Statutory Restrictions on Selling Below Cost

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The rules of the American game of competition are numerous, diverse and often inexplicable, but none of them is as dubious in purpose or as devious in operation as those found in the statutes prohibiting sales below cost. Such statutes have been enacted in the overwhelming majority of states, the earliest ones dating back to the Great Depression. Indeed their philosophy has infected the federal antitrust laws. That the impetus back of these statutes was not just

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There is a detailed but rather uncritical review of the statutes and the cases in 1 Callmann, Unfair Competition and Trade-Marks 515-64 (2d ed. 1950).

2. Section 3 of the Robinson-Patman Act makes it unlawful "to sell goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor." 49 Stat. 1528 (1936), 15 U.S.C. § 13 (a) (1952). Presumably cost is the factor most relevant to a determination of a "reason-
a product of depression fears and frustrations is shown by their passage after the depression was over in some states, and during the height of post war prosperity in others. They remain a factor to be reckoned with by businessmen and their legal advisers who wish to avoid the risks of harassment caused by a lawsuit over their pricing policies.

It is the purpose of this paper to report critically on the present condition of restrictions on sales below cost, with emphasis on the more recent developments. The discussion will have as a by-product some reflections about the legislative and judicial processes exemplified in the enactment and administration of these statutes.

The form which "sales below cost" statutes take varies in detail from state to state, but their chief features can be described accurately enough to provide the reader with a background for this discussion. Particular provisions will later be more thoroughly examined. After a preamble in which the legislature makes a self-serving declaration of its purposes, the statute forbids sales below "cost" when made "for the purpose of injuring competitors and destroying competition." The prohibition may extend to all sales, or only to named commodities, and it may cover all sellers, or only some kinds of merchants. Certain sales are exempt, such as sales made to meet a competitor's price. "Cost" is usually defined to mean the seller's invoice cost, plus the cost of doing business. The merchant is assisted in computing the cost of doing business by a provision making it a percentage of invoice cost, or, in some instances, by a provision allowing reliance on a "reasonable" price, whatever that may be. See F. and A. Ice Cream Co. v. Arden Farms Co., 98 F. Supp. 180, 189 (S.D. Cal. 1951).

3. Statutes of this type were passed in 1941 in Kansas, Nebraska, New Hampshire, North Dakota and Oklahoma. See statutes cited note 1 supra.
4. Unfair Sales Acts were passed in Alabama in 1951, in Mississippi in 1954 and 1956, in New Mexico in 1958. See statutes cited note 1 supra.
5. E.g., CAL. BUS. & PROF. CODE ANN. § 17001 (Deering 1954).
6. E.g., ARK. STAT. ANN. § 70-303 (1947). The quoted phrase is found in many statutes and apparently was the work of a trade group, the National Food and Grocery Conference Committee. See 2 MARKETING LAWS SURVEY, STATE PRICE CONTROL LEGISLATION XLVIII-LIX (1940), which gives the history of the legislation.
7. E.g., MONT. REV. CODES ANN. § 51-103 (1964). This covers production, distribution and sale of all commodities and services.
8. See note 1 supra, for the many special statutes, relating to cigarettes, milk and sometimes liquor.
9. See various statutes cited note 1 supra.
10. E.g., TENN. CODE ANN. § 69-109 (1956) (applies only to manufacturers); TEX. PEN. CODE ANN. art. 1111m, § 2 (h) (Supp. 1956) (applies only to grocery stores). The latter statute was held unconstitutional in San Antonio Retail Grocers, Inc. v. Lafferty, 297 S.W.2d 813 (Tex. 1957). For another statute which was held to discriminate against certain kinds of retailers see Lane Distributors, Inc. v. Tilton, 7 N.J. 349, 81 A.2d 786 (1951).
11. E.g., OKLA. STAT. ANN. tit. 15, § 598.6 (Supp. 1950).
12. E.g., NEB. REV. STAT. § 50-1202 (1952). In this statute, as in some others, cartage cost is also required to be added.
13. E.g., CAL. BUS. & PROF. CODE ANN. § 17026 (Deering 1954) sets a presumptive cost of doing business of 6% on invoice or replacement cost. See also CAL. BUS. & PROF. CODE ANN. § 17029 (Deering 1954), which enumerates specific factors entering into the cost of doing business.
"cost survey" made by a trade association. Percentages so arrived at are only presumptive, the merchant being free to show what his actual costs were if he can. Enforcement of the statute is accomplished by criminal penalties, and by civil actions for damages or injunctions. In some states civil actions for enforcement can be brought by "any person." Sometimes a state administrative agency is authorized to enforce the act. The state's licensing power is still another means of enforcement.

CONSTITUTIONALITY OF SALES BELOW COST LEGISLATION IN GENERAL

From the first the constitutional validity of these statutes has been questioned on many grounds. Aside from the legal issues which such attacks raise, they give evidence that businessmen are not unanimously in favor of the statutory policy. Many have apparently found their pricing methods so seriously interfered with as to justify the expenditure of time and money required to challenge the statutes. Unfortunately for this point of view, the general scheme of the statutes has been largely upheld, with only details being held unconstitutional.

It is certainly too late to argue that a legislature has not the constitutional power to regulate prices for a purpose which promotes the general welfare. makes this plain. For this reason it is important to consider the purpose which underlies the "sales below cost" statute when it is broadly asserted to be contrary to due process as outside the legislature's police power. The drafters of such statutes realized that attacks would be made and provided a statement of purposes in the statutes themselves which was intended to foreclose such assertions. The statement of purposes in the California statute is typical:

The Legislature declares that the purpose of this chapter is to safeguard the public against the creation or perpetuation of monopolies and to

14. E.g., MONT. REV. CODES ANN. § 51-105 (1954). Section 51-114 of the same act prescribes the method for conducting a "cost survey."
15. E.g., TENN. CODE ANN. § 69-305 (1956).
17. E.g., CAL. BUS. & PROF. CODE ANN. § 17070 (Deering 1954).
18. E.g., MONT. REV. CODES ANN. § 51-113 (1954).
19. This is most frequently used in the cigarette and liquor cases, where a license to sell the commodity is required before the merchant can do business. See, e.g., TENN. CODE ANN. § 69-411 (1956).
foster and encourage competition, by prohibiting unfair, dishonest, deceptive, destructive, fraudulent and discriminatory practices by which fair and honest competition is destroyed or prevented.22

No court could quarrel with this as an abstract statement. Ignorance or confusion about what competition is has never prevented people from being in favor of it, except possibly for the competitors themselves. And when the legislature adds that it is protecting fair and honest competition, any cavilling at their statement would be downright un-American.

