell directly to consumers.⁴⁷ The Supreme Court has, however, been careful to point out in such cases that the acts complained of might have been done with impunity by any of the individuals involved. "An act harmless when done by one may become a public wrong when done by many acting in concert, for it then takes on the form of a conspiracy, and may be prohibited or punished, if the result be hurtful to the public or to the individual against whom the concerted action is taken."⁴⁸

It is beyond the scope of this article to attempt to list groups of cases which represent one or another type of restraint. The Department of Justice has recently prepared such a summary of antitrust cases in the construction industry for the Senate small business committee. (the printed report runs over fifty pages).⁴⁹ However, it would probably be no exaggeration to say that every type of restraint of trade mentioned here exists, or has existed, in every branch of the construction industry. Consequently, most of the cases that have reached the courts have involved several different restraints affecting a single commodity or group of business units.

Boycotts in support of the established channels of distribution have been most prominent in the fields of lumber and plumbing. In 1941, cases were brought against a number of lumber dealers associations, including the National Retail Lumber Dealers Association.⁵⁰ It was charged that these associations set up certain lists of dealers which were limited to so-called recognized, legitimate or qualified dealers. Manufacturers and wholesalers were required to market their products through the dealers on these lists or face the threat of a boycott by the members of the associations. Manufacturers or wholesalers who sold directly to contractors or builders

⁴⁶ *Montague & Co. v. Lowry*, 193 U. S. 38 (1904).

⁴⁷ *Grenada Lumber Co. v. Mississippi*, 217 U. S. 433 (1910).

⁴⁸ *Id.* at 441; *Eastern States Lumber Assn. v. United States*, 234 U. S. 600, 613-14 (1914).

⁴⁹ SEN. COMMITTEE PRINT No. 12, *supra* note 45. ⁵⁰ *Id.* at 29 *et seq.*

were boycotted the same as those who sold to retail dealers not on the approved lists. In addition, some of the associations allotted the territory within which each approved dealer might do business, and competing dealers were not permitted to encroach upon it. The defendants in most of these cases pleaded *nolo contendere* and were fined.

In the plumbing field, the Department of Justice reported, there are two methods of distribution: the old-line or restricted system in which boycotts are used at each stage of the system to maintain established channels, and the direct-to-you method in which the manufacturer sells to the consumer.⁵¹ Under the old-line system, the manufacturers sell only to jobbers, these jobbers sell only to master plumbers, the master plumbers refuse to install plumbing not sold by themselves, and the unions refuse to work for master plumbers who do install any plumbing not sold in this fashion. The manufacturers of 80 per cent of the plumbing supplies made in this country, agreed to boycott mail order houses, cooperatives, and other direct-to-you outlets, thus effectively preventing anyone from getting plumbing installed more cheaply by cutting out some of the uneconomic steps in distribution.

Price fixing is one of the oldest and most widespread restraints of trade. Price fixing agreements have been held to be in restraint of trade since the early days of the Sherman Act, and the Court has consistently said that the reasonableness or justification for the particular prices charged is irrelevant, as price fixing agreements are illegal *per se*.⁵² In spite of this, various schemes for fixing prices have continued in use in the construction field. One of the least subtle and most popular of such schemes is the bid depository. Under this plan, a group of contractors, or other businesses, set up a central authority to which they submit all bids which they wish to make on any job. This authority then determines the price at which the bid shall be made and the contractor who shall get the job by some pre-determined system.⁵³ One method is to throw out the highest and the lowest bids, and average the rest, then add a certain amount for overhead and expenses, and establish that as the price for the job. Usually the jobs are awarded to different contractors in rotation, and the ones who are not "entitled" to a particular job must submit a bid higher than the one fixed by the central authority. In the two years before the war, injunctive decrees were entered forbidding the continuance of such bid depositories in the District of Columbia, Pittsburgh, St. Louis, New Orleans, and southern California.⁵⁴ The price fixing schemes involved in these cases related to plaster and masonry, tile, heating, piping and ventilating, electrical wiring and installation, and cut stone. Similar practices have prevailed in other branches of the building field, both before and since.

A more subtle method of price fixing is the use of a single formula by a number

⁵¹ *Id.* at 50 *et seq.*

⁵² See, e.g., *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211 (1899); *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 218 (1940).

⁵³ SEN. COMMITTEE PRINT No. 12, *supra* note 45, at 18 *et seq.*

⁵⁴ *Id.* at 18-20.

of ostensibly independent enterprises. The most widely used type of such formula is the so-called "basing-point system." The use of such a system eliminates the need for any formal meetings or any central agency to insure uniformity in quoted prices. Under the basing-point formula, prices are calculated by selecting a number of mills throughout the country as base points. The price to any consumer is the price at the base point nearest to that consumer plus the cost of rail delivery. All members of the industry are informed as to the base points to be used and the prices at such base points, and as to the railroad freight rates. Thus it becomes a simple matter to calculate the price for any point in the United States. This system has been in use in the cement industry for thirty years.⁵⁵ Under this system, the price of cement is the same for any particular consumer regardless of the plant or place from which it is purchased. During 1918-1919 the City of Los Angeles called for bids on cement on ten different occasions; and each time the bids were identical for all the companies bidding. Twenty-five years later, in 1943, the Navy Department took bids on cement for delivery at 18 different points stretched from Portland, Maine, to New Orleans. Out of a total of 206 bids at these 18 different places, 203 of the bids were identical to the last penny.

