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# ARTICLE

## ADAM SMITH ON THE INEVITABILITY OF PRICE FIXING

*Arthur Austin*<sup>†</sup>

### ADAM SMITH'S PRICE FIXING PARADIGM

Charles Dickens would call price fixing the “best” but also the “worst” of antitrust violations.<sup>1</sup> A “fix” can take much of the risk out of pricing, the tradesman’s most complicated and unpredictable task. Too low and it’s predatory, too high and it’s monopolization. The downside is the Draconian penalties—fines and jail time tracked by treble damages in civil actions. There is also the detection factor emboldened by the government’s amnesty program which encourages officers and employees to cooperate with the prosecution in exchange for favored treatment. Substantively, defendants are confronted with the *per se* rule—proof of the *act* of fixing is a legal issue<sup>2</sup> and, under the *per se* presumption, proof of economic effects are excluded.<sup>3</sup>

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<sup>1</sup> As the author of BLEAK HOUSE (1853), Dickens was familiar with the vicissitudes of law hence, “the one great principle of the English law is, to make business for itself.” CHARLES DICKENS, BLEAK HOUSE 529 (The Heritage Press 1942) (1853).

<sup>2</sup> RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 289 (2003).

An unintended consequence of this emphasis is that the cartels most likely to be discovered and prosecuted are those in which the price and output effects are small. They are the cartels with many members, so there is a better chance that one will become disgruntled and inform on the others; that depend on explicit and reiterated negotiation and agreement, which provide the essential evidence of violation; and that are likely to be riddled with cheating and collapse shortly amidst mutual recrimination—circumstances that create opportunities to obtain willing witnesses to offer evi-

The best of times trumps the risk of detection—and people of trade persistently risk careers and reputations to fix prices. Some are willing conspirators, others are coerced or duped. Once caught they will offer an exonerating rationalization before abjectly confessing culpability in exchange for a lighter sentence. The best and the brightest—and the dregs—are equally vulnerable. In *THE WEALTH OF NATIONS*, Adam Smith provides the explanation for this mess:

People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices. It is impossible indeed to prevent such meetings, by any law which either could be executed, or would be consistent with liberty and justice. But though the law cannot hinder people of the same trade from sometimes assembling together, it ought to do nothing to facilitate such assemblies; much less to render them necessary.<sup>4</sup>

Smith's lecture implicitly assumes a connection between the corporate *raison d'être*—profit maximization—and price fixing. Tradesmen are dedicated to controlling that which assures their existence—price. Any monopolist—scrap dealer or computer mogul—knows that as soon as they set a price, it is “fixed.”<sup>5</sup> In most cases, firms co-exist in an oligopoly where everyone can fairly accurately assess costs, enabling everyone to follow a lockstep pricing strategy that produces *supra* competitive profits. Whatever the context there is the trade association which exults the exchange of information as an enabler for price stabilization.

But protracted stability is an unachievable ideal; the appearance of a new irascible rival, technology innovations, external blips like catastrophe, along with changes in government policy, are constant threats to price. These are the disturbances that the Invisible Hand<sup>6</sup> is

dence of agreement. The smoothly functioning cartel is less likely to generate evidence of actual agreement.

*Id.*

<sup>3</sup> See James Rahl, *Price Competition and the Price-Fixing Rule—Preface and Perspective*, 57 NW. U. L. REV. 137, 141 (1962) (discussing the legal ramifications of application of the *per se* rule of price fixing). For the best survey and analysis of the law and economics of price fixing, see Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE L.J. 775 (1965); reprinted in 75 YALE L.J. 373 (1966).

<sup>4</sup> ADAM SMITH, *THE WEALTH OF NATIONS* 128 (Modern Lib. Ed. 1937).

<sup>5</sup> *United States v Aluminum Co. of America*, 148 F.2d 416, 428 (2d Cir. 1945). Because price fixing is *per se* illegal, in turn this arguably renders monopoly-in-fact *per se* illegal.

<sup>6</sup> See SMITH *infra* note 4.

programmed to handle by each firm engaging the menace with improved performance and efficiency. There is, according to Professor Smith, an alternative response; as firms ensconce in a shared identity, they gravitate to the most effective safety net—price fixing.

I rely on four cases to evoke a predictable course of price fixing as corporate zeitgeist—a corporate way of life. In *American Tobacco I*<sup>7</sup> the defendant incorporated small rivals into a Smith version of a “government of towns corporate”<sup>8</sup> to create a monopoly. After the Supreme Court ordered dissolution, *American Tobacco II* extended the price fixing ethos to a three firm oligopoly.<sup>9</sup> (A portion of the enormous profits from the *Tobacco Trust*, as it was called, went to Trinity College in Durham, North Carolina, on condition that it rename to “Duke,” after the president of American Tobacco.) The legacy of the General Electric conspiracy is a lesson plan in process—the tactics used to avoid detection and responsibility. The Sotheby’s/Christie’s conspiracy proves that there is no safe harbor for price fixing. In the chic fix of the post-modern generation, the major art capitalists got caught with their hands in the cookie jar.

#### THE AMERICAN TOBACCO ETHOS

In 1911, Chief Justice White, a civil law lawyer from Louisiana trained to the literal reading of the Code, anticipated Paul deMan’s glance into the abyss of deconstruction<sup>10</sup> by revising the Sherman Act’s prohibition of “every restraint of trade” to read “every [unreasonable] restraint of trade.”<sup>11</sup> He first used the decon ploy to dissolve the Rockefeller empire followed by the *American Tobacco* case. The first Justice Harlan objected to the rewriting of the Sherman Act: “One thing is certain, ‘rule of reason,’ to which the court refers, does not justify the perversion of the plain words of an act in order to defeat the will of Congress.”<sup>12</sup> While Harlan knew that American Tobacco was a “monster combination,”<sup>13</sup> he also knew that “every”

<sup>7</sup> 221 U.S. 106 (1911).

<sup>8</sup> Smith, *supra* note 4, at 124.

<sup>9</sup> 147 F.2d 93 (6th Cir. 1944).

<sup>10</sup> Arthur Austin, Essay, *A Primer On Deconstruction’s Rhapsody of Word-Plays*, 71 N.C. L. REV. 201, 211 (1992).

<sup>11</sup> *Standard Oil Co. v. United States*, 221 U.S. 1 (1911). In his dissent, Justice Harlan stated that the result of the Court’s decision was that the Sherman Act, which refers to a “contract in restraint of trade” will be construed not to “include all contracts in restraint of trade, but only those which are in unreasonable restraint thereof.” *Id.* at 87.

<sup>12</sup> *United States v. Am. Tobacco Co.*, 221 U.S. at 192. For more on Paul deMan’s glance into the abyss, see Austin, *supra* note 10.

<sup>13</sup> *Id.* at 190.

meant “every” and White’s interpretation could have unanticipated consequences.

American Tobacco controlled prices the old fashioned way—they monopolized. Beginning in 1890, the year the Sherman Act was enacted, James B. Duke began a campaign to counter the sting from “various competitions” that periodically surfaced by acquiring every tobacco related business that could pose a threat, shoring up the money-makers while closing the marginal operations.<sup>14</sup> In an early version of corporate restructuring, Duke presented the public with a façade of price competition by maintaining the newly acquired firms as ostensibly “independent concerns disconnected” from American.<sup>15</sup> Lorillard, for example, continued as an “independent” company in competition with American. The facilitation of price and profit maximization was, as Chief Justice White said, achieved by “the exertion of honest business methods brought into play for the purpose of advancing trade instead of . . . obstructing and restraining the same.”<sup>16</sup> Duke had used the Invisible Hand as a front to subvert competition. The Company internalized the trade association concept to maintain the external façade of open competition.