The only constitutional question then remaining is whether the prohibition of sales below cost is reasonably related to the named purposes. The courts have held that the relation does exist.23 In reaching this conclusion they have taken the statement of purposes at its face, as this article will do, rather than treat it as camouflage for the imposition of a collusive system of price-fixing upon a defenseless consumer public.24 But to do this the courts have had to make certain assumptions about economics. They have said that the statute does preserve competition because price-cutting is a weapon by which the large firm drives its smaller rivals out of business, after which the price-cutter can enjoy a monopoly.25 This is alleged to be accomplished in at least two ways. One explanation is that the chain store, for example, can cut prices below cost in one area, and at the same time raise prices in another area sufficiently to prevent any overall losses.26 This theory seems absurd,27 although it may be true that the chain

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26. The best known expression of this view is United States v. New York Great A. & P. Tea Co., 173 F.2d 79, 87 (7th Cir. 1949), in which Judge Minton said that if prices in one area are set below cost, there is "an almost irresistible conclusion" that prices in another area will be raised to compensate for the losses.
27. This is demonstrated plainly enough by Adelman, supra note 24, at 59. Uncritical reliance on doubtful economic hypotheses has been especially prevalent in the judicial treatment of sales below cost.
store may cut its prices in one area without showing a loss on its total operations due to normal profit margins in other areas where competition is not so keen. The seller with a single outlet of course does not have this advantage.

The second explanation for the large firm’s ability to cut prices below cost is that it either possesses or has access to greater capital, and is therefore able to take large short-run losses and still remain in business, while its smaller competitors cannot. This hypothesis has been criticized. Its verification as a broad generalization would seem to be difficult, since its application turns on too many variable factors, such as the amount and extent of price-cutting, the firm’s financial resources, the resources of its competitors, and others.

Still another purpose behind this legislation is the prevention of that form of price-cutting known as the “loss leader.” The phrase in the quoted preamble about preventing deceptive and fraudulent practices refers primarily to the loss leader. The deception which is supposed to be accomplished by the use of loss leaders consists in persuading the customer that the seller is offering all his goods at low prices, when in fact his prices other than a few items are those prevailing generally in the trade, or even higher. It is sometimes asserted that prices on many articles are raised to compensate for the cuts on loss leaders, although such a practice seems unlikely, since any intelligent seller would charge the higher price if he could, whether or not he was using loss leaders. Economists may have other objections to the use of loss leaders under some circumstances, but the sales below cost statutes contain much broader prohibitions than are needed to meet those objections. If protection of the consumer

28. S. Doc. No. 85, 73rd Cong., 2d Sess. 104 (1933). This report, entitled Chain Stores-Chain-Store Price Policies, was part of the Federal Trade Commission’s comprehensive study of chain store operations. Although it may be out of date, it contains much useful information on how operations were conducted by the very corporations against whom sales below cost statutes are supposedly aimed.

29. Leeman, The Limitations of Local Price-Cutting as a Barrier to Entry, 64 J. Pol. Econ. 329 (1956). The author denies that the large firm can block entry into a market by cutting price and later recouping its losses by price increases. He suggests that the later price increases merely invite additional competition. He also argues that although the large firm has greater resources, greater demands are made upon it, and therefore no competitive advantage exists.

30. This term is often loosely used. A working definition might be that it refers to articles sold below cost, or perhaps below normal mark-up, for the purpose of attracting customers to the seller’s store. See S. Doc. No. 51, 72d Cong., 1st Sess. 2 (1932), Chain-Store Leaders and Loss Leaders. This is another report produced by the Federal Trade Commission’s study of chain-stores.

31. See note 22 supra.


33. S. Doc. No. 85, 73rd Cong., 2d Sess. 29 (1933), entitled Chain-Store Price Policies.

against deception is all that is involved, perhaps it is justifiable to assume that he is gullible and ignorant of pricing practices.\textsuperscript{35} Other doctrines of unfair competition are formulated on the assumption that the average careless buyer should be protected.\textsuperscript{36} Yet here again the statute goes beyond the abuses at which it is supposedly aimed, by forbidding all loss leaders (with a few exemptions not significant here) in order to prevent those whose effect might be deceptive.

One final justification for sales below cost statutes should be mentioned briefly, although it does not appear in the statutes themselves. It has been suggested in one case that the legislature could properly pass such statutes in order to preserve from extinction the small independent merchant, even though merchandising through large chains might be economically beneficial.\textsuperscript{37} The assumption is that the small merchant has social value to the community which outweighs the economic cost involved in protecting him. This argument takes us far outside economic factors (which are nebulous enough), into a consideration of what kind of society we want, and whether it is feasible or possible to arrest the modern American movement toward bigger business units and a greater concentration of economic power. Some experts would say there is no such movement.\textsuperscript{38} If so, the statutes are superfluous. But if not, the answer to this argument would seem to be that the statutes are not necessarily calculated to have the claimed result. They could be used by a large chain store to curtail aggressive competition by a small merchant.\textsuperscript{39} And by making price

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SCIENCE 245 (1955). The author reaches the qualified conclusion that some loss leader selling is economically undesirable because it eliminates the small specialist firm which may be more efficient than the larger firm, and it distorts the price structure so that resources may be misallocated. But he also concludes that these factors do not justify a blanket prohibition of loss leaders. He makes the interesting suggestion that an adequate remedy would merely require the loss leader seller to sell his loss leader to any buyer, even a competitor, in amounts limited only by his stock on hand. A statute of this kind has been proposed in Texas, but an attorney general's opinion has said it would be unconstitutional. Opinion of the Attorney General of Texas, No. WW-123, CCH Trade Reg. Rep. (1957 Trade Cas.) ¶ 68742, at 73038 (May 16, 1957).

35. S. Doc. No. 85, 73rd Cong., 2d Sess. 28 (1933) quotes an official of a chain-store on the subject of the consumer's intelligence as follows: "It appears to be due to the fact that the average mental age of consumers, as revealed by the Army intelligence tests at the time of the draft in 1917, is very low and that they want to be fooled.... They are seemingly incurably gullible and stupid."

36. \textit{E.g.}, in trade-mark infringement cases the question of confusing similarity is determined with reference to the ordinary buyer, buying under the usual circumstances, which in fact often means a rather careless buyer. See 3 CALLMANN, UNFAIR COMPETITION AND TRADE-MARKS 1383-88 (2d ed. 1950).


38. Adelman, Effective Competition and the Antitrust Laws, 61 Harv. L. Rev. 1289, 1293 (1948) asserts that concentration of economic power has not increased since 1939.

turn on cost they favor the large firm whose size enables it to reduce its costs, to the extent that its costs can be proved, though this usually cannot be done. At any rate no one can say with assurance that these statutes, if enforced, will have any tendency to preserve the small businessman's share of the market.

The preceding paragraphs describe a statute whose announced purposes are unexceptionable but whose methods are crude to the point where they do as much to frustrate as to accomplish those purposes. One may accurately describe this legislation as extremely unwise. This raises the question of most concern to the lawyer—what should a court do when asked to enforce such a statute? There are at least three alternatives open. The first, as we have shown, is the one courts have taken in the past. They have found some tenuous relation between the statute's goals and its prohibitions, and following the familiar principle that courts may not invalidate legislation merely because they consider it unwise, they have held it constitutional. This is the conventional approach, justified on the ground that it gives the legislature the opportunity to meet new problems and demands in a changing world. It is unreal, however, where the legislature has made no investigation or reasoned judgment about the need and the effect of the statute, but has merely accepted uncritically a bill drawn, presented and lobbied by a pressure group. And there is less reason for judicial self-restraint where constitutionality turns on whether the statute's provisions are calculated to accomplish its ends than where the wisdom of those ends is in issue. The former issue is a narrower one, which turns on fewer imponderables than the latter. In deciding it a court has the advantage over a legislature, of having been able to observe the statute in operation.