As business has become more sophisticated about the Antitrust Laws, restraints of trade which have been condemned by the courts have been modified or abandoned in favor of schemes which are less flagrant in contravening the law. One variant of the basing point system has been the use of zones, rather than base points, with an established price differential for each zone. Another method of avoiding competition without the necessity for a formal mechanism to fix the prices, is the acceptance of one firm in an industry as the price "leader," with either express or tacit agreement among the others to follow any changes and adhere to any prices set by the leader. One of the most sophisticated of all restraints of trade is the use of published statistical information to achieve uniform pricing or sales policies. The gathering and dissemination of factual trade information is, of course, a perfectly legitimate activity. There are even situations in which general publication of price information may be conducive to competition (as in the case of stock market prices). However, such information may be, and often is, used to reduce or suppress competition. Thus publication of price information by a trade association, the members of which are pledged to "cooperation" may imply an obligation on the members not to deviate far from the published prices. No rule of thumb can be formulated to distinguish between legitimate publication of trade information and the use of statistics as a disguised form of trade restraint. However, when the information published is of a kind which businessmen would normally not reveal to one another, there is at least the basis for an inference that the underlying motive may be an improper one. An example of such activity is the publication by a branch of the Southern Pine Association of statistical information showing every order taken by each mill, the details of the items sold, the prices received, and the territory to which shipment was made.⁵⁶ The Department of Justice dryly labels this "excess statistics."⁵⁷

⁵⁵ *Id.* at 52 *et seq.*

⁵⁶ *Id.* at 24.

⁵⁷ *Ibid.*

Another form of restraint in which statistics are used is the establishment of "quotas" or limits on the production or sales of the members of an economic group. Such quotas can, of course, be effective only when they are based upon rather complete statistical information. When they are effective, they can be used to reduce competition to any desired level or to eliminate it completely. Thus, during the depression, the Western Pine Association adopted a maximum production limit of 37.5 per cent of capacity for all its members.⁵⁸ Since the members of this association produced more than 80 per cent of all soft pine in the western states, it is apparent that such a quota would have a substantial effect upon the market. An example of a quota on sales, rather than production, is a scheme used by the Southern California Marble Association. Each member of the association was required to report to the secretary the total amount of business done during a certain period of time. On the basis of this information, the marble business of southern California was divided on a pro rata basis among the members. Each member was given a quota comprising a definite percentage of the total business in the area, and each agreed to limit his business to the quota set for him.⁵⁹

Those who believe that there is more profit to be made by restraint of trade than by competition are constantly searching for a cloak of legality in which to clothe their schemes. The cloak that has been most widely used for this purpose is the patent license agreement. Such devices are used to control the volume of output and the price level in many branches of the construction industry, including glass, insulation, plaster and wallboard, plumbing, heating, electrical supplies, and many other special items.⁶⁰ In the mineral wool business an elaborate licensing and royalty system was set up whereby a limited number of companies were permitted to enter the field. The royalties collected were used almost exclusively for policing the system by prosecuting competitors of licensees, who were accused of infringement. The patent used was obviously based on flimsy claims of novelty, and after twelve years of litigation it was finally declared invalid.⁶¹ However, for twelve years this invalid patent was used to restrict production and maintain prices of a new and essential building material which could greatly contribute to the comfort and economy of heating of the average house. Furthermore, unless some litigant with the patience and money necessary to fight such a case through the courts for long expensive years challenges the system, such a restraint might continue indefinitely since there is doubt as to the right of the government to challenge the validity of a patent in an antitrust action. The government may, however, attack a scheme of licensing set up under a valid patent on the grounds that it is primarily directed to control of the market by price fixing, or other means, rather than to commercial exploitation of the patent.⁶² If the court finds, as it did in the Masonite case, that the patent is being used merely as a cloak for restraints of trade, then the court will enjoin the restrictive system, regardless of the existence of a patent.⁶³

⁵⁸ *Id.* at 26.

⁵⁹ *Id.* at 20.

⁶⁰ *Id.* at 11.

⁶¹ *Id.* at 17.

⁶² *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20 (1912).

⁶³ *United States v. Masonite Corporation*, 316 U. S. 265 (1942).

It must be apparent from even this cursory view of the restraints of trade most prevalent in construction that practices which are clearly illegal shade imperceptibly into practices which are questionable, and on over into practices which are quite legal under prevailing concepts. Boycotts and price fixing are the most easily distinguishable of the restraints of trade, but even these have variants of doubtful legal status. The lines between legitimate and illegitimate use of statistics and patent licensing agreements are extremely vague. In addition there are various trade combinations which do not fall into any of the usual categories, but which seem to lie, at best, on the borderline of legality. One of the most interesting of these involved an unusual twist to the usual price fixing scheme. This plan was devised to meet the temporary crisis of the imposition of an O.P.A. ceiling on a certain group of contractors. O.P.A. enforcement officials noticed that after the ceiling had been set the majority of jobs were taken at substantially less than the ceiling price. This was so unusual as to arouse suspicion. Investigation revealed that while O.P.A. was gathering the information on which to base its ceiling order, the trade association representing these contractors had been very busy. Dozens of letters were sent out to all of the contractors in that business in the O.P.A. region. They were informed that an investigation was being made by O.P.A., and were told to show only their highest priced jobs to the O.P.A. investigators. Meetings were held at which the trade association secretary instructed members how to fill out O.P.A. questionnaires, and a scare campaign was conducted among non-members to make sure that they played ball with the association. The conspiracy was successful; the ceiling price arrived at by O.P.A. was so high that it imposed no real limit on the operations of the contractors at all. It is very doubtful that this particular scheme is legal; but the fact must be noted that, in spite of investigation, this association has not been prosecuted.

