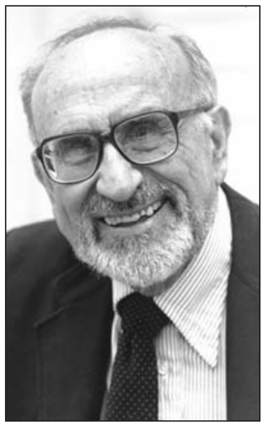
The Premature Post-Chicagoan: Alfred E. Kahn

BY JONATHAN L. RUBIN



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THE YEAR WAS 1977 and Alfred Kahn,the Cornell economics professor and former head of the New York State Public Service Commission, had just taken over the (now defunct) Civil Aeronautics Board (CAB). Heavy on lawyers and light on economists, the agency leaned toward pompous writing and overly legalistic administrative procedures. It was attempting to fulfill a mission that had crept far beyond issues of the airlines' pricing and routes to making a thousand other "picayune decisions" on all nature of things—from the designs for flight attendant uniforms, to the types of aircraft that may be flown to the maximum size of an onboard sandwich. "Is this," Kahn wrote after eight months on the job, "what my mother raised me to do?"[1]

Clearly, the regulatory regime at the CAB was not up to dealing with an industry in crisis. By the end of the decade, oil price shocks, recession, and excessive general inflation had produced crippling stagflation.[2] The industry, which had loaded itself up on shiny new jets earlier in the decade, was flying half-empty and suffering huge losses. The new chairman's first order of business? To take on what Kahn termed "the artificial and hyper-legal language that is sometimes known as bureaucratese or gobbledygook." Writing in a June 1977 memo to the CAB staff, Kahn cautioned, "If you can't explain what you are doing in plain English, you are probably doing something wrong." He was serious: "May I ask you, please, to try very hard to write Board orders and, even more so, drafts of letters for my signature, in straightforward, quasi-conversational, humane prose—as though you are talking to or communicating with real people."[3]

The press, delighted to hear such talk from a government official, had a field day. The *Washington Post* published the memo in full and praised it in an editorial entitled "The Sayings of Chairman Kahn" at a time when there was much talk of "The Sayings of Chairman Mao." Kahn was profiled in *People* magazine, and nominated for the presidency by a newspaper in Kansas and for the Nobel Prize by a newspaper in Singapore. He was appointed to the Usage Panel of *The American Heritage Dictionary*, a post he continued to hold until his death on December 27, 2010. Six months after the CAB memo, his war on bureaucratese became a major feature of a full-hour appearance on the MacNeil-Lehrer NewsHour,[4] for which demand for copies was greater than for any previous program.[5]

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Kahn's attack on obfuscation at the CAB was more than an exercise of personal privilege. It was arguably the *sine qua non* of the Airline Deregulation Act of 1978,[6] signed into law by President Carter on October 28, 1978, which mandated completely open entry by 1981, elimination of the CAB by 1985, and an end to the perverse and pervasive system of regulation that had marked U.S. aviation policy for forty years. A 2008 festschrift in celebration of Kahn's 90th birthday and of thirty years of airline deregulation written by Philip Weiser cast Kahn as the archetypical "political entrepreneur," whose broad public appeal was an indispensible tool for forging reform in a long-ossified institution.[7]

Kahn's biographer, Thomas McCraw, who won a Pulitzer Prize in 1985 for his book, *Prophets of Regulation* (which also included portraits of Charles Francis Adams, Louis Brandeis, and James Landis),[8] put it somewhat more succinctly: Kahn, for years a performing Cornell Savoyard and aficionado of the operettas of Gilbert and Sullivan, was, in McCraw's description, "the model of the modern media general."[9] In other words, his stage presence, "irrepressibly candid wit,"[10] and broad public appeal partly explain why he and not his predecessor from the Ford Administration, John Robson, got the credit for airline deregulation. Robson's testimony at hearings sponsored by Senate Commerce Committee Chairman Howard Cannon amazed onlookers by favoring deregulation and the elimination of his own agency. But there was little traction for what one industry publication called Robson's "one-man reform crusade."[11] Not until Kahn took the reins did airline deregulation fly.