A second alternative is supported by recent fair trade cases. Several decisions since 1949 have held the “non-signer” sections of resale price maintenance statutes unconstitutional as violating state due process clauses, on reasoning which would justify a similar holding with respect to sales below cost statutes.

234 P.2d 287 (1951). Thus the California courts hold (a) the act is constitutional because it is passed to protect the small merchant, and (b) it is constitutional because it applies equally, without discrimination, and therefore can be used against the small merchant. See notes 108, 107, infra.

This is best demonstrated by the excellent student note, \textit{Sales Below Cost Prohibitions: Private Price Fixing Under State Law}, 57 \textit{Yale L.J.} 391 (1948) which exposes the undesirable consequences of a rule that prices must in all cases cover costs. The result is likely to be higher prices and lower production. See cases cited note 23 supra.

42. \textit{E.g.}, Union Carbide and Carbon Corp. v. White River Distributors, Inc., 224 Ark. 558, 275 S.W.2d 455 (1955); Olin Mathieson Chemical Corp. v. Francis, 134 Colo. 166, 301 P.2d 139 (1955) (\textit{semblle}) (it is somewhat difficult to determine precisely what the ground for decision was); Miles Laboratories, Inc. v. Eckerd, 73 So. 2d 680 (Fla. 1954); Liquor Stores, Inc. v. Continental Distilling Corp., 40 So. 2d 371 (Fla. 1949); Shakespeare Co. v. Lippman's Tool Shop Sporting Goods Co., 334 Mich. 109, 54 N.W.2d 268 (1952); McGraw Elec.
Lippman’s Tool Shop Sporting Goods Co.\textsuperscript{43} for example, the court found that the prohibition of sales below the fair trade price had no relation to the “public health, safety, morals or the general welfare.” The opinion also suggests that the statute did not, as claimed, serve to protect small retailer from his large competitor, nor that any connection was shown between that objective and the general welfare. There are of course differences between the fair trade program and sales below cost, but the similarities are close enough so that if the legislature cannot constitutionally impose minimum prices by one method, they cannot by the other. In fact the leading cases of State v. Langley\textsuperscript{44} and Wholesale Tobacco Dealers v. National Candy Co.,\textsuperscript{45} relied upon the fair trade cases to hold the sales below cost statutes valid, emphasizing that the “basic theory” of the two types of price regulation is the same. The writer is aware of no case which turns the Langley argument around and uses it to overthrow sales below cost, but there is no reason why this cannot be done, in those states which have invalidated fair trade. In fact there is strong likelihood that courts in those states will be faced with this contention, because with fair trade eliminated those business firms which favor a rigid noncompetitive price structure may make greater use of the sales below cost statutes than they have in the past. One reason for the relatively few reported cases on sales below cost has probably been that resale price maintenance statutes accomplished all that was desired.

Other constitutional arguments against sales below cost statutes are furnished by the fair trade cases and should at least be mentioned. One is the determination that they violate antitrust provisions in the state constitution.\textsuperscript{46} Another is that they allow delegation of legislative power to private individuals.\textsuperscript{47} This latter claim could be strongly asserted against sales below cost statutes in those states where “cost” is really the result of a survey made by a trade association.\textsuperscript{48}

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\item\textsuperscript{43} 334 Mich. 109, 54 N.W.2d 268 (1952).
\item\textsuperscript{44} 53 Wyo. 332, 84 P.2d 767, 777 (1938).
\item\textsuperscript{45} 11 Cal. 2d 634, 82 P.2d 3, 15 (1938). This case also points the way to a possible escape from the application of the fair trade authorities, by characterizing the sales below cost statutes as not being price fixing legislation. This sounds incredible, but the same assertion is occasionally found in other opinions. See, e.g., People v. Gordon, 105 Cal. App. 2d 711, 244 P.2d 287 (1951); Dickeou v. Food Distributors Ass’n, 107 Colo. 38, 108 P.2d 529 (1940).
\item\textsuperscript{46} General Elec. Co. v. Thrifty Sales, Inc., 5 Utah 2d 326, 301 P.2d 741 (1956).
\item\textsuperscript{47} Dr. G. H. Tichenor Antiseptic Co. v. Schwegmann Bros., 90 So. 2d 343 (La. 1956).
\item\textsuperscript{48} E.g., ARK. STAT. ANN. § 70-305 (1947); ORE. REV. STAT. § 646.130 (1955).
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The third alternative referred to is to find the program of sales below cost to be constitutional in general, but either to hold details invalid, or to administer it in such a way as to eliminate its objectionable features. This is perhaps the most common way of handling the problem, having been used in varying degrees by many courts. It is analogous to the federal courts' reading into the Sherman Act the "rule of reason,"\textsuperscript{49} with the result that although the statute forbids "every contract, combination . . . or conspiracy in restraint of trade,"\textsuperscript{50} the cases have established the principle that only "unreasonable" restraints are forbidden. In deciding what restraints are unreasonable courts have conducted broad investigations into the economic factors affecting the various markets. This could be done in administering the sales below cost statutes with less violence to the statutory language than was necessary in construing the Sherman Act, since sales below cost are only prohibited where made with intent to injure competitors or to destroy competition. Such language is an invitation to the courts to look into the circumstances surrounding the particular below-cost sale.

In subsequent sections of this paper an attempt will be made to determine how far the courts have accepted this invitation and to what extent they have taken economic factors into account in granting or denying relief. This can best be done by considering in detail some of the more important statutory provisions, the first of these requiring a showing of some wrongful intention.

\textbf{The Intent Requirement}

In some instances these statutes have forbidden sales below cost (with certain exemptions) without regard to the seller's purpose or the sale's effect. This has generally been held unconstitutional.\textsuperscript{51} As one leading case puts it, not all price-cutting is harmful, but only that done for the purpose of destroying competitors or defrauding the public.\textsuperscript{52} Thus, the argument runs, a statute which forbids all price-cutting goes beyond what is necessary to remedy the social or economic evil and is therefore arbitrary. Some cases have gone somewhat farther, to hold that the statute is invalid where a requirement

\textsuperscript{49} The leading case, as all antitrust students know, is Standard Oil Co. v. United States, 221 U.S. (1911).
of wrongful intent is omitted, even though there is a requirement that the sale below cost have a harmful effect upon competition.\textsuperscript{53} The courts' insistence on proof of a wrongful intent is probably due to the presence in the statute of criminal sanctions, courts being traditionally reluctant to impose criminal penalties without proof of a guilty intention.\textsuperscript{54} Aside from this consideration the intent requirement is superfluous. If the statute is aimed at eliminating types of price-cutting which are socially or economically harmful, the price-cutter's mental state is irrelevant. The only relevant circumstance is the effect of the price cuts, which turns on the nature of the market, and a host of other economic factors. For this reason the statutes could be greatly improved by eliminating both the criminal penalties and the requirement of intent. Criminal sanctions are entirely out of place in such a statute, proof of which lies in the fact that, so far as the writer has been able to discover, criminal prosecutions are almost never brought. Civil actions for injunctions and damages are adequate sanctions and far more effective to use.