A more respectable form of combined activity is the establishment of industrial codes. One of the best known is the National Electrical Code, which is drafted by a committee composed of representatives of manufacturing and insurance companies. This code is generally adhered to by both manufacturers and installers of electrical equipment, and it has a quasi-official status with most city building inspectors. Most of the provisions of this code are probably salutary, and it may have improved the quality and safety of the electrical apparatus sold generally. Nevertheless, the fact remains that it represents trade legislation by a group of private concerns. Large manufacturers such as General Electric and Westinghouse have great, if not dominating, influence in such an organization. It has been claimed that this influence has been used to secure code provisions that favor the installation of equipment manufactured by the dominating companies, or that prevent the use—and consequently the development—of new and more efficient devices. Recently the manufacturers of certain types of fluorescent lighting equipment have claimed that provisions have been inserted in a new draft of the code for the specific purpose of preventing the installation of such (cold cathode) fluorescent lighting in competition with the types

of equipment now being used. Perhaps such practices violate the Antitrust laws; this has never been decided, and the Department of Justice itself seems uncertain. But, regardless of legal status, such a combination represents another element of rigidity in the industry, is one more influence against improvement, efficiency and lower costs.

In theory the only proper way to establish codes of construction standards is by the action of some responsible political unit which will be concerned solely with the public welfare. In practice, the building codes of general application are formulated by municipal government; but in many cities they show small concern for the public welfare. Ostensibly intended to enforce minimum standards of public safety and health, most building codes are in fact the means of preventing the introduction of new methods or materials in construction. The codes should establish minimum requirements as to strength, sanitation and fire resistance, and manufacturers and builders should be free to meet those requirements in the most efficient and economical manner they can devise. Instead, the codes are usually drafted to require the use of particular materials or methods in order to favor the special group interested—sometimes the manufacturer or distributor, sometimes the union or craft workers involved.⁶⁴ Thus the codes reflect the political influence of the organized business and labor groups within the building trades, rather than the best judgment of the engineering profession. Since municipal building codes themselves have the force of law, they cannot be called restraints of trade. Nevertheless, they make excellent substitutes for restraints of trade in many cases, and are undoubtedly, in some of those cases, intended for exactly that purpose.

At quite the other extreme of legality from the building codes are the undisguised racketeers. In this field, only the racketeers observe no jurisdictional lines; they work the labor and the employer side of the street impartially. Probably the honest contractor is himself just as much the victim of the racketeers within the business as the customers are. Complaints have been made of "Employers' associations" which took a percentage cut from all members on every job performed. Contractors who refused to join were subjected to sabotage, violence or labor trouble. Those who complain about such organizations do so furtively, and often in real fear of physical harm. Investigation of one such association in Brooklyn disclosed that the active head was an individual who had just been released from prison after serving a term for extortion, and who was reputed to be working in cooperation with some of the best known and most feared gangsters in New York. In this case, the racket involved the control—through bribery, corruption and terrorism—of the labor union in that field. Usually, although not always, racketeering on the business side involves the connivance or corruption of union leaders; and racketeering in unions exists with the connivance of employer groups. As has been remarked, there is no accurate information as to the extent of racketeering in this industry; and by its very nature it is usually hidden or disguised. However, without in any way mini-

⁶⁴ LASCH, *BREAKING THE BUILDING BLOCKADE* (1946) 105 *et seq.*

mizing the undesirable and criminal nature of such activities, it is doubted that they are of more than secondary economic significance.

More numerous and of greater importance than the cases involving primarily force and violence, are the situations in which groups of employers combine with labor unions to use the economic power of the union to enforce some restraint of trade. In the recent *Allen Bradley* case⁶⁵ local manufacturers of electrical equipment and local contractors in New York entered into closed shop agreements with the local union of electrical workers. The agreements covered the entire New York City area. The manufacturers agreed to confine their sales to contractors who had such agreements with the union, the contractors agreed to purchase only from manufacturers who had such agreements with the union, and the union agreed to permit the installation of equipment manufactured in New York only. The result was a complete monopoly in the electrical field in New York for all three groups. Electrical equipment manufactured outside the New York area was completely excluded, even though manufactured by members of other locals of the same union. Wages and prices increased—and the consumer paid. The Supreme Court made it clear in this case that such practices are restraints of trade. Although union activities are normally not within the operation of the Antitrust Laws, when unions combine with nonlabor groups to create monopolies or restrain trade, the entire combination is within the ban of the law. There can be no doubt that this rule applies whether the conspiracy uses economic or physical force, or both. All the cases in which employers groups combine with unions to raise prices, limit work, eliminate competitors, or impose other illegal restrictions, are restraints of trade and prohibited by the Antitrust Laws.

On the other hand, the activities of labor unions alone do not, under present law, constitute restraint of trade. That this is the law has been made perfectly clear by the Supreme Court in a series of cases, beginning with the *Apex* case in 1940⁶⁶ and coming down to the *Crumboch* case in 1945.⁶⁷ This has not always been the law, and there are many who feel that this should not be the law. But until changed by Congress or the Supreme Court, this most emphatically is the law. In the *Hutcheson* case, regarded by the Antitrust Division as a "landmark" because it was such a definite setback to the campaign against restraints in the construction field,⁶⁸ the Carpenters' union under Big Bill Hutcheson demanded that the Anheuser-Busch Company employ millwrights instead of machinists to install certain machinery in their plant. Both millwrights and machinists were members of unions affiliated with the A. F. of L. Nevertheless, the Carpenters' union went on strike against the company to force it to accept millwrights for the job, and finally organized a boycott of union men all over the country against the products of the company. Action was begun by the Department of Justice against Hutcheson and the Carpenters'

⁶⁵ *Allen Bradley Co. v. Local Union No. 3*, 325 U. S. 797 (1945).

