

possible exception of Heck, all of them seem to be more technicians than significant builders. A short quotation from Stoll will perhaps indicate something of what I mean:

Legal science must also satisfy the theoretical demands of systematization. Thus another limitation is imposed upon the scholar who establishes concepts and proposes theoretical theses or formulas. For he will discharge his duty toward legal theory only if he presents concepts and rules as components of a consistent and complete whole, into which all of them can be incorporated and as the result of major principles to which all of them can be traced back. Not only those concepts are erroneously formulated which fail to indicate the essential characteristics of the legal rules they are supposed to condense, but also those which prove to be contradictory to the system. "Within the system there can be no foreign bodies." In the process of systematization, formulation ceases to be a mere matter of usefulness; it becomes a matter of correct logical reasoning. It will rarely be possible to speak of an "equivalence" of formulations. The interests underlying a legal rule or institution may be expressed by different formulations; if we proceed, however, to assign to a given rule or institution its place in a definite system, we are bound by the historical content of the concept as well as by the fundamental outlines of the system. On the one hand, concepts and formulas must be capable of comprising all legal rules which come within their scope; on the other hand, they themselves must fit into major concepts, larger divisions, and more general propositions. To be sure, legal science will frequently achieve only provisional and relatively general formulations, and a choice between several concepts or forms may sometimes be possible. But ultimately one view will prove to be correct. For legal science works incessantly to build a system. Although every system represents a complete and harmonious whole, no system is ever perfect or finished.<sup>1</sup>

All these comments are purely incidental to a sense of great debt which all of us owe to Dr. Schoch and to Professor Fuller and to the editorial committee. No such scholarly and thorough treatment of legal interests has been available in English up to this time. This volume will be found indispensable to those who work seriously in the law. Some of the discussion could perhaps be called statutory interpretation in the manner of Gény and Saleilles, although it is presented in the language of legal interests, while other parts are philosophical in interpreting the law itself on a high plane. But these are necessary variations in the work of continental jurists who constantly presuppose their codes, and who postulate the codes as an inarticulate major premise, while of course in the common-law world our theory of interests presupposes the very different system of customary or judge-made law.

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A NATIONAL POLICY FOR THE OIL INDUSTRY. By Eugene V. Rostow. New Haven: Yale University Press, 1948. Pp. xvi, 173. \$2.50.

Mr. Rostow writes a good brief for drastic changes of law and administration affecting the industry. His main bias seems to be to attribute imperfections in the present oil industry to the original sin of the Standard Oil trust. He fails to appreciate what a good job the oil industry is doing, as compared with the American coal industry or foreign oil industries, for instance. Those who agree with me that he has completely jumped the track to a sensible policy for the antitrust laws in the near future should not be dis-

<sup>1</sup> P. 271.

posed, however, to disregard all his suggestions. He points out that oil pools ought to be operated on a unified basis and that the law ought to be changed to facilitate this result. This idea is not new,<sup>1</sup> but it remains sound. When the existing law of property relating to oil in the ground was spelled out, it was not possible to determine the bounds and the content of pools as it is now. Legal ideas blocked out with inadequate scientific knowledge require legislative changes. This has little relation to original sin.

The flavor and cogency of the author's style may be appreciated through the reproduction of a few lines of his argument in support of his next thesis, that proration and production controls are adapted to price maintenance, and not conservation:

If we were really serious about conserving our oil supply, we would eliminate our oil tariffs; we would use foreign oil in peace time, and perhaps have a holiday in one or more areas of production, keeping the American oil extraction industry as a model plant, and a standby for defense purposes; we would mix gasoline with alcohol made from grain; and we would discourage consumption by a horse-power tax, and perhaps by a prohibition against using oil where coal or water power would do.<sup>2</sup>

He accordingly argues for abolishing present controls, and for removing burdens upon the free importation of petroleum products. He is sufficiently objective to state the facts showing that these production controls are administered in the interest of small land-owners. They are scarcely in the interest of the major oil companies on balance. He is not so unfair as to charge them to the major companies, but he fails to point up the indications to the contrary.