After tackling CAB gobbledygook and capturing the public's good will and imagination in the process, Kahn issued an order granting the airlines freedom to cut fares up to 50 percent without prior approval. This built on a successful natural experiment in California where the intrastate carrier Pacific Southwest Airlines was flying much higher loads at much lower prices. The benefits of such a move must have seemed self-evident to the author of the (still) authoritative *The Economics of Regulation, Principles and Institutions*,[12] a two-volume explication of the fundamental regulatory theory of marginal cost pricing (Volume 1—*Principles*) and its application to an imperfect real world of regulators and market participants (Volume 2—*Institutions*). When the new chairman was asked to predict how the industry would look if the CAB got out of the way, he pointed with characteristic clarity to the limitations of his own profession:

> If I knew what was the most efficient configuration of routes in the airline system, then I could continue to regulate. But since I can't tell you whether it's going to be a Delta kind of operation or it's

> going to be more like the Eastern shuttle or Southwest Airlines it doesn't make sense to leave it to an ignorant person like me to tell airlines how they can best configure their routes.[13]

To get out of the way the agency needed to reorganize itself and, with the support of deregulation-minded Republican CAB appointee Elizabeth Bailey, Kahn's Board eliminated three of its existing Bureaus, created two new ones, and established an Office of Economic Analysis headed by Darius Gaskins. He shared his motive in a letter to his former graduate student, Irwin Stelzer: "I want to have objective economists watching carefully what we are doing and how it works out . . . [rather than] simply substituting the cliché 'leave it to the market' to take the place of using my own eyes."[14] Before long, the new CAB was "thrusting the United States beyond anyone's predictions as to the pace and scope of competition."[15] Over the next several years, deregulation in railroads, trucking, telecommunications, and electric power followed.

No Preconceived Deregulator

It is little wonder, then, that the world came to know Professor Kahn as "the Father of Airline Deregulation." An obituary in *The Economist* would describe how his "adventures with airlines led on to the freeing of the trucking, telecoms, and power industries, and heralded the Thatcherite and Reaganite revolutions."[16] The same obituary that anointed him "the father of the deregulated world," however, also recognized that if anyone had called him that he would have demanded a paternity test.[17]

More than ordinary humility, however, compelled Kahn over the years to eschew the father-of-deregulation label. He thought it belied the subtlety and complexity of the issues and exaggerated the certainty with which he had taken charge at the CAB. Moreover, other equally indispensible players who had had a hand in airline deregulation also deserved to have their contributions remembered. And, not at all trivially, the political and economic conditions at the time, including the onset of rampant inflation, had provided fertile ground for genuine reform.[18] At best, the deregulator moniker distracts from Kahn's broader contributions to economic scholarship; at worst, it distorts his economic and political perspective, particularly with respect to antitrust policy.

To begin, Kahn was "no preconceived deregulator," and he once insisted that any such characterization would ignore "how serious the agnosticism" was with which he ultimately decided to accept the CAB chairmanship.[19] Indeed, when the Carter White House asked if he would accept the job, he first asked about switching with whoever might be named chairman of the FCC. After all, he reasoned, "He can't possibly know less than I about the airline industry."[20] Moreover, he recognized that in an age of energy insecurity, "telecommuting and teleconferencing would have to substantially displace physical transport."[21] It took a call from Edward Kennedy—"Dr. Kahn? I want you to take that [CAB] job"—and a message—"The President wants to see you"—before Kahn seized the opportunity he later would describe as "play[ing] the Walter Mitty role of a mouse driving that elephant . . . ."[22] As he told the celebrants at the University of Colorado on his 90th birthday, any implication that he had arrived at the CAB "with a fixed commitment to flat-out economic deregulation does an injustice to the complexities of the issue . . . ."[23] In a 2005 law review article he noted his background in telecommunications "for most of the previous 35 years"—going back to his five years or more membership on the National Economic Advisory Council to AT&T—"as contrasted with a mere 18 months in the Chairmanship of the late, unlamented Civil Aeronautics Board."