Chief Justice White explicitly, if not expressly, acknowledged Smith’s concern with the tendency of rivals to collectivize price. In American Tobacco’s case, it was shrewd, ruthless, and eventually illegal, to play upon the “cupidity of competitors”<sup>17</sup> in order to combine acquisitions with otherwise reasonable contractual restraints to create a network of sham rivals who, in addition to serving as captive price fixers, were exploited as barriers to entry.<sup>18</sup> White cited the rule of reason from *Standard Oil v. United States*<sup>19</sup> to condemn American Tobacco for using “trade conflicts designed to injure others, either by driving competitors out of the business or compelling them to become parties to a combination.”<sup>20</sup>

The remedy phase exposes the no-win dilemma in monopolization suits created by White’s deconstruction of “every.” White remanded to the 6th Circuit for a dissolution decree “recreating out of the elements now composing it, a new condition.”<sup>21</sup> Seeing the quandary, Harlan argued that White’s recommendation cut against the facts. How can one “recreate” a legal system composed of the very entities

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<sup>14</sup> Thereby rendering them “useless for the purposes of trade.” *Id.* at 163.

<sup>15</sup> *Id.* at 164.

<sup>16</sup> *Id.* at 178.

<sup>17</sup> *Id.* at 182.

<sup>18</sup> *Id.* at 183.

<sup>19</sup> 221 U.S. 1 (1911).

<sup>20</sup> *United States v. Am. Tobacco Co.*, 221 U.S. at 182.

<sup>21</sup> *Id.* at 189 (Harlan J., concurring and dissenting in part).

of what White called a “ruthless violation?”<sup>22</sup> Under a literal interpretation of the Sherman Act, the monopolization charge would have subsumed the otherwise reasonable contracts as enablers to the violation, eliminating them as the basis for repackaging. Harlan, a common law disciple, anticipated a recreation as a dagger into the soul of the Invisible Hand in the form of oligopolized shared monopoly.

He was right—the 1911 dissolution decree led to a revised version of the old sham “competition” between American Tobacco, Liggett & Myers, and R. J. Reynolds in an oligopoly controlling 91 percent of cigarette sales.<sup>23</sup> During the throes of the 1930s’ severe depression, the three firms were engaged in Smith’s prediction on price facilitation – they were adhering to conscious parallel pricing.<sup>24</sup> Big Three prices were “practically identical since 1923, and absolutely identical since 1928.”<sup>25</sup> During “one of the worst years of financial and economic depression in the country”<sup>26</sup> the Big Three on the same day raised the price of leading cigarette brands from \$6.40 to \$6.85 per thousand. The president of Reynolds said it was an expression of confidence; in the voice of John D. Rockefeller’s Sunday school lesson,<sup>27</sup> the American Tobacco president called it an “opportunity of making some money.”<sup>28</sup>

Evidence of parallel pricing alone will not get a price-fixing case to the jury; there must be a “plus,” an accompanying indicia of consciousness, i.e., the agreement.<sup>29</sup> In *American Tobacco II*, the 6th

<sup>22</sup> *Id.* at 190.

<sup>23</sup> *Am. Tobacco Co. v. United States.*, 147 F.2d 93, 100 (6th Cir. 1944).

<sup>24</sup> [C]onscious parallelism is devoid of anything that might reasonably be called agreement when it involves simply the independent responses of a group of competitors to the same set of economic facts – independent in the sense that each would have made the same decision for himself even though his competitors decided otherwise. But the consciously parallel decisions of oligopolists in setting their basic prices, which are interdependent in that they depend on competitors setting the same price, are not nearly so easily disposed of on the ground that no agreement is involved.

Donald F. Turner, *The Definition of Agreement Under The Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655, 663 (1962).

<sup>25</sup> *Am. Tobacco*, 147 F.2d at 103.

<sup>26</sup> *Id.*

<sup>27</sup> The growth of a large business is merely a survival of the fittest . . . . The American Beauty Rose can be produced in the splendor and fragrance which brings cheer to its beholder only by sacrificing the early buds which grow up around it. This is not an evil tendency in business. It is merely the working-out of a law of nature and a law of God.

RICHARD HOFSTADTER, *SOCIAL DARWINISM IN AMERICAN THOUGHT* 45 (Bacon 1962).

<sup>28</sup> *Am. Tobacco.*, 147 F.2d at 103.

<sup>29</sup> However, parallel pricing, without more, does not itself establish a violation of the Sherman Act. Courts require additional evidence which they have described as ‘plus factors.’ Examples of these ‘plus factors’ include actions contrary to a defendant’s economic self-interest, product uniformity, exchange of price information and opportunity to meet, and a common motive to conspire or a large number of communica-

Circuit cited facilitation factors as probative "plus" indicia including, a trade association that provided the opportunity for confidential exchanges and a vehicle for conspiracy.<sup>30</sup> They also recognized the relevance of historical testimony, reflecting a lingering echo from *American Tobacco I*.<sup>31</sup>

The American Tobacco experience validates Harlan's prediction that the government cannot break price-fixing by merely repackaging the culprits. It also resonates with Smith's warning about a price fixing ethos: the presence of "social and historical relationships which favor cooperative behavior rather than hard-nosed rivalry."<sup>32</sup> Moreover, according to Justice Burton in the majority opinion affirming the conviction, "a community of interest . . . provides a natural foundation for working policies . . . unfavorable to outsiders."<sup>33</sup> He is thus including ethos as a "plus" in proving conscious parallelism price-fixing and a factor the jury is entitled to add to the mix. Most significant is the Court's conclusion that the ethos was so obviously anti-ethical to the Sherman Act as to constitute a level of circumstantial evidence justifying a jury verdict of conspiracy.<sup>34</sup>

#### A CORPORATE WAY OF LIFE

*"They developed complex and unique systems to work out their conspiracies, utilizing the moon, of all things, to act as signal lamp for their plans."*<sup>35</sup>

The shadow of *American Tobacco II* motivated firms to be wary of suggestive inter-enterprise contact. More importantly, the demise of the Rockefeller and Duke empires and the emergence of an oligopolized economy created more dynamic markets in which firms compete in quality and prices. Nevertheless, while obvious facilitation gestures were eschewed, price-fixing continues to be as "American as apple pie."<sup>36</sup>

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(citations omitted). *Wallace v. Bank of Bartlett*, 55 F.3d 1166, 1168 (6th Cir. 1995).

<sup>30</sup> *Am. Tobacco*, 147 F.2d at 119. The trade association movement is traced to Arthur Jerome Eddy's *The New Competition* (1912) which endorsed the benefits of rivals exchanging information on market conditions. See ARTHUR JEROME EDDY, *THE NEW COMPETITION* 232-56 (1912) (noting that collaboration benefits more parties than secrecy and competition).

<sup>31</sup> *Id.*

<sup>32</sup> Paul L. Joskow, *Firm Decision-Making Processes and Oligopoly Theory*, 65 *AM. ECON. REV.* 270, 278 (1975).

<sup>33</sup> *Am. Tobacco Co. et al. v. United States*, 328 U.S. 781, 793 (1946).

<sup>34</sup> *Id.*

<sup>35</sup> JOHN G. FULLER, *THE GENTLEMEN CONSPIRATORS* 13 (1962).

