

ERNIE RATLIFF
ON PRICE FIXING

No will will dispute that America is now living through its most dangerous season of discontent. Never before have so many people so seriously questioned the basic premises upon which our country operates. Perhaps the most insistent and protracted attacks are upon our beloved free enterprise concept. ~~xxxxxx~~ Loud and clangorous as these attacks are, they generally seem disconnected and meaningless. But if one listens closely and carefully, a significant and coherent strain can be detected amid all the clamor. It is this muted strain which, ^y properly understood, enables one to discern pattern and sense of purpose in the outraged cries about the failure of capitalism. It is this elusive strain too which points the way to reconciliation of our differences and shows the path to restoration of confidence in our economic system thereby insuring its continued viability.

The attentive listener learns from this subdued strain that we are not being attacked so much for our system as for our failure to live up to it. In the language of the young and the disaffected—for our hypocrisy. Indeed, logically, the young cannot attack us for what we are. Are not "committment" and "do your own thing" the watchwords of this generation? The principal thrust of the new morality is not to establish personal ^{license} lliscence but to inure the right of every individual to go his own way and to not be subject to censure for his personal ideology. In this framework, mortal sin is not found

in a particular belief but in the failure to live up to it, in the failure to be true to one's self. The real attack then is on the gap between our practices and our professions, on the differences between our standards and our performances. With this background, let us consider one aspect of the present operation of our economic system.

II

Somewhere in this country, this past week, as for many years past now, a group of the most respected men of any given community got together. Very likely, the locale was the nicest hotel or the most exclusive businessman's club in town. In attendance were all the important men in a particular industry or trade. The occasion was a trade association meeting or an industrial conference. The fare included a luncheon, drink, trade reports, probably a workshop, an after-dinner ~~speech~~ speaker and general camaraderie and good fellowship. But something else was included too. During the course of the meeting these men - good citizens, lay churchmen, local government officials and other pillars of the community - who control one area^{of} trade, decided among themselves what the uniform price of their goods or services would be. Over coffee, these men arrested and directed the force of the market. They arranged to limit competition, the keystone of free enterprise. They short-circuited capitalism, by putting an artificial floor under prices.

As a result of this activity, the American housewife found herself paying more whenever she went to buy. She paid more at the drugstore for medicines necessary to sustain life, in many cases more extra than she could afford. She paid more at the bookstore for items needed for her children's education. She paid more for Johnny's haircut and Judy's permanent. If Johnny had an accident with the car, she paid more for its repair and for legal fees to defend him.

She was not alone. For so great is the effect of these price fixing arrangements that even the U. S. Government has been victimized as indicated by the TVA bidding incidents of a few years back.

Yet the same men ~~xxx~~ who set these prices, who made a mockery of the principle of free and open competition are the same ones who extol the virtues of free enterprise in letters to the editor, who give long disquisitions at ~~xx~~ civic club meetings about the glories of capitalism and who never miss an opportunity to flay youths who raise doubts about the economic system.

If our youth are more cynical than the rest of us, perhaps it is because they are more perceptive. For clearly what is happening in events such as these is the ~~the~~ of the system for personal gain. Competition, our solid

citizens are saying through these acts, is fine so long as it is not likely to hurt me. But if allowing the impersonal forces of the market free and unregulated play endangers my position and ~~my~~ personal status, then I'll have none of it. Better to emasculate the system for my personal preferment. As a smokescreen for my anti-social activity, I'll raise a hue and cry about welfare and poverty. Shame and faker, cries ^{many of} our youth and retreat ~~from~~ from entry into a society denoting threescore and ten to self-delusion.

On this one issue then, ~~the honest man~~ ^{Color compels us to} must admit that ^{in many instances} the youth are right. To make this admission, as I have, is to be compelled to call this sorry state of affairs to the attention of the citizenry as I am today, because I must. I call it to your attention ~~is~~ not merely because I believe that a full-fledged return to our historic guidepoints and a ceasing and desisting from misuse of our system as a citadel of privilege will bring us closer together but because, I believe, the continued abuse of our system poses fatal danger to it. ~~and will also ultimately destroy it.~~

III

In my belief that the market forces must be left alone so as to give the little man of our society some chance and not just those already established, I am squarely in line with one of the oldest doctrines of my discipline. The law has always regarded artificial interference with the market

as (except in certain limited instances) antithetical to the general welfare. As early as the Fifth Century Emperor Zeno of Rome commanded by royal edict that no persons would "combine or agree in unlawful meetings, that different kinds of merchandise may not be sold at a less price than they may have agreed upon among themselves."