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Kahn also resisted any notion that airline deregulation had not also depended on the efforts of many other influential actors. Kennedy and Cannon held hearings that had exposed the public's discontent with high airfares and persistently empty seats. Kennedy's hearings in particular, organized by Stephen Breyer, showcased a new philosophy that merged New Deal liberalism with procompetitive policies presaging the emergence of the Clintonian "New Democrat."[24] Mary Schuman Boies, a young lawyer on the Senate Commerce staff who then became a member of Carter's transition team, backed Kahn's appointment to the CAB and convinced the President that airline deregulation would be a political win for a Democrat.[25] When Alan Greenspan in his 2007 memoir remembered Kahn, the "wisecracking economist from Cornell University,"[26] as the father of airline deregulation, he appreciated the credit but bristled openly that Greenspan "consistently and ungraciously" mentioned deregulation as "the Ford Administration's great unsung achievement" while Carter, Kennedy, Cannon, Packwood, Breyer, and Boies received no mention at all.[27]

Nor was it right, in Kahn's view, to discount the catalyst for reform that was the economic and political environment at the time. It was no coincidence that the regulatory statutes overturned in that period were enacted during the Great Depression, when the fear was deflation and the accelerating tendency of wages and prices to spiral downward. In the mid- and late-1970s, the conditions could not have been more different. "We were certainly assisted in our efforts to deregulate," Kahn later recalled, "by the very severe inflation that was occurring during the Carter administration, particularly where regulation had historically taken the form of restrictions on competition."[28]

> We were able to say if you would unleash these forces of competition it will be counterinflationary. And in point of fact, in the first year real fares, adjusted for inflation, went down 10 to 12 percent . . . . [Airline deregulation] was counterinflationary, it was visible, it got headlines, and so I think those are the principal reasons why it succeeded there.[29]

He later wrote that "unraveling those irrational government interferences between willing airlines and willing travelers took on a momentum of its own" after which "deregulation followed with almost amazing speed."[30]

Another reason the 1970s were propitious for deregulation was philosophical. The fact "that you could be an old-time liberal [like Kennedy] and consistently with that be in favor of competition, and that that would be beneficial to the public" was "an eye-opener" for Kahn.[31] As Congress got onboard, the zeitgeist was reflected in the titles of the bills. The Senate version was called the "Air Transportation Regulatory Reform Act of 1978." The House version was called the "Air Service Improvement Act of 1978."[32] Success did, indeed, have many fathers.

Marginal Costs Without Wings

Labeling Kahn as the father of airline deregulation also risks obscuring his many contributions in industries that operate on the ground. After all, he never was an avid aviation man, once amazing Eastern Airlines CEO Frank Borman and other executives by admitting that he could not tell the difference between one type of aircraft and another. "To me," he said, "they are all marginal costs with wings."[33] Not surprisingly, his insights were equally impressive in other industries, particularly in telecommunications, where the problem was a governmentally created monopoly rather than a governmentally supervised cartel as had existed among the airlines. The difference, he explained, was critical, because regulation in the two industries was designed to meet two very different concerns. The original rationale for regulation in commercial aviation was the presumed tendency of the industry to succumb to periodic bouts of predatory competition, requiring governmental price floors. In telecommunications, by contrast, the assumption was that the industry was a natural monopoly, requiring price ceilings to protect consumers from monopolistic exploitation. As a result,

> [t]he case for deregulation of such industries [as air transport] has to be that competition, once freed of governmental restraints, will better protect the public, weed out inefficient suppliers, and leave it to free consumer choices to confer profits on the ones offering the best possible price and quality combinations. In contrast, the case for deregulation of industries such as telecommunications has to be that monopoly is no longer the most efficient form of supply, if it ever was . . . .[34]