⁶⁶ *Apex Hosiery Co. v. Leader*, 310 U. S. 469 (1940).

⁶⁷ *Hunt v. Crumboch*, 325 U. S. 821 (1945).

⁶⁸ SEN. COMMITTEE PRINT No. 12, *supra* note 45, at 40.

union on the theory that their activities constituted restraint of trade. The case went to the Supreme Court which held that since the case involved a labor dispute it was not within the reach of the Sherman Antitrust Act.⁶⁹ Perhaps even more extreme on the facts is the recent *Crumboch* case.⁷⁰ In that case, a particular employer incurred the enmity of a union by operating during a strike and causing (according to the union view) the death of a union member. After the strike was settled, the union refused to permit any of its members to work for the employer, refused to permit any other employers to deal with him, and eventually forced the employer out of business altogether. The employer sued the union under the Sherman Act. The Supreme Court held that the acts of the union were not restraints of trade under the Sherman Act, although it said plainly that the same acts done by a nonlabor group would have been illegal, and that the acts would have been illegal if the union had been acting in combination with a nonlabor group.

This decision will certainly strike those unfamiliar with the history of the Antitrust Laws as being quite incomprehensible. Whether it is justifiable legally or socially, lawyers and others may and do disagree. But the decision does not represent simply an irrational prejudice in favor of labor unions. When the Sherman Act was passed in 1890 it contained no reference to labor as such. Any combination of workmen which interfered with a business might be considered in restraint of trade. Since the only effective weapon labor had was the strike, and since the strike depended for its usefulness on interfering with normal business activities, every strike was a restraint of trade if the business involved was in interstate commerce. There were in fact many cases against labor unions under the Sherman Act, and the principal question considered by the courts in most of them was whether or not interstate commerce was affected. As a result of this situation, labor came to regard the Sherman Act as an anti-labor law, and the act did seem to be used against labor more often than against the business "trusts" at which it had been aimed. Consequently, in 1914 Congress passed the Clayton Act declaring that human labor was not a commodity, and that a labor organization carrying out its legitimate objectives should not be considered a combination in restraint of trade. In the words of the Supreme Court, "Congress in that Act responded to the prolonged complaints concerning applications of the Sherman law to labor groups . . ." but, "This Court later declined to interpret the Clayton Act as manifesting a congressional purpose wholly to exempt labor unions from the Sherman Act."⁷¹ Again labor went to Congress to protest that the Antitrust Laws were being used against labor rather than against business combinations, and Congress passed the Norris-LaGuardia Act emphasizing the exemption granted to labor in the Clayton Act and further restricting the power of the courts to interfere with the activity of labor unions. Finally the court came to the view that labor union activities, carried on independently of any nonlabor group, are not subject to the Antitrust Laws. The

⁶⁹ *United States v. Hutcheson*, 312 U. S. 219 (1941). ⁷⁰ *Hunt v. Crumboch*, 325 U. S. 821 (1945).

⁷¹ *Allen Bradley Co. v. Local Union No. 3*, 325 U. S. 979, 803, 805 (1945).

Court says, "It was an interpretation commanded by a fair consideration of the full history of Antitrust and labor legislation."⁷²

Having noted the prevalence of restraints of trade in nearly all branches of the construction industry, the question still remains as to their relative significance. If restraints are thought of in naïve terms as any economic shackles interfering with efficient production, it is obvious that they represent the crux of the problem. But keeping in mind that restraint of trade is a technical legal term referring to certain specific types of activities, the conclusion is not so clear. In this latter view, the question is really how effective the Antitrust Laws are, actually or potentially, in reforming the primitive and inefficient practices of the construction industry. The answer to this question seems to be largely conditioned by one's attitude towards the Antitrust Laws in general. Those who are unsympathetic to the Antitrust Laws tend to underestimate their importance and effectiveness; those who believe in them tend to overestimate their power. Mr. Arnold gives the impression that a vigorous enforcement of the Sherman Act is a remedy for most of the faults of most industries.⁷³ Actually he did succeed in accomplishing some rather impressive results in a widespread enforcement drive in the construction field. In particular localities the prices on lumber, sand and gravel, and electrical equipment dropped as much as 20 per cent when the Antitrust Division attacked bid depositories and other restrictive schemes.⁷⁴ But Arnold himself realized that results could be obtained in construction through Antitrust enforcement only by simultaneous prosecution of the various combinations on a nation-wide scale.⁷⁵ Even then the results are not permanent, but last only so long as the drive for enforcement continues.⁷⁶ In fact, the enforcement drive undertaken by Arnold was short-lived and the results appear to have been completely lost.⁷⁷

There are additional difficulties in the use of Antitrust as an instrument for reformation of the construction industry. Most of the states have Antitrust Laws, but as a general rule they are completely dead letters, either because the statutes are loosely drawn, the administration is indifferent, or the courts are unsympathetic. On the other hand, the federal laws apply only to restraints of interstate commerce. But in the construction industry, many of the activities are either local in nature or of such an indirect relation to interstate commerce that it is difficult to persuade the courts that they do actually affect commerce sufficiently to come within the scope of the federal laws. At different times, and in various situations, the personnel of the Department of Justice or the Antitrust Division may be inadequate or unwilling to prosecute all of the numerous restraints which exist. In addition, business is becoming increasingly more sophisticated about the Antitrust Laws, so that the violations are becoming more subtle and more carefully concealed. This means that the proof upon which to base enforcement is becoming increasingly difficult to get,

⁷² *Id.* at 806.