<sup>36</sup> Arthur Austin, *Price Fixing: American As Apple Pie*, *DAILY LEGAL NEWS AND*

The prototype for the more sophisticated version of price-fixing came in the 1960s' "G.E. Conspiracy": twenty-nine companies, including elites General Electric and Westinghouse, were convicted of fixing the bid prices for transformers and ancillary products. While the jailing of top executives got the headlines, lawyers paid attention to the details of conspiracy. The industry lifestyle was "price stabilization" by bidding according to market share. Under the "Phase of the Moon" formula G.E., the leader, followed by Westinghouse, Allis-Chalmers, plus three fringe firms, rotated low bids: "the price spread between defendant manufacturers' quotations would be sufficiently narrow so as to eliminate actual price competition among them, but sufficiently wide so as to give an appearance of competition."<sup>37</sup>

The process was designed to avoid detection and assure efficiency. G.E., acting as the enforcer, divided responsibility into two groups: "high level" executives who devised tactics and met with counterparts to work out details and the "working group," the grunts who implemented the plan.<sup>38</sup> The inter-enterprise conspiracy meetings were conducted with C.I.A. hush-hush secrecy: code names, mail drops, and false travel vouchers to hide actual trips to meet at places like Dirty Helen's in Milwaukee. "When they walked in," according to Helen, "I'd say: 'Here come the big shots again.' They were gentlemen, and they paid for their drinks."<sup>39</sup>

One of the more ingenious tactics was Directive 20.5, a company-wide order forbidding violation of the Antitrust laws and, to emphasize seriousness, requiring a signature of commitment from every employee. On its face, it professed the authority of G.E.'s willingness to assume a burden of accountability. In practice, it engendered the "quiet wink," a maneuver permitting upper level executives to walk the high road with an admonishment to the working group accompanied by a "wink" that simultaneously nullified the admonishment.<sup>40</sup> If the "winkees" got caught, they were left twisting—facing discharge or exile.

CLEVELAND RECORDER 1 (Nov. 21, 1995).

<sup>37</sup> FULLER, *supra* note 35, at 65.

<sup>38</sup> *Id.* at 106.

<sup>39</sup> *Id.* at 174.

<sup>40</sup> For the record, a superior officer might say to his underling: 'Joe, let's have none of this price-fixing monkey business, remember that!' And he would punctuate his remark with a broad smile and the neutralizing wink which would mean, far beyond the words on the corporate records: 'Get off your tail and 'stabilize' those prices with the competitors, or we're going to be in trouble with the profit side of the ledger.'

FULLER, *supra* note 35, at 124.



Price stabilization and the threat of twisting was DNA at General Electric. As employees “moved up through the corporation ranks, they found that they were inheriting a certain corporate ‘way of life’ which had to be accepted, or they were no longer in line for promotion.”<sup>41</sup> An “absolute ‘way of life,’”<sup>42</sup> price stabilization became the controlling culture—tantamount to company policy—in which the chairman of the G.E. board, the president, and the executive vice-president were able to hide behind Directive 20.5.<sup>43</sup> In testifying before the Senate Judiciary Subcommittee, Ralph Cordiner, chairman of the board, pleaded a complete lack of knowledge about what everyone else at G.E. practiced as a way of life. The best he could do was to cite Directive 20.5 and note that he assumed his lawyers were taking care of antitrust. It was a version of the “‘It Wasn’t Me’ Defense”<sup>44</sup> raised at the Nuremberg war trials and more recently in *United States v. Taubman*,<sup>45</sup> the Sotheby’s/Christie’s conspiracy.

The G.E. Conspiracy flushed out a pathology that lurks in every price-fixing afterthought—the no harm, no foul rationalization. After contacting customers Cordiner concluded that in spite of G.E.’s inflated pricing “I don’t think any customers have been hurt by it. If we unwittingly damaged any customer anywhere, we wish to make an adjustment.”<sup>46</sup> The president of another defendant got to the gist of what Cordiner was trying to say: “No one attending the gatherings was so stupid that he didn’t know the meetings were in violation of the law. But it is the only way a business can be run. It is free enterprise.”<sup>47</sup>

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<sup>41</sup> *Id.* at 58.

<sup>42</sup> *Id.* at 89.

<sup>43</sup> *Id.* at 122. Directive 20.5 prohibited G.E.’s employees “from meeting with competitors for the purpose of fixing prices and dividing up markets.”

<sup>44</sup> Susan Pulliam, *The ‘It Wasn’t Me’ Defense*, WALL. ST. J., July 9, 2004, at B1 (discussing various scandals in which high-level executives pleaded ignorance).

<sup>45</sup> 297 F.3d 161 (2d Cir. 2002).

<sup>46</sup> FULLER, *supra* note 35, at 90.

<sup>47</sup> *Id.* at 91.

## ADAM SMITH AND ART

Smith's lecture implied that the "Invisible Hand"<sup>48</sup> of profit maximization is the authority for bringing tradesmen together in common cause. Threats to profit—"distress" pricing, over-production, product fungibility, along with structural conditions—are red flags that will prompt a collective dialogue, first via trade association and then directly. For most industries—those that mirror *G.E.* and *American Tobacco II*—the Smith assumption holds. Its authority becomes problematical in situations where the profit motive is marginalized. These are situations where the Sherman Act jurisdictional requirements of "trade or commerce"<sup>49</sup> are satisfied but the profit motive is counterbalanced by non-commercial factors. Medicine and law are obvious examples: in both fields fee scheduling was rationalized as motivated by consumer protection interests. For lawyers, price fixing "complemented the objective of the ethical codes."<sup>50</sup> Education is a more recent example where diversity rationalized tuition price-fixing.<sup>51</sup> These are areas of some familiarity—but only recently did Adam Smith and the Justice Department visit the elite and snobby world of Sotheby's and Christie's—the world's largest "Art" auction houses.

Both Houses are establishment English legacy—both came before WEALTH OF NATIONS. Sotheby's opened in 1744 with the auction of a book of "Polite Literature,"<sup>52</sup> Christie's emerged in 1766 as the self-designated "socially superior" auctioneer. Up to the 1980s they co-existed as wholesalers catering exclusively to dealers shopping for clients. They competed in expertise and *hauteur*, like plastic surgeons: "people tend to entrust their chins and estate sales to the guy they know, not to the quack with the lowest price."<sup>53</sup> In 1983, Alfred

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<sup>48</sup> The term "Invisible Hand," incidentally, is mentioned only one time in Smith's opus, *supra* note 4 at 423. For a novel but logical interpretation of Smith's use of the term see Jonathan Schlefer, *Today's Most Mischievous Misquotation*, ATLANTIC MONTHLY, Mar. 1998, at 16. Moreover, Smith is not, as usually assured,

an earlier version of Milton Friedman . . . He would not have been pleased with the inequities of income in the United States today. He defended the rights of labor and deplored the withering effects of specialization on the individual worker. Smith was a liberal in both the modern and the classical sense. Buried in the work of the great framer of capitalism as a vast impersonal system, there is a modern humanist.

David Denby, *Northern Lights: How Modern Life Emerged From Eighteenth-Century Edinburgh*, THE NEW YORKER, Oct. 11, 2004, at 90, 95.

<sup>49</sup> Sherman Act of 1890, 15 U.S.C. § 1 (2004).

<sup>50</sup> *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791 (1975).

<sup>51</sup> See *United States v. Brown Univ.*, 805 F. Supp. 288 (E.D. Pa. 1991); 5 F.3d 658 (3d Cir. 1993) (rev'd and remanded).