The full fatuity of these statutes, and of the judicial opinions construing them, comes out when we ask what sort of intent makes a sale below cost a crime. The phrasing of the statutes varies. The California statute, with the virtue of brevity, merely requires that the seller's purpose be "injuring competitors or destroying competition."\textsuperscript{55} The same phrase is found in several other states.\textsuperscript{56} The Pennsylvania statute is a little more detailed, providing that the sale is unlawful where made "with the intent of unfairly diverting trade from or otherwise injuring a competitor or with the result of deceiving any purchaser or prospective purchaser, substantially lessening competition, unreasonably restraining trade, or tending to create a monopoly in any line of commerce."\textsuperscript{57} The Tennessee statute makes it unlawful to sell below cost "with the intent or effect of inducing the purchase of

\textsuperscript{53} Englebrecht v. Day, 201 Okla. 585, 208 P.2d 538 (1949). Here the statute required a wrongful intent, or a harmful effect on competition, and the court held this did not meet the constitutional standard. A similar statute was upheld in McElhone v. Geror, 207 Minn. 580, 292 N.W. 414 (1940). The language held invalid in the Englebrecht case is found in the present Tennessee statute. See note 58 infra. The present Oregon statute makes no requirement of a proof of intent, but does require proof that the sale below cost "may lessen, injure, destroy, prevent, hinder or suppress the competition." ORE. REV. STAT. § 646.100 (1) (a) (1955). This would be clearly invalid under the Englebrecht case.

\textsuperscript{54} See Morissette v. United States, 342 U.S. 246 (1952); HALL, GENERAL PRINCIPLES OF CRIMINAL LAW, cc. 8, 10, 11 (1947).

\textsuperscript{55} CAL. BUS. & PROF. CODE ANN. § 17043 (Deering 1954). In § 17044 the California statute prohibits all loss leaders, which is defined by § 17030 as any article sold below cost to promote the purchase of other merchandise.

\textsuperscript{56} E.g., COLO. REV. STAT. ANN. § 55-2-3 (1953); CONN. GEN. STAT. § 6716 (1949); KY. REV. STAT. § 365.030 (1955); ME. REV. STAT. ANN. c. 184, § 2 (1954); MASS. ANN. LAWS c. 93, § 145 (1954); MONT. REV. CODES ANN. § 51-103 (1954).

\textsuperscript{57} PA. STAT. ANN. tit. 73, § 213 (1953).
other merchandise or of unfairly diverting trade from a competitor or otherwise injuring a competitor.\textsuperscript{58} Plaintiffs suing under such statutes are given invaluable assistance in proving defendants' intent by the common provision that proof of one or more sales below cost is presumptive evidence or prima facie evidence of the necessary wrongful purpose.\textsuperscript{59} This shifts to the defendant the burden of producing evidence that his intentions were not of the sort condemned in the statute. By such provisions the legislature takes away with one hand what it gave with the other. For all practical purposes, this reverses the usual principle that a person is presumed innocent until proved guilty, and raises serious constitutional questions which have been decided adversely to the statute in at least two cases.\textsuperscript{60}

When a sale below cost has occurred, the court must decide whether it was made with an unlawful purpose. Sometimes this is fairly clear. Thus sales covered by the statutory exemptions presumably are cases in which the seller's purpose is lawful, though they do not exhaust all the possibilities for lawful sales. There must be a finding of wrongful intent even where the sale does not fall within one of the specified exemptions.\textsuperscript{61} These exemptions include isolated sales which are

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\item \textsuperscript{58} TENN. CODE ANN. § 69-303 (1956). This section goes on to require also that the sale below cost must have the result of tending "to deceive or mislead any purchaser or prospective purchaser or to substantially lessen competition or unreasonably restrain trade or tend to create a monopoly in any line of commerce." A statute like this would seem to require a comprehensive investigation by the court into all the causes and consequences of the sale below cost, but such investigations are not made, at least partly because private litigants do not have the time, money and expertise to provide the courts with the necessary information.
\item \textsuperscript{59} E.g., CAL. BUS. & PROF. CODE ANN. § 17071 (Deering 1954); Colo. Rev. Stat. Ann. § 55-2-13 (1953); CONN. GEN. STAT. § 6716 (1949); KAN. GEN. STAT. Ann. § 50-403 (1949); LA. REV. STAT. § 51:423 (1950); ME. REV. STAT. ANN. c. 164 § 4 (1954); MD. ANN. CODE art. 83, § 113 (1951); MASS. ANN. LAWS c. 93, § 14F (1954); OKLA. STAT. ANN. tit. 15, § 598.5 (Supp. 1956); PA. STAT. ANN. tit. 73, § 214 (1953); TENN. CODE ANN. § 69-305 (1956). The presumption is rebuttable and does not abolish intent as an element of the wrong. Perkins v. King Soopers, Inc., 122 Colo. 263, 221 P.2d 343 (1950).
\item \textsuperscript{60} Wiley v. Sampson-Ripley Co., 151 Me. 400, 120 A.2d 289 (1956) held the presumption a violation of the due process clause, as applied in criminal or civil cases. See also Great Atlantic and Pacific Tea Co. v. Ervin, 23 F. Supp. 70 (D. Minn. 1938).
\item \textsuperscript{61} See Perkins v. King Soopers, Inc., 122 Colo. 263, 221 P.2d 343 (1950) (semble). This would seem to be a sensible construction of the statute, although it raises the question of why the exemptions were specifically mentioned at all. They all deal with instances where no intent to harm competitors or destroy competition could conceivably exist, and this being so, it seems superfluous to mention them. But the enforcement officials may have other views. One Attorney General seems to take the position that any sale below cost is unlawful unless it comes within one of the specific exemptions. See Opinion of the Attorney General of Wisconsin, CCH TRADE REG. REP. (1948-1949 Trade Cas.) § 62364, at 62817 (Aug. 10, 1948). This opinion states that if a merchant has a large stock of seasonal goods which he wants to sell but cannot at a price above cost, he may only sell below cost if he brings himself within the statutory exemption of a "bona fide clearance sale." If he intends to reorder the same type of goods, the opinion suggests this would not be a clearance sale, and would violate the statute. But it would seem clear that a sale to get rid of slow-moving goods, even though they might
not in the usual course of business, clearance sales, sales of perishable
goods, sales of damaged or imperfect goods, liquidation sales, sales for
charity, sales to government agencies, sales to meet legal competition,
and sales by a judicial officer. On the other hand, if it were proved
that the seller were a large firm, with potential power to dominate
the market, and that it sold below cost in order to eliminate local com-
petition and achieve a dominating position, this would be a clear case
of wrongful intent. It is this market situation which the cases on
constitutionality say the statute is aimed to correct.

Unfortunately the cases do not fall neatly into these classes. Sales
below cost are commonly made in more ambiguous market conditions
and for much less clearly defined purposes. In fact the writer is not
aware of a single reported case in which the defendant's motive was
proved to be the domination of a particular market, or in which he
was shown to have any chance of accomplishing such a domination.
In cases where judgment is for the plaintiff, it is usually based either
on the presumption arising from the sale below cost, or on the fact
that the defendant's purpose was to attract into his store a few cus-
tomers who might otherwise have visited his competitor's. In other
cases, indistinguishable from the ones in which an injunction is given,
no wrongful motive is found. The reasoning of these opinions is either
naive in the extreme, or leads one to suspect that the courts are rely-
ing on the intent requirement to neutralize a statute they dislike but
cannot hold unconstitutional.