He finds integration to be an evil founded in original sin. Whatever the remote history, its evils are less easy to demonstrate than those of multiple wells, proration, and tariffs. The industry has gone forward with development without waiting for academic perfection. In the process, there have been natural pressures upon the various producers to integrate, no doubt accentuated by the fact that strong companies became largely integrated at an early date. In times of flush production, creating a buyer's market, the companies that did not control their share of marketing outlets were definitely handicapped. This weakness in the Vacuum Oil Company was given due legal recognition in the allowance of its merger with the Standard Oil Company of New York in 1931.<sup>3</sup> In times of threatened shortage, such as the present, a company that does not control enough crude oil to satisfy the major portion of its needs is again handicapped. Large business units, whether deemed legal or illegal, have long been accustomed to exercise an influence in favor of price stabilization. I have no reason to doubt the common information to the effect that the large oil companies reluctantly went along with the last fifty-cent rise in the price of crude oil. Companies inadequately integrated in the producing end were bidding premiums which eventually caused an imperfectly integrated company to jump its posted price in the hope of getting adequate supplies. These hopes not being fulfilled, such companies find themselves under added pressure to integrate by expansion into the field of production.

The author's most doctrinaire proposal involves expanding the antitrust laws in the

<sup>1</sup> "Experts maintain that not only the bounds of the pool but its content can be determined by tests with sufficient accuracy to afford a basis of division of the produce of the pool. . . . Accordingly an enlightened law would deny priority to the 'best sucker' and remit him to his share in the pool and an enlightened judiciary would not interpose constitutional obstacles to a modification of property rights so obviously in the general interests, but such reorientation of legal ideas is not easily achieved." JAMES ANGELL McLAUGHLIN, *CASES ON THE FEDERAL ANTI-TRUST LAWS OF THE UNITED STATES* 247 n. (1933).

<sup>2</sup> P. 33.

<sup>3</sup> *United States v. Standard Oil Co. of New Jersey*, 47 F. 2d 288 (E. D. Mo. 1931).

name of monopolistic competition, an academic concept developed about fifteen years ago to facilitate a more realistic analysis of how markets work.<sup>4</sup> It exists whenever competitors are few enough to take one another's actions into account. Pure competition, where competitors in the same market are so numerous and so independent that no single one on either side of the market affects the operation of the supply and demand scale, is an immaculate conception rarely encountered in practice. There may be many retail grocers, for instance, but there are not enough in a given neighborhood so that any one may safely ignore the possible reactions of his competitors, and each neighborhood is a distinct market.<sup>5</sup>

Judge Learned Hand took a debatable step when he decided that mere size can be a crime under the Sherman Act<sup>6</sup>—the contrary being generally regarded as so well settled that business might reasonably be conducted in reliance upon that understanding. With several judges on the Supreme Court apparently set to rip business to pieces, it is a tough question how far the lower courts come under a duty to promote the process. The Judge was careful, however, to indicate that he identified such monopoly with control of the market in the hands of a single corporation or combination, suggesting that control of one-third of the market would be insufficient to come within the scope of his condemnation, and that 60 to 64 per cent presented a doubtful case.<sup>7</sup> As I understand the author, he now proposes to purge the law of such moderation and to transform monopolistic competition into a lethal epithet to be used for the purpose of making most business criminal, those engaging in business unpunished presumably owing their immunity to the discretion of a benevolent bureaucracy. He admits that there are twenty-two major oil companies, and that the industry has the four stages of extraction, transportation, refining, and marketing; but apparently eighty-eight companies would not be enough. Where could even eighty-eight really independent groups be found to take an interest in living under the regime he proposes? The cost of the swarms of bureaucrats that would be necessary to attempt the enforcement of such a program is not even remotely recognized.

The author is impressed with the "astronomic" costs of monopolistic competition,<sup>8</sup> but pays no attention to the cost of alternatives. As a lawyer well versed in bankruptcy, he doubtless is aware of the traditionally high mortality among small grocers, with its accompanying economic waste. One of the notable achievements of the last generation has been the development of the chain store, with its remarkable contribution to efficiency in distribution. This significant development necessarily involved a decrease in the number of persons determining price policy in a given market, and is thus to be associated with the growth of monopolistic competition. I do not say that all monopolistic competition is good; I merely insist that careful circumspection must be substituted for epithets and blanket condemnation.