<sup>52</sup> James Surowiecki, *Price-Fixing For Dummies*, THE NEW YORKER, Dec 4, 2000, at 29.

<sup>53</sup> CHRISTOPHER MASON, *THE ART OF THE STEAL: INSIDE THE SOTHEBY'S-CHRISTIE'S AUCTION HOUSE SCANDAL* 97 (2004). The Economist called Mason's book "a rare beast – a

Taubman, a shopping mall magnate from Michigan, bought Sotheby's. He was "a perfectionist who paid an almost excruciating amount of attention to detail"<sup>54</sup> and who saw socializing as the way to get the art business.

Taubman revolutionized the industry by leap frogging the dealers to exploit private collection clients and to attract the multimillionaire people who "pay ridiculous prices for things that they value."<sup>55</sup> Auctions became media-social events—lavish promotions sugar-coating vicious tactics to sign up the blue-ribbon consignments. Sotheby's offered sellers advances against the consignments then sweetened the deal with guarantees of a cover even if the piece did not sell. Treating Impression art and soda pop as fungible, Taubman converted Sotheby's into a check cashier for the rich. He made art a liquid asset, an investment blended with "trophy wives . . . the frisson of the market place . . . to participate in the competitive ritual display of wealth."<sup>56</sup>

Taubman's success titillated the shrewd antenna of Dominick Dunne, a well-traveled connoisseur of high society skulduggery, money, and crime, who used him as a model for his character, Elias Renthal, a self-made billionaire from Cleveland who correctly divines that the ostentatious acquisition of art will grease the entree for him and his young wife into the upper reaches of New York society.<sup>57</sup> Like Taubman, Elias was successful, achieving grudging acceptance, if not admiration, only to have Dunne pull the rug. At the end he was nothing more than another Ivan Boskey—of "Greed is healthy" fame—as he goes down for insider trading. At his sentencing the judge says: "Criminal behavior such as yours cannot go unchecked."<sup>58</sup> Dunne's book came out in 1988. On April 23, 2002, Alfred Taubman was sentenced 1½ years for price-fixing. The Judge: "The Law does not countance robbery."<sup>59</sup>

genuine antitrust thriller, a gripping yarn of real-life collusion that is spiced up with Picassos, class warfare, art-market bitchiness and the rather unsettling conclusion that some well-heeled villains got away with it." *What an Art: Christie's and Sotheby's*, THE ECONOMIST (U.S. ed.) Aug. 2, 2004.

<sup>54</sup> MASON, *supra* note 53, at 39.

<sup>55</sup> *Id.* at 43.

<sup>56</sup> "Serious contenders occupied reserved seats in the salesroom and sat clutching their catalogs with one hand, bracing themselves to raise their numbered paddles to make a bid. Others preferred to place bids more discretely from their stretch limousines or airplanes." *Id.* at 51.

<sup>57</sup> DOMINICK DUNNE, PEOPLE LIKE US 401 (1988). "Some details were so apt that Mr. Taubman demanded changes by Mr. Dunne." Leslie Eaton, *Knight Errant or Erring? Sotheby's Tale*, N.Y. TIMES, April 27, 2000, at C1.

<sup>58</sup> DUNNE, *supra* note 57, at 401.

<sup>59</sup> Carol Vogel & Ralph Blumenthal, *Ex-Chairman of Sotheby's Gets Jail Time*, N.Y.

With a tradesman's profit maximization vision, Taubman set out to convert Sotheby's into a world-wide art shopping mall—the Wal-Mart of snobbery and cash. But, unlike Elias Renthal, he was not preaching to a free market choir: instead of tradesman/employees he had to reorient a “loose confederation of autonomous experts,”<sup>60</sup> each opting to maximize reputation over profit. It was doubly frustrating since Christie's, even more elitist than Sotheby's, was a sitting duck for rehabilitation in free market tactics.

Against this conflicted terrain three events assured a price-fixing tableau. First came the addition of Diana “Dede” Brooks to Sotheby's management equation as chief operating officer. A background at Miss Porter's, Yale, banking, and a flair for the auctioning process, Brooks possessed the class veneer to relate to the experts—both her own, and Christie's. More importantly, she thrived on the tradesman profit vision and quickly became a soul mate to Taubman's Wal-Mart aspirations. She met him on his level: “hiya boss!”<sup>61</sup>

Second, Air Anthony Tennant, chair of the Guinness brewing empire took on a second job as chair of Christie's. Albeit of blue blood wealth, he was at heart a tradesman and a firm advocate of shareholder value and profit.

Third, the economy, the tradesman's savior and nemesis, went sour. “The art world experienced the first major jolt of a collapsing economy on the night of Tuesday, November 6, 1990, when 55 percent of the contemporary art on offer at Sotheby's went unsold . . . .”<sup>62</sup> Cut throat competition ensued, with Christie's 48 percent market share gaining at Sotheby's 52 percent expense.

What had been a nasty rivalry over artistic judgment, procurement, and distribution of art descended to a common Macy's vs. Gimbel's joust over bragging rights to market share. In the heat, the Adam Smith protocol emerged.

TIMES, April 23, 2002, B.1.

<sup>60</sup> MASON, *supra* note 53, at 34.

<sup>61</sup> Shawn Tully, *A House Divided*, FORTUNE, Dec. 18, 2000, at 264, 273.

<sup>62</sup> MASON, *supra* note 52, at 85.

"We Can Talk About Any Goddamn Thing We Want To Talk About"<sup>63</sup>

"We Should Cooperate As An Industry. Because We Are the Industry."<sup>64</sup>

It started with a brief encounter at the London Academy of Arts in September of '91. Sir Anthony identified himself to Taubman as the new Chairman of Christie's and then, in "a languid, aristocratic accent" said: "You wouldn't mind if I called, would you?"<sup>65</sup> The first stage in textbook Smith price-fixing dialogue followed two weeks later when the two contrasting *personas* sought to establish a common bond by lamenting the worsening market conditions both houses confronted. Taubman aggressively took the initiative in favor of industry-wide stability by condemning Christie's bad mouthing of Sotheby's as a tactic harmful to both houses as part of a community. It was the classic Adam Smith collectivization ploy; to Sir Anthony it indicated "they had plenty in common," an indication that "the fog was beginning to lift."<sup>66</sup>

A price-fixing culture inspires rationalization, which Taubman put on the table by forcefully making the point that advertising and bragging about market shares tended to produce a pointless adversarial relationship. He then got to the point: both houses were crazy to give zero commission concessions and thereby forfeit profits. Tennant responded by praising the benefits of a "close relationship" with a rival: "It takes out a level of competition which is unnecessary."<sup>67</sup> Next came a more specific rationalization: "With a sliding scale based on value, there should be no legal problem because you cannot price-fix a unique object."<sup>68</sup>

After establishing a solid bond, the beer and shopping mall moguls cut to the chase of prices and profit. No more public assertions of market share. No more poaching of each other's experts. No more

<sup>63</sup> American Airlines president Robert Crandall to Braniff Airlines president Howard Putnam, *quoted in* United States v. American Airlines, Inc., 743 F.2d 1114, 1116 (5th Cir. 1984).

Crandall: "I think it's dumb as hell for Christ's sake, all right to sit here and pound the \*\*\*\* out of each other and neither one of us making a \*\* dime . . . I mean, you know, goddamn, what the \*\*\*\* is the point of it?... I have a suggestion for you. Raise your goddamn fares twenty percent. I'll raise mine the next morning." Putnam: "We can't talk about pricing." Crandall: "Oh bull\*\*\*\*, Howard. We can talk about any goddamn thing we want to talk about."