Thus, airline deregulation had not only many fathers but also many siblings, and not all of them looked alike or were sources of parental pride. In his 1998 book, *Letting Go: Deregulating the Process of Deregulation, or: Temptation of the Kleptocrats and the Political Economy of Regulatory Disingenuousness*, Kahn took aim at "the rent-seeking strategies and the political maladies" in regulation not anticipated when the original treatise first appeared.[35] *Letting Go* remains a powerful polemic against policies in telecommunications and electric power that misappropriate the stranded costs of incumbents to generate short-term benefits for consumers and micromanage static price-cost relationships at the expense of dynamic efficiency.

No other subject earned more of Kahn's opprobrium than the "pervasive regulated deregulation"[36] engineered by the FCC after passage of the Telecommunications Act of 1998,[37] particularly the Commission's "ill-advised—not to say politically motivated—effort to create competition by subsidizing competitors."[38] Telecommunications reform was the main subject of his 2001 monograph, *Whom the Gods Would Destroy, or How Not to Deregulate*, in which Kahn offered "that the FCC's decisions in 1996 through 1998 would have rated not an F but a zero from Joseph A. Schumpeter."[39] Especially offensive was the Commission's "blank slate" version of the "total element long-run incremental cost" rule that would set default prices for the elements of the incumbents' networks subject to compulsory sharing based on the prospective costs of constructing a most efficient, entirely new system with the most modern technology. The FCC's "open invitation to blue-sky as well as blank-slate model building" earned from Kahn the acronym, "TELRIC-BS," about which he wrote,

> I never dreamed, in proclaiming that efficient prices should be based on incremental costs, that policymakers would then proceed to ignore the actual incremental costs of the incumbent suppliers and instead adopt as the basis for policy the costs of a *hypothetical*, most efficient new entrant, constructing an entire set of facilities as though writing on a blank slate (with the one qualification that it take as given the existing wire center locations of the incumbents).
>
> The entire logic of the marginal cost pricing principle requires that prices reflect the additional costs that society will actually incur or save if purchasers take somewhat more or somewhat less of the product or service in question.[40]

The blank-slate basis for determining the marginal cost of individual network components ignored that an operating firm will always be constrained by the totality of its existing facilities, not to mention other facilities (such as pole locations) already in the market. A firm can build on a blank slate only once, and never again thereafter. Moreover, as Kahn reported in *Letting Go*, the Commission had received the testimony of an economist who admitted that in order to apply TELRIC it would have to be assumed that *all* utilities, not just a particular incumbent, would be constructing a hypothetical, most-efficient network simultaneously. Kahn wondered why this scenario had not been taken to its logical conclusion:

> [B]y positing entire urban areas with streets and all other public facilities built on a green field in such a way as to minimize all the costs of all the services they would be used to provide; and a country with its entire educational system re-designed so as to provide—or to *have* provided—a labor force optimally adapted to today's configuration of technologies and consumer demands. It would be difficult to conceive of a more apt illustration of Keynes' classic observation that "in the long run we are all dead."[41]

Compulsory sharing using TELRIC-BS prices, Kahn wrote, "is essentially a construct of perfect competition; and perfect competition is in flat contradiction of the Schumpeterian preconditions of innovation—a truly startling deficiency, considering that the central purpose of the Telecommunications Act is to encourage the most rapid possible development of a modern telecommunications infrastructure."[42] Perversely, the more innovative the investment, the more the FCC's regulation discouraged it.

To be fair, Kahn allowed for the impossibility of the task Congress and the public had assigned the FCC in the 1996 Act: "massive investments in a modern telecommunications infrastructure, ubiquitously extended, along with competition for residential customers, all with no increases in basic residential rates."[43] In view of this untenable situation both the Commission as regulator and Kahn as regulatory economist were entitled, in his view, to give the same kind of answer Yogi Berra gave when asked why he dropped three consecutive fly balls while substituting in the outfield: "Hank Bauer's screwed up right field so bad, nobody can play it!"[44]

"Can You Hear Me Now?"