⁷³ ARNOLD, *THE BOTTLENECKS OF BUSINESS* (1940).

⁷⁴ Arnold, *Antitrust Law Enforcement* (1940) 7 *LAW AND CONTEMP. PROB.* 12.

⁷⁵ *Id.* at 17.

⁷⁶ *Id.* at 19.

⁷⁷ LASCH, *BREAKING THE BUILDING BLOCKADE* (1946) 169.

that a larger staff is necessary to enforce the laws, and that in at least some cases of violation enforcement will be impossible because of lack of adequate proof.

The most important objection to a principal reliance on law enforcement as a cure for the present situation is that many of the practices which are economically least justifiable are either plainly legal or doubtfully within the proscription of the laws. The economic significance of a practice is, after all, independent of any legal judgment as to whether or not it is a restraint of trade. It is not enforcement of the Antitrust Laws that makes an industry efficient. On the contrary, it is the efficiency of an industry in satisfying the needs of the people that makes enforcement of the Antitrust Laws unnecessary. Restraints of trade, like racketeering, flourish in scarcity industries. The important fact about the construction industry is not that its practices do or do not fall within certain categories of legality, but that as an industry it is committed to a policy of high unit cost and profit and limited production, rather than mass production and low unit cost and profit. The cardinal sin of the industry is not that its policies are illegal, but that they are inefficient.

In the final analysis, of course, all these things are related. High costs mean a limited market, fewer sales, and therefore the necessity for higher profits per unit, which in turn maintain the costs. On the other hand, low prices mean a mass market, which is the prerequisite to mass production with the greater efficiency, lower costs, and larger total profits at lower unit prices which accompany mass production. The existence of restraints of trade, racketeering, and most of the other troubles which plague the industry is largely the result of the economic conditions prevailing within it. These things breed in scarcity industries. The cause of the scarcity does not determine its effects. Rackets flourished in the liquor business during prohibition; the black market sprang up in rationed articles during the war; rackets are now burgeoning in business fields such as automobiles and washing machines, where they are directly traceable to the present condition of scarcity of supply. Housing has always been a scarcity industry—it is only slightly more so today. We have never produced enough houses cheaply enough to satisfy even the minimum needs of the population. The results have been those inevitable concomitants of all scarcity situations—restraints, rackets, higher costs and higher prices. Law enforcement in this situation is both desirable and important, and it will improve conditions. However, that alone is not sufficient to secure permanent and fundamental improvement in the functioning of the industry.

THE FINANCIAL HIERARCHY

Among the distinguishing characteristics of the construction industry is not only its division into a multiplicity of small, restraint-ridden, inefficient operating units, but also the fact that, unlike other industries, these units neither own their own products nor direct their own operations, and so can hardly be called independent. It has been too little noticed that the construction industry carries an incubus of financial supervision and control borne by no other important economic group. It

is true that banker control of American industry has been increasing for some years,⁷⁸ but the control has generally been as to financial or other broad policies. In the field of housing construction the control of the financial interests covers every detail from the choice of the site location to the kind of exterior paint that may be applied to the finished house.

The reason for this condition is obvious. Few contractors, and far fewer purchasers can afford to pay for the construction or purchase of a house in cash. In order to construct even a single house, it is necessary for the average contractor to secure credit to buy materials, pay workmen, and hire subcontractors. Although this credit is usually for a short term, if more than one or two small houses are involved, the total amount of money will be quite substantial. The home "owner," on the other hand, usually does not purchase more than a single house, but he requires a very long term credit to give him sufficient time to pay off the entire purchase price. In both cases, the necessary credit can normally be obtained only through a financial institution. In extending such credit, the universal practice is for the lending institution to take a mortgage on the house as security for the loan. Unless the house meets the approval of the mortgagee in all respects, no loan will be made, and no house will be built or bought.

An interesting example of the extent and exercise of this financial control is a recent case brought by the Antitrust Division of the Department of Justice in New York.⁷⁹ In this case it appeared that more than three dozen of the largest financial institutions in the United States, all of them interested in investment in New York City mortgages, had formed an organization to gather and disseminate information and coordinate their activities with respect to such mortgage lending. Complaints about the control exercised by this group led to an investigation and a recommendation by a Grand Jury that the Department take civil action to eliminate the influence of this organization. Since the case has not yet gone to trial, and since the author presented the case to the Grand Jury, it seems proper to confine the discussion to the allegations of the Complaint. It is, however, no breach of confidence to say that there is a mass of documentary evidence, some of it rather sensational, to support each allegation.

The Complaint in this case states⁸⁰ that the members of the organization are the dominant figures in the New York mortgage market—where the loans made each year are more than \$200 million, and the total loans outstanding run into many billions. The institutions which were not formally members of the organization were persuaded to follow the policies and practices adopted. The purposes of the organization were: to prevent competition for mortgages; to fix minimum interest rates; to establish uniform appraisals between the members; to exclude minority

⁷⁸ T. N. E. C., FINAL REPORT (1941) 13.

⁷⁹ *United States v. The Mortgage Conference of New York, et al.*, Civil Action No. 27-247 in the District Court for the Southern District of New York. Complaint filed August 6, 1946.

⁸⁰ The allegations of the Complaint are stated here in summary form to show their bearing on the subject of this article. This summary is not intended as a legally precise statement of all the allegations.

racial and national groups from certain areas; to fix minimum rents; and to limit new construction that might compete with buildings on which the members already held mortgages. In carrying out these purposes, the Complaint states, the members of the organization set up an elaborate organization to collect and maintain records, and enable them to exchange information concerning their investments in mortgages and applications for mortgages. The records kept by the organization included detailed maps of the city showing all areas in which any Negroes or Spanish speaking persons (identified on the maps as "Other non-whites"⁸¹) resided, and the organization used its influence to keep these minorities within such ghettos. It appears from the Complaint that the organization was successful in carrying out its purposes, that competition for mortgages was substantially reduced, interest rates maintained, and that the erection of many hundreds of apartment buildings was successfully prevented.