Crandall was wrong, and instead of going along with Crandall's proposal, Putnam gave the government a taped copy of the conversation. *Id.*

<sup>64</sup> Alfred Taubman, *quoted in* MASON, *supra* note 53, at 143.

<sup>65</sup> *Id.* at 97.

<sup>66</sup> *Id.* at 100.

<sup>67</sup> *Id.* at 116.

<sup>68</sup> *Id.* at 122.

charitable contributions to get new business. No more “straight” guarantees, where the house gave up profits over the guaranteed bid. No more loans below the prime rate. On the “delicate matter” of auction commissions, the fix was on, with Christie’s announcing the next new price increase to be followed by Sotheby’s. The conversation had followed Smith’s script by ending “in a conspiracy against the public.”<sup>69</sup>

Smith could never have anticipated the tantalizing cultural clash between a shopping mall huckster and the Byzantine world of art auction. Like the driven Elias Renthal, Alfred Taubman successfully finessed his wealth through art collection into grudging social acceptance but could not leverage his considerable entrepreneurial expertise to cope with the intrigues of a dicey menagerie of art collectors. He, and his counterpart Sir Anthony, assumed that the same price stabilization ethos from their prior capitalist universes was *de rigueur* wherever profit was tolerated. Their palpable dedication to the *American Tobacco-G.E.* epitaph is notarized in the obvious fact that Sotheby’s and Christie’s were/are a duopoly in which rivals could, and still do, stabilize prices via conscious parallism.<sup>70</sup> When informed of the fix by Sir Anthony, the C.E.O. of Christie’s opined that it was a superfluous gesture: “Sotheby’s and Christie’s always follow each other’s commission increases anyway. We can raise commissions without having to put our reputation at risk.”<sup>71</sup>

Sir Anthony had an excuse for taking a casual approach to the contacts with Taubman. He was conditioned by the experience of doing business under a relatively benign regulatory regime which avoided *per se* restraint of trade illegality by giving parties the opportunity to get approval for restraints based on rationalization. Moreover, treble damages was never on the table. But the major benefit was jurisdiction; as an English citizen, Sir Anthony was beyond the reach of U.S. subpoena power.

There was no excuse for Taubman, who, having made a fortune under the harshest antitrust system in the world, a “foolish law,”<sup>72</sup>

<sup>69</sup> SMITH, *supra* note 4, at 128.

<sup>70</sup> Mason describes post-trial price parallelism and says: “The great irony was that Sotheby’s and Christie’s were keeping their prices in line because of normal market forces, proving once again that the collision in 1995 had been entirely unnecessary.” MASON, *supra* note 53, at 357. See also Surowiecki, *supra* note 52, at 40 (arguing that conscious parallelism—price-fixing that occurs without an agreement—is the natural product of any oligopoly).

<sup>71</sup> MASON, *supra* note 53, at 123. A judgment later confirmed. See notes 101-2, *infra*, and accompanying text.

<sup>72</sup> [I] have been in a minority of one as to the proper administration of the Sherman Act. I hope and believe that I am not influenced by my opinion that it is foolish law. I have little doubt that the country likes it and I always say . . . that, if my fellow citi-

nevertheless seemed oblivious to the conspicuous evidentiary trail he left. His mistake was in ignoring the lesson of *G.E.*—non-accountability. Instead of erecting a wall between his role as the instigator and the “working group” of implementers, he demanded direct, up to date contact with Dede Brooks. He failed to rely on a 20.5 directive “knowing wink” cover, which had been so successfully used in *G.E.* Blinded by glitter of being a dominant player in the international art world, Taubman failed to hide his hubris.

While *G.E.* instituted a legacy of the resilience of a “way of life” and the dominating glare of a 20.5 “knowing wink” directive it also had to endure the downside of getting caught. Incarceration, however brief, terminates a career. The “way of life” career option lost much of its luster when the Justice Department adopted an amnesty program granting plea bargaining favors to the first executive-employee fink who cooperates by turning over incriminating information. It was amnesty that eventually trapped Taubman, squeezed from both members of the “working group”—Dede Brooks, the flamboyant CEO at Sotheby’s and her counterpart at Christie’s, Christopher Davidge, who both got leniency deals in exchange for damaging testimony. For Brooks it was survival, for Davidge it was class antagonism. He hated Sir Anthony.

Dede and Davidge were separated by more than an ocean. She was a Town & Country media celebrity who generated the where-withal to be a ‘player’ in the league of Henry Kravis, the king of the leveraged buyout.<sup>73</sup> Disdained by his colleagues as a “boring little man,” a “philistine,” and dissed as “the butler,” Davidge relied on street instincts to work his way through the snooty school tie contingent to get revenge as Christie’s CEO.<sup>74</sup> The leniency program gave him the opportunity to settle old scores with Sir Anthony and Dede and, because Christie’s needed his testimony to prove they did not initiate the collusion to get mitigation, they agreed to ignore a punitive clause in his severance contract, enabling him to take \$8 million in retirement. For good measure his testimony put a nail in Sotheby’s, Dede, and Taubman.

From a detection standpoint the execution of the conspiracy was an open invitation to suspicion. No code names, no fake travel

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zens want to go Hell I will help them.

HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI 1916-1935 248-9 (Mark DeWolfe Howe ed., Harvard University Press 1953).

<sup>73</sup> “Kravis’ string of successes forced all the sharks on Wall Street to become players or lose face.” Arthur Austin, *Book Review*, 44 ARK. L. REV 157, 159 (1991).

<sup>74</sup> MASON, *supra* note 53, at 131.

vouchers, and no safe communication channels—instead Dede and Davidge casually and openly met in art auction venues like Zurich and Manila. Both were not reluctant to discuss their meetings—CEO to CEO—with colleagues—Dede even lauding the mutual benefits of the *tête a têtes*. Lack of caution was catastrophic for Taubman when diary entries evoked an image of concealment in notations such as “April 1, 1993: CONFIDENTIAL 8:30 Breakfast w/Sir Anthony Tennant. CONFIDENTIAL.”<sup>75</sup>

“*What Did You Do?*”

“*What a lot of other people have done before me, and a lot of other people will do after me.*”<sup>76</sup>

This was a showcase trial of gossip, money, Art, and sleaze, destined for media posterity.<sup>77</sup> In the New York cocktail-party set the question was “How did they think they’d get away with it?”<sup>78</sup> Knowing the implications of a defeat the Government came in with a well prepared and formidable case. Christie’s won the race to amnesty and in a hostile gesture toward Sotheby’s brokered a deal to give the government access to Davidge’s “hot” notes. Moreover, Sir Anthony was beyond jurisdiction, eliminating him as a witness. His only appearance was as a stage prop in the customary role of a “silent chair.” Conventional wisdom called for Taubman to seek a plea bargain: take a public admonishment, negotiate a mild sentence at a government retreat, while earning the gratitude of colleagues who otherwise would have to testify and the Board who would see a trial as a black hole of money to lawyers. Taubman’s bold—and to many—reckless decision to plead innocent was capped by his “It Wasn’t Me Defense”:<sup>79</sup> as Chairman he was a policy maker whose responsibility was to impose a grand corporate vision, lecture at “B” schools, and leave the day-to-day nuts and bolts details to subordinates. “As a trained architect . . . he was involved in aesthetic decisions like the design of the expanded headquarters on York Avenue”<sup>80</sup> and thus too distant from the petty details of pricing. His witnesses would (and

<sup>75</sup> *Id.* at 323.