His criticism helped bring an end to some of the more inefficient aspects of the FCC's regulation of local exchange deregulation, but the emergence of a competitive terminal equipment market two decades earlier can be traced directly to Kahn, who had been in long-standing opposition to AT&T's bundling of its own customer premises equipment with franchised monopoly telephone service, that is, AT&T's refusal to allow customers to connect independently supplied premises equipment to the network.[45] The FCC issued a decision in 1955 allowing AT&T to bar the *Hush-a-Phone*, a clip-on attachment to the customer's phone designed to let users speak into the handset without being overheard, on the ground that it risked making voice messages unintelligible.[46] Kahn, then a member of the Senior Staff of the President's Council of Economic Advisors, wrote an indignant memo to the chairman, Arthur Burns. "All the party at the other end has to do," he wrote, "is exclaim, 'I can't understand you!' or, more helpfully, 'Take that damn muffling device off your phone!'"[47] The D.C. Circuit reversed the FCC's decision in the following year, holding the prohibition unlawfully discriminatory.[48]

The second skirmish in the opening-up of the terminal equipment market took place as Kahn was concluding five years of service on AT&T's first National Economic Advisory Council, along with William Baumol and Otto Eckstein. The FCC's 1968 *Carterphone* case had started as an antitrust suit against AT&T to compel them to permit interconnection of independently supplied customer premises equipment, but the court referred the case to the FCC under the doctrine of primary jurisdiction.[49] The Commission decided to ban AT&T from prohibiting interconnection of equipment that would not harm the network. Before he left the Council, Kahn sent a parting memorandum that set forth what he referred to as "a grand competitive strategy for the Bell System," advising the company to remove all restrictive tariffs and welcome competition in exchange for the lifting of regulatory restrictions to allow them to compete on price.[50] AT&T essentially ignored the first part of that advice. Said Kahn, "The result, as they say, is history."[51]

The final shoe dropped on the terminal equipment market in 1976 while Kahn was Chairman of the New York State Public Service Commission. The Bell System had seized on the potential of harm to the network as a reason to require expensive and cumbersome "protective connecting arrangements" for interconnection of independently supplied equipment. As the FCC prepared to scrap PCAs in favor of a simpler equipment certification program, AT&T floated the "Consumer Communications Reform Act of 1976," which would have taken the premises equipment issue away from the Commission and put it in the hands of the states, where presumably the company's threat of higher residential rates resulting from competition in the equipment market would resonate with greater effect. Unsurprisingly perhaps, the state commissions and the national association of state utility commissioners supported the measure. Alone among state regulators to oppose it, Kahn called the law "an abomination," contradicting not only the rest of the utility commissioners in the country and their national association but also a member of his own Commission who had been chosen to be the association's spokesman in support of the bill.

What made Kahn's testimony so damaging was the empirical evidence he presented from a liberalized terminal equipment program that had been .granted to an intrastate carrier in New York in 1972 and that AT&T had for some reason tolerated. Kahn revealed evidence that more than twice as many trouble reports were attributable to AT&T-provided terminal equipment than to independently supplied equipment over the three years of the program. So, while AT&T was arguing that PCAs were necessary for public safety, Kahn was presenting empirical evidence to the contrary. And when AT&T complained that it might lose terminal equipment revenues it was using to subsidize basic residential service, Kahn retorted:

> I do not believe in setting up monopolies and giving them an opportunity to exploit consumers in one market in order to achieve some presumed social advantage in other markets. My concern is for the welfare of consumers in this country in the aggregate; that welfare is served by keeping open to competitive enterprise all markets that are not natural monopolies. And terminal equipment is not a natural monopoly.[52]

The FCC's certification program went into effect. Five years later, Judge Harold Greene, supervising the break-up of AT&T, ruled that AT&T was unable to show any actual harm to the network from the elimination of PCAs, just as Kahn's evidence had predicted.