Examples to support these remarks are not hard to find. In one
California case the court held that a laundry which was doing work
below cost had violated the act (a) because of the presumption of
wrongful intent arising from the sales themselves, and (b) because
wrongful intent was proved by the defendant's solicitation of cus-
tomers who had been patronizing its competitors. The defendant
had to admit, as anyone would, that if his solicitation had been
successful, his competitors would have been injured. Cases like this

later be reordered would not be made with intent to harm competitors or to
destroy competition, as the cases have construed those terms, whether or not
such a sale could be described as a clearance sale. In any event this is merely
another graphic demonstration of the unworkable rules this statute imposes.

62. E.g., Texn. Corp Ann. § 69-304 (1956). Other statutes have similar
exemptions.

63. See cases cited note 23 supra.

64. Perhaps the most powerful defendant found in reported cases is Safe-
way Stores, yet in the case involved the court found that its market share was
only 30% over the entire Denver Area, with several powerful chain store
showing of market domination was made here.

65. See note 59 supra.

66. Los Angeles Laundry Owners Ass'n v. Cascade Laundry, CCH Trade
1950).
have the merit of construing the statute's phrase “injuring competitors” literally, though at the expense of making it absurd in application. In another California case, where loss leaders were used to induce the purchase of other goods, with the conceded result that trade was diverted from the defendant's competitors, the court held that no wrongful intent had been shown.67 In fact, some of the California cases have managed to read out of the statute one of the definitions of loss leader, which is a sale below cost for the purpose of inducing the purchase of other merchandise.68 And some cases have held it is all right if the defendant sells below cost in order to increase his volume of business, provided he does not intend to injure his competitors,69 conveniently neglecting to explain how this is possible. It would seem obvious that if a prospective customer is about to buy goods, his purchase from the defendant will injure the defendant's competitor by depriving him of a sale. The courts are forced into this kind of absurdity by the statutes, which, if construed literally, would sacrifice price competition to the preservation of individual competitors.

Similarly inconsistent decisions can be found in other states. One Tennessee court held that the use of milk as a loss leader to attract customers was not a violation of the statute because no wrongful intent was shown.70 Yet in Rust v. Griggs,71 the Tennessee Supreme Court held that the seller's use of loss leaders for precisely the same purpose was deceptive and did violate the act. In reaching this conclusion the court employed some curious arguments. It found that at the same time defendant sold the loss leaders he was selling other items at prices slightly above the prices charged by other sellers. The defendant also used advertising containing the slogan “Pay Cash;
Pay Less.” The court found this advertising deceptive, and seemed to rely on that fact to find a wrongful motive behind the sales below cost. But the sales above the price charged by other stores were what made the advertising deceptive (if it really was). So this defendant was violating the statute not because he sold below cost, but because he sold some articles above the usual prices. The deception which the court emphasized as the reason for its decision was caused by (a) the advertisement, together with (b) the greater than normal markup. The sales below cost had nothing to do with it. This is a peculiar way to enforce a statute prohibiting sales below cost, to say the least.

Few of the decisions give a defendant any clue as to how he might go about rebutting the presumption of wrongful intent which arises from the sale below cost. It would seem that rebuttal could not be based solely on testimony by the defendant that he intended no harm to his competitors, but at least one opinion says that this is sufficient. Here again the court seems to be using the intent requirement to nullify the statute, but no one can say with assurance when the courts will feel disposed to do this.

In the preceding pages the writer has tried to show that the requirement of wrongful intent bears no relation to the world in which the businessman operates, and therefore cannot be defined in intelligible terms. If it is literally defined, it would invalidate nearly every sale below cost because any businessman would have to admit that he set prices in the hope of attracting customers, and that if he were successful he would be taking business away from his competitors, thereby injuring them. Many courts have refused to go this far and have then been forced to fall back on meaningless verbal formulas in discussing intent. In practice this has meant that a large element of arbitrariness has been introduced into the decisions. Since the whole issue is meaningless, the courts are free to reach what results

72. It seems incredible to characterize advertising of this kind as deceptive. Many merchants use extravagant phrases to sell their goods or attract customers to their stores. And even if it were, the law has traditionally refused relief to a competitor for false advertising. American Washboard Co. v. Saginaw Mfg. Co., 103 Fed. 281 (6th Cir. 1900).


74. See Opinion of the Attorney General of Kentucky CCH TRADE REG. REP. (1948-1949 Trade Cas.) ¶ 62302 at 62717 (Aug. 23, 1948), in which the act is said to be “rather difficult to enforce” because of the requirement that an intent to injure competitors and destroy competition must be proved.

75. One case, Dikeou v. Food Distributors Ass’n, 107 Colo. 38, 108 P.2d 539 (1940) seems to go nearly this far. The court relies for indicia of wrongful intent on the defendant’s refusal to agree on what the cost of doing business was, and on the presumption that an actor intends the natural and probable consequences of his acts.
they please. They are aided in this by the presence in the statute of undefined terms like "unfairly diverting trade." It is not surprising then that neither the results of the cases nor the reasoning by which those results are arrived at are consistent. This state of affairs is particularly unfortunate because the courts are dealing with a statute which is supposed to guide the conduct of businessmen in the day-to-day pricing and selling of goods. If a lawyer or a judge cannot arrive at a rational principle from the statutes and cases, the businessman will certainly be unable to decide whether in a given situation he is entitled to price his goods below cost. He can only avoid risk by always selling above cost. Thus in operation the statutory requirement of intent is even more of a fiction than its treatment by the courts would indicate.

THE DETERMINATION OF COST

This aspect of sales below cost statutes has aroused more discussion and criticism than any other. The statutes impose various methods for determining "cost." All of the variations cannot be described in detail here, but examples enough can be given to illustrate the problems which arise.

The invoice cost to the seller (or replacement cost, whichever is lower) is the base figure usually adopted by the statutes in setting the seller's cost. Other elements of cost are calculated on that base figure and then added to it. To avoid the obvious difficulty that the invoice price for particular goods sold cannot usually be identified, the statutes sometimes allow the use of any invoice on similar goods for a prescribed period before the sale, the period varying between thirty and

76. The leading case of People v. Pay Less Drug Store, 25 Cal. 2d 108, 153 P.2d 9, 12 (1944) states that "these provisions are sufficiently explicit to inform the merchant as to what is prohibited. He is not relegated to conjecture to determine his lawful conduct." With all due respect to an able court, statements like this merely give evidence of a failure to understand the conduct of business and the impact of the statute. In Opinion of Attorney General of Minnesota, CCH Trade Reg. Rep. (1950-1951 Trade Cas.) ¶ 62783, at 64315 (Feb. 21, 1951) the Attorney General was unable to advise whether a game called "Spin-O" violated the statute. His opinion states that it depends on the retailer's intent, but he failed to mention what kind of intent was fatal. If the Attorney General could not answer such an inquiry, certainly the businessman cannot be expected to understand and follow the statute.