<sup>76</sup> The character Elias Renthal, *speaking in DUNNE*, *supra* note 57, at 335.

<sup>77</sup> Sigourney Weaver, slated to play Dede Brooks in a prospective HBO movie, attended the trial to scope out the “live” Dede. See John Walsh, *How the Stage Fell in Love with the Art Trade*, *THE INDEPENDENT*, Apr. 3, 2002.

<sup>78</sup> Surowiecki, *supra* note 52, at 40.

<sup>79</sup> Pulliam, *supra* note 44, at B1.

<sup>80</sup> Ralph Blumenthal & Carol Vogel, *Trial Beginning For Ex-Chairman In Sotheby’s Case*, *N.Y. TIMES*, Nov. 8, 2001, at E1.



did) testify that he was bored with operation trivia and “more concerned with what time lunch was served.”<sup>81</sup>

The Government’s case highlighting the guilty plea of Dede Brooks forced the “It Wasn’t Me Defense” to identify the real “perp,” which logically could only mean Dede. Taubman’s response to the indictment: “whatever Dede Brooks chose to do, she did on her own and without my authorization.”<sup>82</sup> The gist of what has cynically been called the “30,000 foot”<sup>83</sup> defense is the existence of an incontinent separation between the chief executive and the price-fixing culprits, an argument inapposite to Dede who, as CEO, was at Taubman’s elbow and reputedly a loyal disciple and favorite. “[S]ome called it a father-daughter relationship.”<sup>84</sup>

Taubman’s lawyer told the jury that Dede was an ingrate, a female Gatsby who used the Waspy chorus to break the glass ceiling over her boss’s head. What the jury would hear was the prosecution’s “one witness case” of the testimony of an admitted liar, “a walking reasonable doubt” who was compelled to earn her debt to the government by putting Taubman in jail.<sup>85</sup> Dede hung tough; she rationalized that following Taubman’s order was in reality a favor to clients, (“[w]e were killed by what we were having to give away”),<sup>86</sup> then surprised no one with the sex card: in a discussion with Sotheby’s lawyers she accused Taubman of flashing a newspaper picture of Dede accompanied by a sarcastic taunt—“You’ll look good in stripes.”<sup>87</sup>

The defense’s assumption that it was a shaky “one witness case” and not enough for a conviction was rebutted by Davidge’s suave performance; beating back a vigorous cross examination, he skillfully insinuated that Taubman was the primary instigator of the fix. Threatened by two tough prosecution witnesses, it was time to fish or cut bait. One group of the defense team offered Taubman’s testimony as the tie breaker. They calculated the jury needed to hear the main man take the stand and categorically deny the working group’s testimony, and expose them as selfish sleezes. For a lawyer who was prepping Taubman and had detected memory lapses on important

<sup>81</sup> Carol Vogel & Ralph Blumenthal, *The Autonomy of Sotheby’s Chief is Scrutinized in Antitrust Case*, N.Y. TIMES, Nov. 30, 2001, at D3.

<sup>82</sup> MASON, *supra* note 53, at 312.

<sup>83</sup> Pulliam, *supra* note 44 at B1.

<sup>84</sup> James B. Stewart, *Bidding War*, THE NEW YORKER, Oct. 15, 2001, at 158-59.

<sup>85</sup> Ralph Blumenthal, Carol Vogel, *Sotheby’s Case Ends on Issue of Character*, N.Y. TIMES, Dec. 4, 2001, at D1.

<sup>86</sup> *Silly Trial, Silly Law*, WALL ST. J., Dec. 12, 2001, at A19.

<sup>87</sup> Disputed by a Sotheby’s lawyer who said Taubman asked, “How’d you think I’d look in stripes?” Blumenthal & Vogel, *Sotheby’s Case Ends on Issue of Character*, *supra* note 85, at D1.

details it was a no go. The jury expert broke the tie by arguing that “you can only hurt yourself” with his testimony because “[t]he jury likes him.”<sup>88</sup> They may have liked Taubman but they convicted him anyway.<sup>89</sup>

FROM THE BOARDROOM TO DIRTY HELENS TO THE JURYROOM:  
THE OMNIPRESENCE OF ADAM SMITH

The final arbiter of the reliability of Adam Smith's assumption of an affinity between price-fixing and capitalist socialization is not the lawyer, the legal academic, or the social scientist; it is the jury. They examine the facts as filtered through the *American Tobacco-G.E.-Sotheby's* endowment and make the final judgment.

Jurors favor flow charts delineating time and events. It provides context, connection, and nuance. The prosecution highlighted their summation with a time chart of the twelve meetings between Taubman and Sir Anthony. To establish a sense of credibility they proposed adding, as on a background slide, the 225-year old Adam Smith quote on the inevitability of price-fixing when tradesmen meet.<sup>90</sup> The defense saw the obvious implication and vigorously protested: “it is totally inappropriate and . . . highly prejudicial.” It was hearsay. Since Professor Smith was not available to personally testify on the credibility of his conclusion the court deleted his quotation from the chart—but allowed the prosecution to quote it in oral summation, which they did.<sup>91</sup>

The jury got Professor Smith's message. In an updated interpretation of *Smith on Price Fixing*, the jury foreman said: “You get together 12 times with somebody, use your common sense.”<sup>92</sup> He was backed by another juror: the flow chart “laid it all out.”<sup>93</sup> The story of the meetings had important resonance with a stubborn holdout who

<sup>88</sup> MASON, *supra* note 53, at 336.

<sup>89</sup> The result revives some advice from an experienced trial lawyer who disdained the use of experts on jury selection but nevertheless hired them. His explanation: conditioned by television, clients expected their use and, if he lost the case without one on board, he feared a malpractice suit. “Besides,” he said, “they are good for laughs.” Arthur Austin, *The Jury System As a Bat*, CLEV. DAILY LEGAL NEWS, Aug. 17, 1994, at 1. See also Arthur Austin, *The Jury System at Risk From Complexity, The New Media and Deviancy*, 73 DENVER U. L. REV. 51, 55 (1995) (discussing the difficulties in jury prediction).

<sup>90</sup> SMITH, *supra* note 4. See also *supra* note 65 and accompanying text; *infra* notes 101-04 and accompanying text.

<sup>91</sup> This was cited by the defense as prejudicial error on appeal. See *infra* notes 112-13, and accompanying text.

<sup>92</sup> Ralph Blumenthal & Carol Vogel, *Ex-Chief of Sotheby's is Convicted of Price-Fixing*, N.Y. TIMES, Dec. 6, 2001, at A1.

<sup>93</sup> *Id.*

reluctantly conceded that “everything revolved around Mr. Taubman meeting 12 times with the man Tennant . . . .”<sup>94</sup>

The Sotheby’s jury reaction is a duplicate of a case from my jury research portfolio. The plaintiffs alleged that natural gas producers and pipeline distributors conspired to use a settlement from contract litigation to cloak price-fixing.<sup>95</sup> After a 6-0 verdict for the plaintiff consumers, the judge declared a mistrial; the plaintiffs hired me to conduct a jury survey in preparation for a second trial.<sup>96</sup> It was a typical antitrust case: long, boring, complicated testimony, and a modestly educated jury.<sup>97</sup> Like the Sotheby’s jury, they liked the illuminating presence of a time flow chart—“it was a heck of a tool.”<sup>98</sup> Instructions were incomprehensible, especially when it came to “conspiracy.” Most jurors had “never thought about it” but knew from TV that conspiracy was “illegal—something that you’re trying to get away with.” “A mistake—like Nixon.” To them, documentation was the key. “Once your mind sees it on paper—[they] can’t say it’s not true.”<sup>99</sup>

<sup>94</sup> Steve Dunleavy, *Juror: In My Heart, I Don’t Believe He is Guilty*, N.Y. POST, Dec. 6, 2001, at 3. “[J]urors who spoke to reporters after the trial said that the guilty verdict wasn’t a close call.” Dan Ackman, *Outclassed*, AM. LAWYER, Feb. 2002, available at <http://www.law.com/jsp/statearchive.jsp?type=Article&oldid=ZZZQNV7W0XC>.