This Complaint is, of course, filed on the theory that these practices are restraints of trade and can be prevented. However, the illegality lies not in the nature of the things done but in the conspiracy to do them. Assuming that all cooperation between the various financial and real estate interests could be prohibited or prevented, the degree of control and the effect of the influence of these interests would be changed very little. Builders and buyers would still be dependent upon financial institutions for credit. And the control given by this credit would be—as it is in many places without such conspiracies—exercised to oppose change in method or design, to maintain slums and oppose urban planning, to maintain credit costs out of the reach of the mass of wage earners, and to lobby against all progressive housing proposals.

The most competent and comprehensive recent analysis of the construction industry is the brilliant book by Lasch, "Breaking the Building Blockade." That author reaches the conclusion that most of the blame for opposition to any innovation in the construction industry must be placed on the bankers.⁸² They feel, he says, that any radical change in house building may make present houses obsolete and so impair their investments; and that any large reduction in costs would bring down the value of existing real estate, and thus threaten them even more. Since the banker must approve of the plans before any money is actually spent on construction, it is obvious that such an attitude is an extremely potent force in preventing any departure from tradition.

The same motivation lies behind the opposition of financial interests generally to elimination of slums and to scientific city planning. When a neighborhood begins to deteriorate, for any reason, the rental value of the property goes down. In order to maintain income from such property, the owners usually forego repairs and improvements, and subdivide the property into smaller units so that more tenants can be accommodated. Thus lower rentals are charged but total income from the property is maintained. However, the failure to maintain the property, plus the crowded

⁸¹ See PM, August 7, 1946.

⁸² LASCH, BREAKING THE BUILDING BLOCKADE (1946) 166.

condition, causes further deterioration of the neighborhood and further depression of the rental. So the process continues, until a bottom has been reached and a slum created. During this process the income producing ability of the property is maintained, so the property may actually increase in economic "value" although its physical utility has almost vanished.⁸³ Thus the financial and real estate interests acquire a large stake in maintaining the slums and opposing any attempt at city planning or reform by any method other than buying the slums at exorbitant and inflated prices.

Next to archaic methods and uneconomic distribution systems, the maintenance of such inflated values and of high interest rates is probably the most important factor in maintaining the high cost of housing. This is true as well of rental housing as of occupant owned housing. A study of 39 New York apartment houses before the war showed a variation in profit and loss from 31 per cent net loss to 32 per cent net profit.⁸⁴ The apartment house which showed the greatest loss had a much higher rent per room and a lower rate of vacancy than the one which showed the highest profit. The profitable one had lower relative operating expenses. However, the big difference was in the per cent of annual income which went for interest on the mortgage. The unprofitable apartment paid 44 per cent of its income for interest, while the profitable one paid only 15 per cent of its income. The range of income paid for interest ran from 6 per cent to 63 per cent, and the average was 29 per cent. In general, the bankers get about 30 per cent of the monthly rental for housing by way of interest on their mortgage loans.⁸⁵

While there is considerable variation in the situation of individual home purchasers, and therefore of the terms they are able to command when borrowing to buy a house, on the average they pay no less to the bankers than the renter. It is only fair to note that, while all other construction costs have gone up in recent years, the rate of interest has come down.⁸⁶ There are many reasons for this, and even economists would not agree as to all of them. Perhaps the two principal ones are the general inflation, or fall in the price of money, and the policy of the government both in its lending and its borrowing activities to exert pressure to lower the interest rate. It is certain that the reduction has not been voluntary on the part of the bankers. They not only oppose any lowering of interest rates, but, in general, any liberalizing of the terms on which mortgage money may be borrowed. A typical attitude was that expressed by one of the speakers at a recent meeting of the New York State League of Savings and Loan Associations: "It seems to me that the veteran's problem is pretty well taken care of by the G. I. Bill of Rights. And I cannot see any necessity for lowering the down payment and postponing the time of maturity and tending to make home owners out of people who should not own

⁸³ See STRAUS, *THE SEVEN MYTHS OF HOUSING* (1944), *passim*, for full documentation and analysis of this process.

⁸⁴ T. N. E. C., MONOGRAPH 8, p. 150.

⁸⁵ *Id.* at 45 and 77.

⁸⁶ LARCH, *BREAKING THE BUILDING BLOCKADE* (1946) 118.

homes."⁸⁷ This was at a time when the maximum guarantee under the G. I. Bill was \$2,000. One wonders what kind of people "should not" be home owners on the modest scale permitted by such a provision—some new race bred from veterans, perhaps, who may also learn to live without food or clothing and work for twelve hours a day without pay.

In any event, the prevailing interest rate on new loans for home construction remains at about 5 per cent.⁸⁸ The cost of making such loans, apart from the allowance for risk, is under 1 per cent; including the allowance for risk, is under 1½ per cent.⁸⁹ Probably the majority of loans for houses today are guaranteed by the government, either under the "G. I. bill" or the F. H. A. Nevertheless, under the "G. I. bill" interest is still 4 per cent and under the F. H. A. 4½ per cent, although there is no risk at all for the lender involved in such loans. There would seem to be plenty of margin still for reducing the interest rates on mortgage loans for homes. A reduction in these interest rates of only 1 per cent would save more than 5 per cent of the total cost to the builder or purchaser; a reduction of 2 per cent would save more than 10 per cent of the total cost. Here is another very significant factor in maintaining construction costs at a high level.