Kahn's influence on how regulation is practiced would not have been what it was without his work in the academy and his remarkable internalization of the fundamentals of economic learning. After receiving his Ph.D. from Yale in 1942,[53] he spent a year in the Army before becoming Chairman of the Department of Economics at Ripon College. From there he went to Cornell, in 1947, where he was the Robert Julius Thorne Professor of Economics, Chairman of the Department, a member of the Board of Trustees and Dean of the College of Arts and Sciences. In 1974 he took a leave of absence from Cornell to enter public service—to chair the New York State Public Service Commission and then the CAB and then to take on a dual appointment as Advisor to the President on Inflation (Carter's "Inflation Tsar") and Chairman of the Council on Wage and Price Stability—before returning to Ithaca in 1981. Behind each desk he kept a sign that read, "I have tenure at Cornell,"[54] as a friendly reminder for visitors that the government needed him more than he needed the government.

There is, of course, nothing unusual about the revolving door between government service and the academy, but in Kahn's case the synergies between the two were unusually strong. Kahn's scholarship was almost single-mindedly geared toward melding theory and practice, reconciling neo-classical price theory (Principles) with a messy and imperfect world (Institutions).[55] The New York commission, which was responsible for the regulation of New York's electric, gas, telephone, and water companies, became Kahn's personal laboratory for testing his principles, notably marginal cost pricing and peak or congestion pricing, against the workings of real institutions. As a result, recalled Irwin Stelzer, "Kahn raised the entire game of almost all commissions" and "set a standard of integrity that at the time baffled the companies he regulated."[56] Kahn started a revolution that moved utility regulators across the globe to abandon rate-of-return regulation in favor of rate caps and other much more efficient mechanisms.

Defender of the Antitrust Faith

The notion that Kahn was the consummate deregulator or standard-bearer for Reaganomics works its greatest mischief, however, when it comes to understanding his views on antitrust. It is easy to see why: a master of neo-classical price theory and a deregulating "free-marketeer" might be expected to be a pointman of sorts for the ideas of the Chicago school and naturally sympathetic to its single-minded emphasis on economic efficiency as a guide to antitrust policy. As McCraw points out, there was much in *The Economics of Regulation* that appealed to Milton Freidman, Theodore Schultz, George Stigler, and other Chicagoans, such as the recognition of the tension between regulation and competition, the tendency of the government to miscalculate the economic consequences of its policies, and the superiority of market incentives to command-and-control regulation. Yet, McCraw notes, "In no sense did he belong to the Chicago school."[57] Kahn openly regarded himself variously as a "pre-Chicagoan," or a "post-Chicagoan," and, ultimately, a "premature post-Chicagoan of several decades' standing."[58]

It could hardly have been otherwise. Kahn's institutionalist background was no mere developmental stage, and his Volume 2, *Institutions*, which eschewed price-theoretic imaginings as a measure of economic performance or a goal of public policy, no mere appendix. Under the influence of his advisors, Myron Watkins and Joseph Schumpeter, "competition" for Kahn was always something imperfect and inseparable from the messy facts in the market, if not on the ground. And despite the title of his chapter in McCraw's annals of regulation, "Kahn and the Economist's Hour," no optimization of economic efficiency could ever substitute for the evaluation of conduct, and the intent behind it, as traditionally practiced in antitrust. He once proclaimed "I have long been an antitrust true believer."[59]