Any program calling for the mobilization of government to atomize an industry must be weighted with the realization that the resources of even bureaucracy are likely to be limited, and that some attention must be paid to meeting the most pressing needs first. We are suffering to a considerable extent from the same kind of mislabeling that has

<sup>4</sup> See EDWARD CHAMBERLIN, *THE THEORY OF MONOPOLISTIC COMPETITION* (1933); JOAN ROBINSON, *THE ECONOMICS OF IMPERFECT COMPETITION* (1933).

<sup>5</sup> The wheat market is commonly referred to as a prime example of pure competition, although it is not clear that large speculators do not try to outguess individual competitors. The bureaucrats don't like the way this market works at the producer level. While the lunchrooms are still serving one roll instead of two, the government is again suggesting a reduction in wheat acreage.

<sup>6</sup> *United States v. Aluminum Co. of America*, 148 F. 2d 416 (C. C. A. 2d 1945).

<sup>7</sup> *Id.* at 424.

<sup>8</sup> P. 117.

enabled the life-insurance companies to overexploit their product. Fire insurance is correctly labeled with reference to the event it contemplates. The death-insurance salesman would not be tolerated as the life-insurance salesman is. So-called labor unions have not existed for the purpose of promoting labor. On the contrary, they have existed for the purpose of exacting more pay and other collateral advantages for less labor. The point has now been reached where highly organized unions have assured their members of not working hard enough nor long enough for the public good, while they extract rewards disproportionate to their efforts. A proper designation of "loafer unions" instead of "labor unions" might conduce towards a more accurate appraisal of the balance that should be struck in the legal regulation of our economic system.

The oil industry is meeting an increasing portion of our needs, while the coal industry is not doing its share because a loafer monopoly is firmly entrenched in a strategic position. The relative importance of labor costs in coal is partly due to difficulties inherent in extraction, but, with the invention of remarkable mining machinery, the main cause is the lack of strong companies to undertake the necessary investment. The few companies controlling automobile prices have shown noteworthy restraint in keeping their prices something like one-third below what the grey market in "new-used" cars indicates they would obtain by the free operation of supply and demand. But the interdependence of modern manufacture has arrested production of automobiles through the disrupting effects of the rounds of strikes in coal, steel, parts, and finished products. Concessions to monopolistic power by an interminable series of wage increases in these industries and elsewhere promise interminable and eventually disastrous inflation.<sup>9</sup> The disaster will come when the public finally comes to the conclusion that its government bonds and its death-insurance policies are wasting assets, depreciating more rapidly than they accumulate interest. The banks and the insurance companies, having only depreciating claims to meet, may still be readily forced by the government to act as conduits, but conduits whither?

I soberly suggest that the power of government in relation to monopolies must now be directed primarily against loafer monopolies, if we are to continue any serious attempts to maintain a free economy. In spite of the extra burden thrown on the oil industry by the stranglehold that Lewis has on coal, and in spite of the military demands on a scale hitherto unprecedented in times of peace, we are not suffering seriously for lack of petroleum products. Their increase in prices does not seem out of line with the course of other prices. Gasoline has long carried a heavy load of special taxes. We lack new automobiles to use the petroleum efficiently, for reasons already discussed. Much greater is the suffering from lack of adequate housing. An antitrust attack on the construction industry, initiated around the commencement of the current decade, was doomed to failure by the judge-made immunity for loafer unions.<sup>10</sup>

If it be conceded, as Mr. Rostow indicates, that the prevalence of monopolistic competition in markets tends to restrain the present upward surge of prices, there would seem to be no immediate pressure to change the general situation along that line. "Under a regime of competition prices would, undoubtedly, be more flexible, at least in a downward direction, in response to great declines in national income."<sup>11</sup> That would be very

<sup>9</sup> With the help of tax carrybacks, General Motors was able actually to render a strike unprofitable. While this moral victory helped to stem the tide temporarily, it could not turn it. Strong companies seem, however, the best protection the public has under present conditions.

<sup>10</sup> Indirectly the cost of all manufacture is increased by the great rise in construction costs. The repercussions of this fact upon the corporate balance sheet are aggravated by a Treasury insistence upon historic cost as a basis for depreciation allowances. This can only operate as a drag on a wide variety of enterprises.