78. E.g., CAL. BUS. & PROF. CODE ANN. § 17026 (Deering 1954). This and other statutes commonly provide that if the article is purchased at a forced, bankrupt or closeout sale, the invoice cost cannot be used as the basis for price unless the article is separately handled and sold. See id. § 17027. Manufacturers' published list prices may often be used in lieu of invoices.
ninety days. Where the statute applies to producers as well as to wholesalers and retailers, the cost computation is of course even more difficult, but the statutes merely require that it include "the cost of raw materials, labor and all overhead expenses of the producer."

The invoice cost referred to may then be reduced by any trade discounts granted to the seller, but discounts for cash cannot be deducted, under most statutes. Here arises the first objection to the statute, albeit a minor one. The discount for cash is given to a buyer because he does not avail himself of a service offered by the seller, that is, the extension of credit. The buyer who does not pay cash buys both the goods and the credit service. Therefore it clearly puts a false construction on the transaction to treat the buyer who pays cash as having incurred the same cost as the buyer who receives credit. The two buyers have bought different things and paid different prices for them. It is not clear why the statute does refuse to let the cash buyer compute his cost by deducting the cash discount, and no purpose seems to be served by making this rule.

Once the base figure, usually invoice cost, is established, the statutes require that an additional sum be added representing a factor variously called "overhead," or the "cost of doing business." The statutes do not say so, but presumably these elements of the cost of doing business are to be allocated to the particular items sold on some rational basis. The only definition of the cost of doing business found in most statutes is tautological, but they customarily list the elements entering into this cost, such as labor, salaries, interest, depreciation, rent, selling costs, maintenance of equipment, delivery costs, credit losses, licenses, taxes, insurance and advertising.

With implicit recognition that few businessmen are able to prove the share of the overhead borne by a particular item, the statutes establish rebuttable presumptions. These take two forms. One of them merely establishes the cost of doing business at a stated percentage of invoice cost, to be applied to all items in the absence of proof of

83. See, e.g., Colo. Rev. Stat. Ann. § 55-2-3 (1953): "The 'cost of doing business' or 'overhead expense' is defined as all costs of doing business incurred in the conduct of such business...."
the actual cost.\textsuperscript{84} The other allows the use of "cost surveys" conducted by trade associations or other groups.\textsuperscript{85} "Cost survey" is an ill defined term. Supposedly it refers to some impartial investigation into the cost of doing business, but the conditions, objectives and methods of such surveys are never described in a satisfactory manner.\textsuperscript{86} High markups have been imposed by trade associations on the basis of unscientific and unreliable cost data gathered under authority of these provisions.\textsuperscript{87}

The first problem to be faced is the constitutionality of the provisions relating to cost. The argument has been made that cost, as applied to a particular item in a store selling many items, can never be determined with sufficient certainty to enable the seller to know whether he is violating the statute or not. The assertion is that a criminal statute should set up an ascertainable standard of guilt, and that "cost" is not a definite enough term to meet that standard. The validity of this argument, which has been persuasive to some courts\textsuperscript{88} and rejected by others,\textsuperscript{89} turns first on an understanding of accounting principles and difficulties, and second on an evaluation of the purpose underlying the statute.

There are two obstacles which prevent the total cost of an article in a retail store from being fully and accurately determined. The first of these is the complete absence of any logical connection between the handling of that article and certain classes of expense which are


\textsuperscript{86} The Montana statute contains detailed provisions on how cost surveys are to be conducted, but it allows a single survey to cover the entire state. Mont. Rev. Codes Ann. § 51-114 (1954). A figure purporting to measure the cost of doing business for a particular type of enterprise, no matter where located, in a state as large as Montana would seem to be an approximation so rough as to bear no real relation to the facts.

\textsuperscript{87} Tannenbaum, supra note 77, at 50–51, gives as an instance cost data compiled from answers to the following questions: "Based on my total grocery sales for the year 1936, I find that my minimum cost of doing business ...% of my net sales." In Los Angeles Laundry-Owners Ass'n v. Cascade Laundry, CCH Trade Reg. Rep. (1950–1951 Trade Cas.) ¶ 62667, at 63919 (Super. Ct. Cal. July 11, 1950) the court seems to have based its judgment as to the cost of washing a sheet on a "cost survey" taken at a single laundry.


\textsuperscript{89} May's Drug Stores Inc. v. State Tax Comm'n, 242 Iowa 319, 45 N.W.2d 245 (1950); State v. Langley, 53 Wyo. 332, 84 P.2d 797 (1938). Dickeou v. Food Distributors Ass'n, 107 Colo. 38, 108 P.2d 529 (1940) seems to approve the definition of cost, without passing directly on the constitutional question.
part of the costs of the enterprise. Costs of this kind are often called "joint costs," and many accounting authorities refuse to make any attempt to allocate them to individual items of merchandise. Thus it would be impossible to say how much of a store manager's salary ought to be allocated to the cost of a bag of sugar, as against a bag of flour. The same would be true of the cost of heating and lighting the store, and the cost of buying and maintaining a parking lot for the convenience of customers. There is thus a large class of costs which can never be related in any rational manner to the particular articles sold.

The second obstacle to a full calculation of costs for the retail grocery store, (which we may assume is the enterprise most commonly concerned with the impact of these statutes) is that it is impossible as a practical matter to determine how much of the cost of doing business should be allocated to a particular item, even when the elements of that cost have some relation to the handling of a particular item. For example one could logically say that the cost of frozen orange juice should include the cost of refrigeration, whereas the cost of canned orange juice would not. And the cost of meat should include a factor representing the allocation of butcher's and meat cutter's salaries. But any retailer who attempted to compute costs in this much detail would no longer have to worry about the statutes because he would be too busy doing his accounting to make any sales. In other words, these statutes are commanding the seller of goods to keep records and make computations which no seller could do and remain in business, and which in fact no seller does do.

But this is not the whole story. What about the presumptions? By imposing the requirement of a fixed markup over invoice cost, they relieve the retailer or wholesaler of this impossible burden of cost accounting, and, the argument goes, make it easy for him to know when he is violating the statute. This is true but open to several objections. First, the markups arrived at in this manner, whether the statute sets the percentage figure, or that figure is reached by means of a "cost survey," have nothing whatever to do with the cost of selling the particular article. A moment's thought will demonstrate this. Under the presumptions any article invoiced to the retailer at twenty-

90. Amory and Hardee, Accounting 564-66 (2d ed. 1953); Tannenbaum, supra note 77 at 29-41.
92. By "presumptions" is meant the statutory provision found in many states, either that markup shall be a stated percentage over invoice cost, or that overhead may be proved by cost surveys. See notes 84, 85 supra. Both of these types of provision set up a rebuttable presumption as to the overhead cost, though they are sometimes phrased in terms of prima facie evidence.
five cents will bear the same amount for overhead costs. Application of the percentage markup would result in the same cost for selling a can of beans invoiced to the merchant (we will assume) at twenty-five cents as for a pound of hamburger, which is also (we will again assume) invoiced to him at twenty-five cents. Yet the hamburger arrives in the form of a side of beef, is cut up by meat cutters, ground into hamburger and held under refrigeration until sold. Though the cost of getting it into the hands of the customer is very much greater than the cost of selling a can of beans, the statutory presumption would result in the same cost for both. Thus the percentage markup requirement assumes that each item sold should bear the same proportion of the total cost of doing business, regardless of what the actual cost of selling that particular item might be. This may be a convenient method of arriving at a selling price, but it has nothing to do with the cost of the individual item sold.