One other activity which has an indirect, although probably an important, influence in maintaining building costs is the powerful lobbying done by the real estate and financial interests. The propaganda of this lobby appears almost daily in the metropolitan papers, some of it quite unfettered by either fact or logic. Thus, in a period of a few months, one prominent spokesman for the real estate interests solemnly assured his readers that government red-tape is slowing down the home building program,⁹⁰ but that the building industry will end the housing shortage by the end of the year;⁹¹ that government insistence on low priced homes is causing deterioration of quality,⁹² but that building costs will be lower by winter no matter what happens to O.P.A.;⁹³ and that the "Washington planners" have set an excessive goal for house construction,⁹⁴ but that home builders are constructing houses at a rate in excess of the government goal.⁹⁵ Two of the most frequent appeals are the widow-and-orphan gag, and the socialism-is-coming cry. The first is illustrated by the headlines on a New York Times story: "N. Y. Brokers Form New State Group of Home Owners—Organize Chapter of National Foundation to Protect Small Holders—Public Housing Assailed."⁹⁶ The story tells of the formation of an organization of *home owners* at the closing session of a convention of *real estate boards*! The socialization argument reaches a sort of ludicrous extreme when the

⁸⁷ Report of Midwinter Conference, N. Y. State League of Savings & Loan Associations, Dec. 13-14, 1945, p. 66.

⁸⁸ *Id.* (Report of E. V. Bell, N. Y. State Superintendent of Banks).

⁸⁹ LASCH, *BREAKING THE BUILDING BLOCKADE* (1946) 120.

⁹⁰ Winchell A. Royce, Real Estate column, N. Y. World-Telegram, April 23, 1946.

⁹¹ *Id.*, Feb. 8, 1946.

⁹² *Id.*, June 11, 1946.

⁹³ *Id.*, May 13, 1946.

⁹⁴ *Id.*, May 16, 1946.

⁹⁵ *Id.*, May 10, 1946.

⁹⁶ N. Y. Times, June 30, 1946, sec. 8, p. 1.

Wagner-Ellender-Taft bill, sponsored by the eminently conservative Senator Taft, is described as "highly socialistic" by the mortgage bankers of the country.⁹⁷

But ludicrous or not, such lobbying becomes significant when it succeeds by "parliamentary tricks" in killing legislation aimed at improving conditions in the construction industry, as it did at the last session of Congress,⁹⁸ and in blocking even a reorganization of existing housing agencies to reduce the red tape which the real estate and financial interests ostensibly deplore.⁹⁹ It is impossible to read, much less to judge or weigh, all of the propaganda put out by these groups. However, the Chairman of the New York City Housing Authority has publicly characterized some of it as consisting of "unvarnished lies."¹⁰⁰ Nevertheless, this propaganda has been so effective that Nathan Straus, former U. S. H. A. Administrator, says the present housing shortage has been caused by the real estate interests which have blocked all new housing that might compete with existing slums.¹⁰¹

REFORMS—POTENTIAL AND PROBABLE

This is not a pleasant picture. The anatomy of the construction industry reveals handicraft methods, restraints of trade and restrictive practices, inefficiency, greed and graft. The present economic system, whatever its other virtues or faults, has failed miserably in this field.¹⁰² Are there any remedies, and is there any hope? It requires great temerity to venture any suggestions on this subject. As already indicated, I regard the analysis and proposals of Robert Lasch¹⁰³ as the most cogent and promising of those yet published. Both Nathan Straus¹⁰⁴ and Thurman Arnold¹⁰⁵ have made important contributions to public knowledge of the subject. Nevertheless, after drawing such a black picture, it seems only appropriate at least to indicate—and no more can be done here—the possible means of improvement. It seems to me that an attack on the prevailing practices and policies in the construction industry can be made on each of three broad fronts. These are: the political; the economic; and the technological.

There are numerous political possibilities, and most of the proposals for solving the housing problem are political in nature. (a) Government control through a system of priorities and a kind of rationing is being tried now, to a degree. It promises no improvement of the fundamental faults already noted. (b) A vigorous and continuous enforcement of the Antitrust Laws, and possible enactment of new laws against other abuses existing in the field, would help some. However, the considerations have been mentioned which indicate that this alone will not solve the problem.

⁹⁷ See United Press dispatch, April 22, 1946, reporting Chicago meeting of the Mortgage Bankers Association of America.

⁹⁸ Washington Evening Star, July 20, 1946, p. B-1.

⁹⁹ N. Y. Times, July 16, 1946, p. 1.

¹⁰⁰ N. Y. Times, March 14, 1946, p. 22.

¹⁰¹ Straus, *These Men Block Housing* (Jan. 5, 1946) THE NATION 6.

¹⁰² See statement of Charles P. Taft, N. Y. World-Telegram, April 29, 1946, p. 2; statement of Senator Robert A. Taft, N. Y. World-Telegram, June 28, 1946, p. 1.

¹⁰³ LASCH, *BREAKING THE BUILDING BLOCKADE* (1946).

¹⁰⁴ STRAUS, *THE SEVEN MYTHS OF HOUSING* (1944).

¹⁰⁵ ARNOLD, *THE BOTTLENECKS OF BUSINESS* (1940).