<sup>95</sup> *New Mexico Natural Gas Antitrust Litig. v. So. Union Co.*, 607 F. Supp. 1491 (D. Colo. 1984). The case was eventually settled for over \$100 million. Jonathan Dahl, *Consumers Gain Unlikely Victory in Antitrust Action in New Mexico*, WALL ST. J., June 5, 1984, at 37.

<sup>96</sup> A jury survey involves face-to-face interviews on comprehension of substantive matters, except testimony, lay witnesses, lawyer performance, jury instructions, etc. Arthur Austin, *Next to Shooting Pool, I Like to Interview Jurors*, CLEV. DAILY LEGAL NEWS, Jan. 1, 1994, at 1.

<sup>97</sup> See generally, ARTHUR D. AUSTIN, COMPLEX LITIGATION CONFRONTS THE JURY SYSTEM: A CASE STUDY (1984); Arthur D. Austin, *City of Cleveland v. Cleveland Electric Illuminating Co.: Monopolization, Regulation And Natural Monopoly*, 13 U. TOL. L. REV. 609 (1982); Arthur D. Austin, *Second Trials*, LITIG., Vol. 10, No. 2, Winter 1984, at 34; Arthur D. Austin, *The Truth – and Consequences – of ‘Juror Bonding’*, 135 N.J. L.J. 546, at 26; Arthur D. Austin, *What Jurors Like – And Dislike – About Exhibits*, PRODUCTS LIABILITY: COMMENT. & CASES, May 1986, at 8; Arthur D. Austin, *Why Jurors Don’t Heed The Trial*, NAT’L L.J., Aug. 12, 1985, at 15; Arthur Austin, *Are Juries Obsolete in Complex Litigation? No, But... (Maybe)*, CLEV. DAILY LEGAL NEWS, Apr. 13, 1993, at 1; Arthur Austin, *Finally, no baffle-gab – just justice*, CLEV. PLAIN DEALER, June 6, 1997, at 11B; Arthur Austin, *Jury Experts, Jury Bonding, And The Dominant Juror*, CLEV. DAILY LEGAL NEWS, Sep. 16, 1994, at 1; Arthur Austin, *Jury trial taking a pounding*, CLEV. PLAIN DEALER, Mar. 14, 1995, at 7B; Arthur Austin, *The Jury System As A Bat*, CLEV. DAILY LEGAL NEWS, Aug. 17, 1994, at 1; Arthur Austin, *The Trivialization of the Jury System*, 138 N.J. L.J. 1097, Nov. 14, 1994, at 21; Arthur Austin, *They’re turning juries into social workers*, CLEV. PLAIN DEALER, Feb. 26, 1994, 7B; Arthur Austin, *Trafficant needs to win over just one juror*, CLEV. PLAIN DEALER, Feb. 21, 2002, at B9; Arthur Austin, *Trial juries not likely to bend in a lawyerly wind*, CLEV. PLAIN DEALER, Dec. 20, 1991, at 21-C; Arthur Austin, *Was the Hughes Jury Nullified?*, CLEV. DAILY LEGAL NEWS, Sep. 25, 1997, at 1; Arthur Austin, *When a jury is locked up*, CLEV. PLAIN DEALER, Sep. 7, 1995, at 11B.

<sup>98</sup> Arthur D. Austin, *New Mexico Natural Gas Litigation Jury Survey* (1984) (unpublished survey on file with the author), at 28.

<sup>99</sup> *Id.* at 29-30.

Understanding price-fixing was a challenge; three jurors had never heard of it and thus had to rely on colleagues for explanation, which was shaky at best. Several jurors divined that since it involved prices it was a tactic to make money in a way comparable to robbery—“a form of embezzlement, white collar crime.”<sup>100</sup> They reached a fragile consensus that price-fixing was wrong, but the main problem was in proof of conspiracy—did the accused do the fix?

In their bewilderment and chagrin at a tedious and confusing process, antitrust jurors typically seek some insight from the testimony that they can relate to—an anchor suggesting a plausible rationalization for their subjective impulses. For a monopolization allegation, it was a smoking gun document that showed defendants “did what their intent was. They intended to do it and did . . . .”<sup>101</sup> For the New Mexico jury, as with Sotheby’s, the anchor was the tradesman’s fatal attraction for the socialization of prices.

The plaintiffs knew that the defendant authority executives commingled on a Denver to El Paso plane flight en route to a Dallas Cowboys football weekend. In testimony each executive forcefully rejected plaintiff counsel’s probe on the possibility that “even for merriment and diversion . . . the conversation end[ed] in a conspiracy against the public . . . .”<sup>102</sup> The jury’s reaction:

#### The El Paso Trip

Q. “El Paso, was that the trip where they didn’t talk anything but football?”

A. “Yes sir that was the biggest lie ever told.”

Red was not being overdramatic; to many of the jurors the El Paso trip was the lightning rod of the conspiracy. As Red added, “After El Paso, everything was cut and dried.” M. R. agreed: “This is where they made a mistake . . . this is where we put

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<sup>100</sup> From a survey of jurors from *Liggett Group, Inc. v. Brown & Williamson Tobacco Corp.*, 1990-2 TRADE CASES (CCH) 69,182 (M.D.N.C. 1990) (interview notes on file with author). See Austin, *The Jury System at Risk From Complexity, The New Media, and Deviancy*, *supra* note 89, at 56. See also, Arthur Austin, *Another Viewpoint on Juries*, NAT’L L.J., Mar. 22, 1993, at 15; Arthur Austin, *How the Dominant Juror Dominates*, 21 TRIAL LAW. Q. 23, 23-24 (1991); Austin, *The Truth-and-Consequences of ‘Juror Bonding’*, *supra* note 97, at 26.

<sup>101</sup> Austin, *The Jury System at Risk From Complexity, The New Media, and Deviancy*, *supra* note 89, at 56.

<sup>102</sup> SMITH, *supra* note 4, at 128.

together [the conspiracy] . . . we discussed in the jury room this thing.”

The jurors were incredulous at the “cover story” for the trip. “It was stupid,” according to K.S., “to say that they didn’t talk business.” J.C. agreed, “It was just a social flight according to witnesses—but it was a business flight—they must have discussed the conspiracy.” J.B. made the point that within the privacy of their own plane, they would have talked about things other than the weather. The incriminating point, as Smokey pointed out, was that they “all had the same story—‘we didn’t talk [business] on the plane.’”<sup>103</sup>

*“It’s a universal business in which there are only two major players, and where there are no trade associations. There is basically no other forum. One had to meet.”*<sup>104</sup>

David Boies, who maneuvered a class action settlement with Sotheby’s/Christie’s for \$512 million,<sup>105</sup> criticized the defense for not pouncing on the argument that meetings *que* meetings among rivals is not *per se* price fixing. He interpreted Adam Smith as offering the canon that contact among rivals is a presumption of a fix.<sup>106</sup> Boies argued that the testimony of a “respected businessman” assuring the jury that rivals often meet not to fix prices but to discuss policy and industry lobbying tactics would be sufficient rebuttal. “You’ve got to have an explanation,”<sup>107</sup> he emphasized.