Use of the percentage markup is open to at least two other objections. One is that the total cost of doing business, although usually expressed as a percentage of gross sales, is applied under the statutes as a percentage of invoice figures. The two are not comparable. It is a non sequitur to say that since total overhead is eight percent of gross sales, it is also eight percent of the cost of goods purchased. And in the second place, there is an element of circularity in the use of percentage markup. The reason for this is that volume of business may increase when markup is less, and if it does, the fixed costs per unit will be less. The cost of doing business (on a single item) is therefore partly determined by what the statute says the cost of doing business is.

The foregoing paragraphs are enough to show that the use of “cost” as a criterion of price in these statutes is largely a fiction. In few, if any, cases will the defendant be able to show what the true cost of selling an item is. The court will then apply the presumption that “cost” is invoice price plus the statutory percentage, or, in some states, plus the percentage established by the cost survey. The writer has found few reported cases brought under these statutes in which the actual cost of selling an item was proved. In nearly all cases the presumption was the basis for the judgment. This makes it plain

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93. Tannenbaum, supra note 77, at 50.
96. In some cases the defendant admits sales below invoice cost, thus enabling the court to avoid the problem of overhead. The courts, where they do face the problem and uphold the statute, take refuge in a vague language about reasonable systems of cost accounting adopted in good faith. See May’s Drug Stores, Inc. v. State Tax Comm’n, 242 Iowa 319, 45 N.W.2d 245 (1950).
97. The fictitious nature of the inquiry into “cost” is nowhere shown more
beyond question that references to cost are camouflage, used to shelter the statute from constitutional attacks. The rule announced by these statutes therefore is that sales at prices less than invoice plus a mandatory percentage (with the wrongful intent) are unlawful. Or, to put it another way, all sellers must mark up their goods at the same rate.

It follows from this that the constitutional question raised is whether this uniform markup is valid, not whether sales below cost can be forbidden. If the question were put that way, there seems little doubt that the statutes would be held unconstitutional, on the ground that they prevent the efficient merchant with low costs from competing successfully with his less efficient rivals. Or perhaps it would be more accurate to say that they prevent him from passing his cost savings on to his customers in the form of lower prices. If he wishes to attract business from his competitors, he must do so by means other than lower prices, such as trading stamps, giveaways, advertising, the offering of various services such as music in the supermarket, and other gimmicks. In short the effect of these statutes is plainly than in Commissioner of Corporations v. Ryan, 323 Mass. 154, 80 N.E.2d 471 (1948), in which the trial court was allowed to use the presumptive markup of 8% even though the defendant gave evidence to show that his own average cost of doing business was less than 3%.

98. See cases cited notes 88, 89 supra. In all these cases there is an implicit assumption that the statutes really are concerned with cost, leading strongly to the inference that if the fictional character of cost were understood the statutes would be held arbitrary, since they would be seen to require a universal markup.

99. Trading stamps seem to be entirely outside the sales below cost statutes in some states. The cases saying that a trading stamp is a discount for cash. Oklahoma Retail Grocers Ass'n v. Safeway Stores, Inc., CCH TRADE REG. REP. (1955 Trade Cas.) ¶ 68195, at 70068 (Dist. Ct. Okla. Oct. 21, 1955); Opinion of the Attorney General of Idaho, CCH TRADE REG. REP. (1955 Trade Cas.) ¶ 68100, at 70599 (March 31, 1955). This is of course erroneous. No matter how the trading stamp may be categorized, whether a cash discount or an advertising expense, it should be taken into account in determining whether the statute has been violated. If the price of the goods, less a proportionate deduction corresponding to the value of the trading stamp, is lower than cost, then the statute has been violated. This is the result reached in some states. Trade Comm'n v. Bush, 259 P.2d 304 (Utah 1953) suggests this result is correct, but does not rule directly on the point. Opinion of the Attorney General of Utah, CCH TRADE REG. REP. (1950-1951 Trade Cas.) ¶ 62841, at 64476 (May 21, 1961) plainly adopts this analysis.

100. Apparently it is the law in some states that although a merchant cannot sell goods below cost, he can give them away, without regard to his intention in doing so. Opinion of the Attorney General of Wisconsin, CCH TRADE REG. REP. (1956 Trade Cas.) ¶ 68322, at 71420 (Dec. 22, 1955). The crucial question seems to be whether the gift is contingent on the purchase of other goods. If so, it is unlawful. Opinion of the Attorney General of Wisconsin, CCH TRADE REG. REP. (1948-1949 Trade Cas.) ¶ 63451, at 63451 (April 26, 1949). In Opinion of the Attorney General of Washington, CCH TRADE REG. REP. (1955 Trade Cas.) ¶ 63068, at 70443 (May 22, 1955) a "welcome wagon" gift is said not to violate the statute.

101. Although these are offered free, presumably they are not per se within the statutory prohibition. Their cost would supposedly enter into the cost of doing business, but this would not affect the price which the merchant could charge, since if his costs ran above those of the statutory or cost survey markup, he could rely on those figures rather than on his own cost in establishing his minimum price. See Oklahoma Retail Grocers Ass'n v. Safeway
utes is to forbid competition in price and to encourage non-price forms of competition. The result is that the benefits usually attributed to the competitive system, lower prices to the consumer and an efficient allocation of economic resources, are seriously prejudiced.

**Persons Entitled To Sue**

A minor but illuminating feature of the sales below cost statutes is the provision that *any person* may sue to enjoin a violation. This makes every private citizen a prosecutor, to the extent that he is willing to spend money on litigation. It was probably intended to make it possible for trade organizations to police the statute. It has led to some strange judicial decisions, such as the holding that a plaintiff may enjoin a breach of the statute even though he himself has been selling goods below cost. The defendant's remedy in such a case apparently is to file a cross-complaint, so that the court would then enjoin both plaintiff and defendant from further violations. But if both parties are selling in a market where sales below cost are commonly made, this will do them little good. They cannot rely on the exemption which covers sales to meet the price of a competitor, since most cases have held that this only exempts sales made to meet a legal price, that is a price which itself is not below cost. In other

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102. *E.g.*, CAL. BUS. & PROF. CODE ANN. § 17070 (Deering 1954). This has been held in California to authorize a civilian suit for an injunction by the state. People v. Centr-O-Mart, 34 Cal. 2d 703, 214 P.2d 378 (1950); People v. Part, 102 Cal. App. 2d 653, 223 P.2d 68 (1951).

103. Kofsky v. Smart and Final Iris Co., 131 Cal. App. 2d 530, 281 P.2d 5 (1955). The court said that the "clean hands" defense has no application where it would result in the continuance of acts which the legislature has declared to be contrary to public policy. This seems to assume that the plaintiff is suing not because he is entitled to compensation for an injury done him, but as a kind of proxy for the state, to ensure that state statutes are complied with.