English jurisprudence set its face against this type of restraint of trade as early as 1415. At the birth of our country, the English doctrine against price-fixing came into our own legal system with our receipt of the common law. As American business grew bigger and the possible ~~xxx~~ injury to the public increased proportionately, the Federal government entered the field with the antitrust laws such as the Sherman and Clayton Acts. In 1927 the Supreme Court said: "The ... result of price-fixing, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained because of the absence of competition secured by the agreement for a price reasonable when fixed." Thus, the Court recognized that in a free market the best guaranty for the people is not the goodwill of individuals but the impartial preemptory action of the market.

The market, unlike business associates, is no respecter of persons. No matter that the men who seek to suspend competition are good and honorable. They have mutual interests. The market has none. The law, then, has always understood that destruction of competition through price-fixing is a fundamentally anti-social act in that economic waste and unfair advantage ~~are~~ usually result from it. Perhaps the best example of this waste and unfair advantage is the ~~static~~ static and poverty-stricken society of Europe in the hayday of the guilds. In one of its noblest visions, the law hopes never again to see trade so regulated and controlled by a few.

IV

Despite the ancient tradition of the law and despite the bedrock danger to which we are subjected and despite the economic penalties forced upon us by the practice of price-fixing, it is a sad ~~a~~ fact that the general^(public?)/is not greatly concerned over price-fixing and sees little criminality in it.

To be sure, the public gets excited when corporate giants are caught ^{at it}. The high water mark of public interest came during the trust-busting era~~s~~ that attended the birth of the antitrust laws and saw the dissembling of such corporate giants as Standard Oil and American Tobacco. After that period, public interest lay dormant until the 60's when the Kennedys marched some big electrical manufacturing officials off to jail. In both instances, the sheer magnitude and power of the people involved aroused the little man's inatinctive fear of the giant.

In certain other fields too, where the product or service is particularly important, the public has shown concern. Such fields are insurance, utilities, milk, and communications. This concern has led to state and federal regulatory agencies in all these fields generally limiting the power of the sellers to set prices.

But in the general area where the industry^{is} populated by numerous ^{producers} procedures and sellers and the products or services are not so vital as to require direct regulation, the public shows little interest and allows the people in the field to tamper with the economic system at will. Of course, the monetary loss suffered in all these fields is great (to the public). In this area, trade group associations, industrial councils and similar organizations, acting in concert, control prices to the detriment of the general public and incur little opprobrium.

In trying to understand why the public takes this, I have settled upon three paramount reasons. I believe all of them involve serious error.

First, the public believes that those who have labored long and hard for success in their businesses deserve to make a good profit out of it. Of course they do. It is sufficient to point out that history and experience indicate that the economic interests of the public are best served by

making sellers insure that their products and services continue to meet the public's needs and wants. Public demand, created by the public satisfaction then insures a fair profit. And the public is also protected from gouging through limiting of competition.

Second, citizens do not regard established members of the community as criminals. That is understandable. Consider the community status of some of the most frequent price-fixes. At the head of the list must be lawyers, by the strongest of paradoxes defying what I have called the noblest vision of their calling. The minimum fee schedule is the most common price of liberature put out to law association members. It is bold-faced price-fixing - concert, agreement and tempering are all present. A prominent lawyer, a reputed expert in antitrust laws, has stated that minimum fee schedules are not price-fixing if there is no attempt to enforce them by bar associations. With all deference to the attorney's expertise, I read the decisions of the U. S. Supreme Court in U. S. v NATIONAL ASSOCIATION OF REAL ESTATE BOARDS and U. S. v SACONY-VACUMN OIL CO. to say ~~the~~ that the mere existence of a uniform, minimum schedule is price-fixing. Nowhere is the danger of this practice more clearly revealed than in the field of law. For generations, lawyers, taking advantage of their position and acting in concert, kept the price of legal counsel so high that a great many Americans

I solicit your aid not alone because of the accurate criticism of the difference between our actions and our mouthings. I solicit it, as well, because I am firmly convinced that continual constriction of competition is sapping the very life blood of our economy and as the enfeebled creature resulting from artificial price inflations falters and is unable to deliver services the public now demands, public demand will require that it be replaced by some creature the business community may regret, but regret too late. To the prevention of this end, I call the business community back to its antecedents. The surgery will not be painless; it may be life-saving.

* * * * *