Boies was speaking to an audience of prospective price fixing clients. He knew that the type of expert testimony he advocated would be tested by the Court’s instruction to the jury on “credibility.” And even a highly credible witness would have to overcome three serious issues, starting with Sir Anthony’s absence which was presented as an implicit, if not express, admission of guilt (which, in an exclusive interview with Mason, he denied). And, of course, there was Taub-

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<sup>103</sup> Austin, *New Mexico Natural Gas Litigation Jury Survey*, *supra* note 102, at 29-30.

<sup>104</sup> Sir Anthony Tennant, quoted in Austin, *id.* at 349 (quoting Sir Anthony Tennant).

<sup>105</sup> For his account of the negotiations leading to the settlement with Sotheby’s and Christie’s see DAVID BOIES, *COURTING JUSTICE* 322 (2004). Boies is most famous for his blistering cross examination of Bill Gates. See David Margolick, *The Man Who Ate Microsoft*, VANITY FAIR, Mar. 2000, at 138.

<sup>106</sup> See notes 112-13 *infra* and accompanying text.

<sup>107</sup> MASON, *supra* note 53 at 348.

man, whose attorney, on the advice of a jury specialist—the jury likes him”—did not allow him to testify. Moreover, the twelve meetings of the only two corporate chairmen in relative secrecy were persuasive enough to get a hold out juror to join the verdict. For cumulative effect, there was the April 30, 1993, Sir Anthony memo that could be read as setting up a strategic overview of the scheme. One juror called it a “timeline of the evidence and laid it all out.”<sup>108</sup>

*“I like a little competition, but I like combination better.”*<sup>109</sup>

For a simple event, price fixing springs from a Byzantine pathology. Adam Smith drained the swamps into a tight declarative phrase: When tradesmen meet they talk price, when they talk price they fix prices. It is ethos. In the American Tobacco saga ethos was greed, the dark side of the Invisible Hand.<sup>110</sup> The General Electric Conspiracy is the textbook on process as *poseur*—a façade of public-spirited, law-abiding policy fronting for winks and non-accountability. Sotheby’s/Christie’s is price fixing gone chic—a blend of naiveté, hubris, and stupidity.

Any ~~responsible corporate antitrust prevention program~~<sup>111</sup> would devote substantial attention to the Sotheby’s/Christie’s price fix. It evolved without a compelling economic or management justification in an industry in which a serious fix had not occurred in several generations and probably never would have but for the simultaneous appearance of Alfred Taubman and Sir Anthony Tennent. Although tradesmen, both were no longer interested in the gamesmanship of Directive 20.5 or “knowing winks.” Taubman was seeking social status, and Sir Anthony wanted to soften his Guinness responsibilities with more contact with privilege. Yet the tradesmen instinct brought them to meet to scope each other out, share common problems—and invariably talk prices. Although neither one concedes an “agreement”

<sup>108</sup> Blumenthal & Vogel, *Trial Beginning For Ex-Chairman In Sotheby's Case*, *supra* note 80.

<sup>109</sup> J. P. Morgan, *quoted in* CLARENCE H. CRAMER, *AMERICAN ENTERPRISE: FREE AND NOT SO FREE* 423 (1972).

<sup>110</sup> A new oligopoly known as “Big Tobacco” continued the price fixing tradition by brazenly colluding in a “tie-bid” rigging scheme in buying leaf tobacco. The prearranged “tie” enabled the buyers to share the tobacco according to respective market shares. The case was settled for \$200 million. *DeLoach, v. Phillip Morris Co., Inc.* 00-CV No. 1:00-CV01235, (M.D.N.C. 2003); *Tobacco Firms, Farmers Reach Deal*, *WALL ST J.*, May 19, 2003, at B3.

<sup>111</sup> “The purpose of this typographical maneuver . . . is to indicate that the cancelled words though inadequate, are the only ones available to the writer. It’s a flashy gesture, and it makes an interesting point, though it can quickly become an annoying affection.” DAVID LEHMAN, *SIGNS OF THE TIMES* 53 (1991). “Preventative Antitrust” cannot adequately transcribe the maneuvers of Directive 20.5.

to fix prices, they nevertheless got into trouble because they ignored Adam Smith's directive.

For the defense, the reference to the tradesmen's quote was an ominous message. Twenty-nine words from Adam Smith insinuated a shadow prosecution expert witness into the dialogue. The quote went up on appeal where it received an antagonistic reception from the Second Circuit who accused Adam Smith of "impermissibly" suggesting a rule of law that tolerates a presumption of conspiracy upon proof of the "mere fact" of contact among rivals—an "impermissible suggestion" certified by the imprimatur of "the father of modern economics."<sup>112</sup> Acknowledging the Government's admission that the quote was a frequent reference in price fixing cases a *per curiam* court warned that without direct evidence of the defendant's participation in a conspiracy, reference to Adam Smith could result in remand.<sup>113</sup>

Learned Hand, the author of numerous antitrust masterpieces for the Second Circuit, would sigh in disdain at the *per curiam's* warning. Censoring the quote will not quash its presence. The reality is that the typical antitrust juror is not interested in an abstract comment about tradesmen by a dead economics professor. The reference was correctly characterized by John Greene, who summed up for the prosecution, as nothing more than a "rhetorical device."<sup>114</sup> It is Adam Smith's intuitive judgment on the capitalist instinct that sustains the credibility of the price fixing canon. When jurors receive testimony on inexplicable meetings among rivals, they will get the message. As Red said: "After El Paso, everything was cut and dried." Echoing Smith, the *Taubman* jury foreman said: "If you meet twelve times, you must be up to no good. It's common sense!"<sup>115</sup>

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<sup>112</sup> United States v *Taubman*, 297 F.3d 161, 166 (2d Cir. 2002).

<sup>113</sup> Indeed, were this a case where the Government asked the jury to infer the existence of or a defendant's participation in a price-fixing conspiracy, we might well have vacated the conviction and remanded for a new trial. We now consider the Government to be on notice that future uses of a quotation such as the one used in this case might well prove fatal to its case.

In the instant case, however, the Government relied on the overwhelming direct evidence of *Taubman's* knowledge of and participation in the conspiracy, as noted above. Accordingly, we conclude that, in the particular circumstances of this case, the inclusion of the Adam Smith quotation in the Government's summation was harmless.

*Id.*

<sup>114</sup> Phone interview with John Greene, Oct. 6, 2004 (interview notes on file with Author).

<sup>115</sup> MASON, *supra* note 53, at 343.

## CHRISTIE'S RAISES ITS RATES

It has taken Christie's nearly two years to match what Sotheby's charges buyers. But this week Christie's announced that it would raise its buyer's premium from 19.5 percent of the first \$100,000 to 20 percent on the first \$100,000. Its charge of 12 percent on amounts exceeding \$100,000 will stay the same.

"We wanted to rationalize our price structure worldwide and to remain competitive" said Marc Porter, president of Christie's Americas.<sup>116</sup>

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<sup>116</sup> Carol Vogel, *Inside Art*, N.Y. TIMES, Dec. 3, 2004, B34. Compare *id.* with *supra* notes 70-71 *supra* and accompanying text.