104. One case tries to solve this problem by delaying the issuance of an injunction until the defendant had time to sue all other persons in the market who were selling below cost. Obrecht v. S. Kotzin Co., CCH TRADE REG. REP. (1950-1951 Trade Cas.) ¶ 62694, at 64017 (Circuit Ct. Md. Aug. 23, 1950), but this places on a defendant the expense of policing the market, on pain of being the only firm enjoined.

105. The statutes themselves, in many instances, give an exemption only where the defendant has attempted to meet a legal price. See *e.g.*, CAL. BUS. & PROF. CODE ANN. § 17050 (Deering 1954); TENN. CODE ANN. § 69-304 (1956); People v. Gordon, 105 Cal. App. 2d 711, 224 P.2d 207 (1951). Some courts seem to follow the rule that sales are exempt when made to meet a competitor's price, regardless of the legality of that price, so long as the defendant had no actual knowledge that the price was illegal. This is true even where the defendant made no attempt to determine the legality of the competitor's conduct. These cases vaguely say that the defendant is protected if he acts in good faith, which apparently means without actual knowledge.

May's Drug Stores, Inc. v. State Tax Comm'n, 242 Iowa 319, 45 N.W.2d 245 (1950) (the court reaches this result in the face of a statute which expressly grants exemption only where the competitor's price is a legal one); State v. Commercial Candy Co., 166 Kan. 433, 201 P.2d 1034 (1949). Opinion of the Attorney General of Utah, CCH TRADE REG. REP. (1952-1953 Trade Cas.) ¶
words enforcement by private lawsuits is totally inappropriate and ineffective where price-cutting is frequent and price competition keen. The only effective remedy in such situations would be enforcement by the state in actions brought against all violators. But suits by the state are relatively infrequent, probably because prosecutors are naturally reluctant to spend the time and money required to discover violations and try cases involving complex issues and unfamiliar economic factors.

The result is that, as with other criminal statutes which are infrequently enforced, the statute is likely to have an arbitrary and unfair impact. It will be most often used against an annoying maverick in the market, one who has refused to go along with the pricing practices of his fellow merchants, but one who has not the resources or market position to fight back.\textsuperscript{106} It will seldom be invoked against one of the large chain stores.\textsuperscript{107} Perhaps one reason for this is that a suit of this kind makes excellent advertising copy for the defendant who can afford wide publicity and who can bear the expense of protracted litigation.\textsuperscript{108} No better testimony to a defendant's concern for low consumer prices can be had than the fact that his competitors are suing him as a price-cutter.

\textbf{Conclusion}

Superficially, sales below cost statutes look like class legislation, passed by unresisting legislators under pressure from interested trade associations, with no one available to urge the claims of consumers or the public. But this is an over-simplification which fails to explain why the statutes have been so generally approved and enforced by the courts and why they are so pervasive in many jurisdictions, in the face of much adverse criticism. There must be some appeal for twentieth-century America in such legislation, and it is not hard to find.

\textsuperscript{67}410, at 68079 (Dec. 31, 1952) states that a defendant violates the statute when he meets an illegal price, whether he knows it to be illegal or not. In \textit{Cohen v. Frey & Son, Inc.}, 197 Md. 586, 80 A.2d 267 (1951) the statute and the case allowed the defendant to meet any price, not merely a legal price.

\textsuperscript{106} \textit{Cohen v. Frey & Son, Inc.}, 197 Md. 586, 80 A.2d 267 (1951) is a good example. Here the action, nominally with a trade association as plaintiff, was really controlled by two individual firms, both of which did a much greater volume of business than the defendant.

\textsuperscript{107} Two recent cases against Safeway are the exception. Both of these cases show a conflict between competing philosophies of selling, the trading stamp form of competition on the one hand, and price competition on the other. \textit{Standard Store v. Safeway Stores, Inc.}, CCH \textsc{Trade Reg. Rep.} (1955 Trade Cas.) \textsuperscript{1} 68153, at 70740 (Dist. Ct. Colo. Oct. 5, 1955); \textit{Oklahoma Retail Grocers Ass'n v. Safeway Stores, Inc.}, CCH \textsc{Trade Reg. Rep.} (1955 Trade Cas.) \textsuperscript{1} 68195, at 70906 (Dist. Ct. Okla. Nov. 4, 1955).

\textsuperscript{108} See Denver Post, Oct. 6, 1955, p. 47, for a double page advertisement by one of the victorious defendants in \textit{Standard Store v. Safeway Stores, Inc.}, supra note 107. This advertising takes full advantage of the implications for the consumer of lawsuits like this one.
Viewed in general terms, these statutes give legal sanction to the modern social philosophy, so well documented outside the law,\textsuperscript{109} that it is reprehensible to be aggressive or to excel at the expense of one's fellows. This attitude is not merely one of self-preservation. It has the force of moral doctrine. Getting along with others in the community is a moral duty. These statutes translate this duty into the concept of competing unfairly. It is unfair to cut prices to get customers away from your fellow-merchants. The old-fashioned ideal of the businessman as a hard-driving competitor who gets ahead by cutting his costs and his prices and driving his rivals into bankruptcy no longer attracts us. In fact such conduct today would be considered unethical. This reversal of ideals explains why the obvious economic objections to sales below cost have had so little effect. The statute enacts a moral and ethical philosophy, not an economic system.

But just as there are many in this country who refuse to accept the ideal of the "organization man," so there are many businessmen who refuse to comply with these statutes. In fact, very little is known about the extent to which these statutes do affect the conduct of business. The reported cases are relatively few. This may be due to ignorance and indifference about the statutes, or, on the contrary, to the fact that they are generally obeyed. An investigation of this subject would be, in the writer's opinion, a fruitful project for the kind of cooperative study by social scientists, economists and lawyers which is frequently advocated these days.\textsuperscript{110} Such a study might reveal how vigorous the enforcement of the statutes has been, and, more important, how general is approval of their purposes and obedience to their provisions.

The interesting thing to students of the law is the technique by which the sales below cost statutes operate. As this paper has suggested, the regulatory scheme turns on two fictions, the first the fiction of presumed wrongful intent, the second the fiction that cost is presumed to be invoice cost plus a fixed percentage. Although legal fictions have a long and respectable history as instruments by which ancient rules are adapted to modern conditions,\textsuperscript{111} they are somewhat out of fashion today. Their use in a statute of this kind raises questions different from those which arise when they are used by a court to get rid of an outdated legal rule. In theory the legislative process should produce a statute only after a chance for discussion not only by the legislature itself but also by whatever members of the community may be interested. If the legislation accomplishes its purposes by fic-

\textsuperscript{109} Riesman, The Lonely Crowd (1952); Whyte, The Organization Man (1956).
\textsuperscript{111} Stone, The Province and Function of Law 459, 677-78 (1950).
tions, there is probability that the discussion will be irrelevant, due to misunderstanding caused by the fictional provisions. Under such circumstances the legislative process does not perform its function. There is the additional danger that the use of fictions will mislead the courts who have to administer the statute. If so, it will be a matter of chance whether the statute is enforced as it was intended to be. For these reasons, the reliance upon legal fictions, here called presumptions, to accomplish the statutory purposes is not consistent with, and in fact stultifies essential steps in the legislative process. This is true whether or not one approves of the purposes which the statutes were enacted to serve.