Beginning with *Fair Competition: The Law and Economics of Antitrust Policy* (co-authored with Joel Dirlam)[60] and his Harvard Law Review article, *Standards for Antitrust Policy*, both appearing in 1953, and his 1954 Yale Law Journal article, *A Legal and Economic Appraisal of the "New" Sherman and Clayton Acts*, Kahn remained a steadfast and vigorous defender of the faith. Antitrust policy, he wrote, is "always dictated primarily by the mores of a free enterprise society, rather than by the clear-cut requirements of optimum economic performance."[61] McCraw saw *Fair Competition* and its thesis that "economics does not offer clear cut objective criteria for antitrust superior to those which have long prevailed"[62] as a "remarkable abnegation of [Kahn's] profession."[63] But economics had failed to offer an objective standard for the vitality of competition or to settle on how to account for efficiency as a determinant of policy. The book mounted a spirited defense of the *Alcoa*,[64] *American Tobacco*,[65] *Paramount Pictures*,[66] *Griffith*,[67] *United Shoe*,[68] and other decisions and described how these cases improved the conditions for competition in the aluminum, tobacco, motion picture, and shoe-machinery markets. Judge Hand's "virtual per se condemnation of Alcoa as a monopolist" was seen by some as a retreat from the rule of reason and renunciation of the *U.S. Steel* dictum that "mere size is no offense." Characteristically, Kahn called on the facts to meet the criticism:

> Alcoa might have enjoyed its predominant position in the American market in 1944 without having bought out the Cowles Brothers and the critical Bradley patent in 1903; without the expressly exclusive clauses in its bauxite and power purchase contracts, annulled by a 1912 consent decree; without the acquisition of at least one imminently threatening domestic competitor in the 1920's, the squeeze on fabricators, and the direct and indirect understanding with foreign producers, including the strangely cooperative "competitor" Southern Aluminum Company. Its head start and advantages of "experience, trade connections, and elite of personnel" might alone have sufficed to discourage or destroy competitors. Neither an economist nor a lawyer can be sure. But in fact these actions provided ample evidence to support a finding of an intent to monopolize—to keep the American aluminum market Alcoa's exclusive preserve by whatever methods were required.[69]

Unlawful conduct rather than market structure or industry performance is the central tenet of illegality under the antitrust laws and, in Kahn's view, *Alcoa* was no exception.

Such an emphasis on conduct must inevitably confront the allegedly subjective nature of "intent." Watkins had written Kahn a letter on the subject, saying that

> the only practicable criterion for distinguishing the licit from the illicit is intent . . . . I need hardly explain that this standard is as far removed from subjective motive as it is from concrete "effects." Intent, in law, turns on objective tests: the design, judged by common experience, of what is *done*.[70]

Citing the letter, Kahn wrote that "[i]llegality must inhere in the act, not in the result, and the test of intent is only a means of defining the act."[71] The lesson had been learned: "The quest for an explanatory intent," he and Dirlam wrote in *Fair Competition*, "does not involve psychoanalysis. The question is not: 'Why did A really do what he did?' but simply: 'What was A really doing? Was he competing or was he suppressing competition?'"[72]

A Skunk at the Picnic

Not surprisingly, Chicagoans such as John McGee criticized *Fair Competition* for mixing up "vague moral values" with "unsystematic economics."[73] Even McCraw, Kahn's biographer, found the analysis "largely confused and lacking in rigor," which he attributed to the mixed legacy of Kahn's graduate training.[74] Although McGee makes reference to the later maturation of Kahn's analytical powers, there is no more discussion about antitrust. In reality, Kahn lost little faith in the benefits of judicial antitrust intervention, came to worry little about false positives, investment disincentives, or the burdens of discovery under traditional antitrust principles, and was never dissuaded by developments in microeconomics from believing in a vigorous antitrust regime. When the Silicon Flatirons Center at the University of Colorado celebrated Kahn in 2008, he brought a "skunk to the picnic"—his view of antitrust policy:

> To put it simply, my views in antitrust cases are more likely to be reflected in the—alas, dissenting—opinions of Justices Stevens [*Credit Suisse*, *Twombly*], Souter [*Leegin*], Ginsburg [*Twombly*], and Breyer [*Leegin*] than in the—alas, predominating for at least the next several years—[opinions of] Justice Scalia [*Trinko*]. . . . As a self-proclaimed 20th century liberal—I have long been an antitrust true believer of the pre-Chicago variety, emphasizing its role as a proscription of anti-competitive conduct—collusion and exclusion of rivals from a fair opportunity to compete—and—how old fashioned can one get?—the intent that may be inferred from it.[75]

Kahn proceeded to decry the triumph of the "highly sophisticated liberals of the eighteenth century variety" that would require a demonstration of actual consumer harm for antitrust liability, chastising the Digital Age Communications Act, a project on which his host Philip Weiser and many others in the room had worked, for condemning under its Section 5-style unfair competition provision only practices that "pose a substantial non-transitory risk to consumer welfare." Not only did this represent a clear victory for Chicago, but also, Kahn suspected, the consensus view of most "respectable economists," for whom it happened also to be "a Full Employment Act."[76]

The re-concentrations in transportation and telecommunications and the Supreme Court's recent activism in antitrust caused Kahn genuine concern toward the end of his life. But no case challenged his antitrust traditionalism more than *Trinko*.[77] "I've spent the last seven years at least involved in endless administrative proceedings under sections 251 and 271, and under state statutes before that . . . . The notion of the companies now having to re-litigate those complex issues before juries I think would give any reasonable person nightmares." He later remarked that deregulation had "most definitely not displaced the antitrust laws. On the contrary, the truism is that it makes antitrust more important rather than less."[78]

Kahn had repeated the "truism" countless times, but the *Trinko* case had put it to the test. He could remain faithful to antitrust, but the cost might be years of administrative proceedings that end up being a colossal waste of time. He assumed the Supreme Court would be constrained to allow the *Trinko* case to proceed, but it reminded him of the difference between a psychotic and a neurotic: "A psychotic thinks two and two equal five. A neurotic knows that it equals four, but can't stand it."[79] Ultimately, of course, the Court dismissed the *Trinko* case, limiting the reach of the antitrust laws in that context and leaving the FCC's "regulated deregulation" unmolested.

John Shenefield, former Assistant Attorney General for Antitrust and Chairman of the National Commission for the Review of Antitrust Laws and Procedures, summed up Kahn's lifetime contribution to antitrust and regulatory policy like this:

> He taught us a lesson that competition, even imperfect competition, is better than imperfect regulation, that facts make a difference, if only we have the humane procedures to uncover them and the brains to understand them, and that intellectual rigor, decked out in wit and flair, even in Washington, can be a winning combination.[80]

1 THOMAS K. MCCRAW, PROPHETS OF REGULATION 272 (1984).

2 Interview with Alfred E. Kahn, Professor Emeritus of Economics, Cornell University, *available at* http://www.pbs.org/fmc/interviews/kahn.htm.

3 MCCRAW, *supra* note 1, at n.103.

4 The program aired on January 10, 1978.

5 Alfred E. Kahn, My War Against Bureaucratese, Address at Kendal in Ithaca, NY (July 21, 1998).

6 Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705.

7 Philip J. Weiser, *Alfred Kahn as a Case Study of a Political Entrepreneur: An Essay in Honour of his 90th Birthday*, 7 REV. NETWORK ECON. issue 4, art. 8 (2008), http://www.bepress.com/rne/vol7/iss4/8.

8 MCCRAW, *supra* note 1.

9 *Id.* at 223.

10 Susan Lang, *Economist Alfred Kahn, "Father of Airline Deregulation" and Former Presidential Adviser, Dies at 93*, CHRON. ONLINE, Dec. 27, 2010, http://www.news.cornell.edu/stories/Dec10/KahnObit.html.

11 MCCRAW, *supra* note 1, at 273.

12 ALFRED E. KAHN, ECONOMICS OF REGULATION, PRINCIPLES AND INSTITUTIONS (1971).

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