(c) Public housing, properly administered, enables construction to be undertaken on a larger scale than when privately financed, and therefore achieves some improvement. Public housing, involving some degree of subsidization, will probably always be necessary for a substantial submarginal group which is unable to buy itself adequate housing under our present economic system. (d) But the very crux of the problem is to find some means by which the majority of the population lying in the great middle income groups can buy adequate housing at reasonable prices. Some variation of public housing might help meet this problem. The government might set up a corporation which could use government credit to purchase materials and undertake construction on a wholesale basis, thus eliminating much of the waste now inherent in the process. Such a corporation might also plan residential areas and communities as most private interests are unable to do. Such housing developments could then be sold or leased to those able to pay enough to make a subsidy unnecessary. A few such projects have already been undertaken by very large financial interests, and seem to be successful.¹⁰⁶ (e) The government, either in connection with its housing projects or independently, might and should undertake an extensive program of research in developing new materials and methods. It should also undertake concurrently a program to secure agreement on standardized module units for all common construction materials and supplies. (f) In the field of credit the government has already forced the interest rate down substantially. This pressure should not be relaxed, but increased and continued. Mortgage interest rates can be further lowered, and amortization terms further liberalized with profit to everyone except a few bankers and real estate men. (g) Finally, at the municipal level, building codes can and must be modernized to permit the use of new and improved materials and methods. Land use must be planned and organized so that decent homes when built will be surrounded by decent neighborhoods.

If business desires to avoid government "interference" in this field, there are non-political economic measures that will accomplish many of the objectives of the political proposals. (a) The distributive system for building materials should be simplified. Builders should be able somehow to buy either directly from the manufacturer, or at least on wholesale terms, thus reducing the disproportionate share of the construction dollar which now goes for profits to the distributors of materials. (b) The functions now performed by numerous separate business enterprises should be combined. The process of construction itself, instead of being performed by numerous contractors, should be performed by a single business enterprise with unified management. This should produce greater efficiency and economy. Further, the numerous craft unions which exist in the construction industry, with all their conflicting jurisdictions, are merely reflections of the business organization of the industry. The craft union organization will not be simplified until the business and industrial organization is simplified. (c) The rationalization of the business units engaged in construction should permit some smoothing out of the extreme seasonal

¹⁰⁶ See *Metropolitan Life Makes Housing Pay* (April, 1946) 33 FORTUNE 133.

variations in work, and the payment of an annual wage in some form. This would undoubtedly relieve the pressure for high hourly rates and increase productivity, thus substantially lowering the relative cost of labor. (d) Business itself is capable of extending more liberal terms and lower rates of interest to the ordinary home owner. Large borrowers, often just as great risks as the small ones, are now getting very low interest rates. Except for a very small differential, to allow for cost of administration, similar rates can be made available to the average borrower.

Perhaps the best chance for self-improvement lies in the possibility of technological progress within the industry. (a) Prefabrication so far has succeeded in producing good, but not cheap, houses.¹⁰⁷ It is a dream which has been touted for many years,¹⁰⁸ but which still seems to nurture the potentiality of an industrial revolution for housing.¹⁰⁹ (b) To be distinguished from prefabrication is site-fabrication. This involves some enlargement of the size of the business enterprise undertaking the construction job, and has much in common with the suggested economic rationalization of the industry. Site fabrication has been tried, with some success in achieving economies,¹¹⁰ and seems to have further possibilities. (c) The standardization of materials and parts by means of generally used module units can easily be undertaken by the industry without government intervention. Business organizations already in existence are equipped to set appropriate standards, and efforts are being made to do so. Theoretically, substantial economies can be secured in this manner. Actually, not enough has been done yet to show any results. (d) Scientific planning and mechanization of the construction process itself is urgently needed, regardless of any other changes. These things have increased the productivity of many other enterprises,¹¹¹ including even farming.¹¹² Experimental applications indicate that there may be as much as a 50 per cent increase in efficiency by such methods.¹¹³ When reasonably presented, unions will accept such changes.¹¹⁴ The industry cannot afford to neglect this much longer. (e) Scientific research should be undertaken by the construction industry itself, without waiting for government to take the lead. New, cheaper and better materials undoubtedly can and will be discovered. These in turn may lead to better construction methods and greater economies. Both the public and the various segments of the industry can hope for great benefits from an extensive program of research. American industry generally has been successful because of the investment it has made, and the results it has achieved, in scientific research.

The country cannot much longer tolerate a construction industry with archaic handicraft practices and restrictive policies. Not all the members of other industries

¹⁰⁷ See *Where Is Prefabrication?* *id.* at 127.

¹⁰⁸ See, e.g., *At Last—The "Flivver" House* (Sept., 1941) *ESQUIRE* 63.

¹⁰⁹ See *Fuller's House* (April, 1946) 33 *FORTUNE* 167.

¹¹⁰ See *Big Dave Bohannon*, *id.* at 145; also *The Minneapolis Tribune*, Sept. 3, 1946, p. 1.

¹¹¹ T. N. E. C., *MONOGRAPH* 8, p. 189-191.

¹¹² *The Minneapolis Tribune*, Sept. 7, 1946, p. 8.

¹¹³ T. N. E. C., *MONOGRAPH* 8, p. 196.

¹¹⁴ See *N. Y. Herald-Tribune*, Jan. 11, 1946, *Labor Saving Tools Accepted by Electricians*.

are either honest, unselfish or philanthropic. It is not economically important that all persons in the construction industry acquire such virtues. The majority of those in most other industries, however, are enlightened enough to know that their own advantage, as well as the public welfare, depends upon achieving a reasonable degree of efficiency by economic rationalization and scientific research. Those engaged in construction must come to realize the same thing. The people must and will have decent houses at prices they can afford to pay. They will get them from the government if private enterprise in construction remains a handicraft industry handcuffed by its own practices.