<sup>11</sup> P. 52.

fine with a free labor market, but with government-fostered loafer-union monopolies, the situation is rendered acutely worse. An employer might be inclined to keep up the scale of his operations if he were free to cut wages in line with falling prices, but he can be assured that people who want to work for such appropriate wages will be deterred by the violence and intimidation which the government has reserved as the prerogative of the privileged loafer-union class.<sup>12</sup>

There are a sketchy dozen pages on "oil abroad," developing the idea that the proposed Anglo-American oil treaty contains desirable political provisions covering access to raw materials on a competitive and non-discriminatory basis, while the economic provisions are objectionable as adopting the familiar philosophy of cartels, with the accompanying concern for price maintenance, and "equitable dispositions" in that context. While these opinions are not without basis, it is hard to attach much importance to a foreign policy for oil divorced from our general foreign policy. An idea of the rather rarefied academic medium in which the work seems to move is suggested by the statement: "Foreign oil reserves may be important to American security; at any rate, we think they are, and that is the important thing."<sup>13</sup> If we are wrong in our thought on this matter, we can hardly avoid going astray in our oil policy. The author's apparent lack of conviction on this point raises questions concerning the perspective from which the problem is viewed.

It seems to me that questions of foreign policy are presently significant only in so far as they relate to the maintenance of free institutions on this planet, now seriously menaced. The concept of unqualified national sovereignty promotes wars, and ought to be surrendered in favor of a superior government with limited powers, operating directly on the individual. We ought to trust all people free from totalitarian control sufficiently to promote such a union with them. It is impossible, however, to reach the peoples under totalitarian control so as to bring them into any such government. The world is now part slave and part free.<sup>14</sup> This cleavage cannot be bridged by conversations or appeasing gestures. It can be resolved in favor of freedom only by war, or by so strengthening the forces of freedom through union that a bloodless victory can be achieved in the course of time. Whether this view is right or wrong, to exclude the considerations on which it is based is to assume that we can complacently ignore the seriousness of the threat to our future. The more complacent course may facilitate academic exercise within a narrow frame of reference.

Moreover, any oil policy in the Middle East which ignores the question of Palestine would seem to be unrealistic. Great Britain received the Palestine mandate for the express purpose of founding a Jewish National Home. When the need for it as a refuge became most acute, Great Britain repudiated its trust. The Western Powers falling heir to this problem have hesitated to take a strong stand against the Arabs because of the oil situation, but the Jews have shown themselves well able to look out for themselves if only they are given access to military supplies. They have business and intellectual ties

<sup>12</sup> I asked an experienced railroad engineer recently how he liked his help. He said that they were sloppy and dangerous, and talked about what the union would do for them rather than attending to business; that he had never thought that he would pray for another depression, but found himself doing so. While a depression might have a sobering effect, there is reason to fear that many loafer unions are so firmly entrenched that lay-offs could not be achieved on the basis of inefficiency. The possibility that the sanction of discharge may induce proper attention to work is diminished by such fantastic laws in the "labor" field as the provision in Massachusetts of unemployment compensation running up to \$49 per week for loafers with large families—more than many of them earn on the job, even under present wage scales.

<sup>13</sup> P. 107.

<sup>14</sup> Our failure to achieve complete freedom in human rights at home only dulls this contrast, without destroying it.

with the West to make them a strong outpost of Western civilization. They raise the standard of living so that the land will support more Arabs, as well as more Jews. The backward Arab lords don't like this, but know they would hardly do better by rushing into the arms of the Soviets. This is no time and place to attempt a solution of the touchy problem of holy places. The point is that no oil policy which does not square with the ideals and the obligations of the Western Powers deserves to succeed, and any discussion of foreign oil policy which ignores such questions is submitted to have most limited value.

A reviewer's views on the cosmos are obviously no proper test of the author's achievement, however, and the book need not stand or fall on the inadequacy of the lonely little section on foreign policy. The rampant conceptualism of its atomization program is not likely to triumph. The more temperate proposals, which seem well founded, are sufficiently drastic. If the work promotes their adoption, it will be well justified.

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