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The conclusion here reached is that the Wyoming statute prohibiting selling below cost not only does not accomplish its avowed purposes, but the blanket prohibition of below cost sales actually contributes to the alleged evils sought to be remedied by the legislation. In support of this conclusion, Professor Henderson contends that experience with such laws demonstrates that they are not susceptible to uniform and fair application or to meaningful judicial interpretation. The discussion examines the practical effect of this form of regulation in light of broader policy goals. The suggestion is made that these statutes are unnecessary and undesirable.

SELLING BELOW COST IN WYOMING

Stanley D. Henderson*

The general business collapse of the thirties prompted an abundance of legislation designed to mitigate the hazards of aggressive price competition during a period of falling prices and declining consumer demand.1 Perhaps none of the various enactments raises as many serious doubts about objectives, and the means selected for realization, as do the statutes prohibiting selling below cost, still with us today in

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1. The codes of fair competition contained in the N R A legislation fixed minimum prices, prohibited sales below cost, and generally condemned price reductions; on the state level statutes directly fixing prices, establishing resale price maintenance and prohibiting price discrimination were enacted. McAllister, Price Control By Law in the United States: A Survey, 4 LAW CONTEMP. PROB. 273, 286-300 (1937). Following the collapse of the N R A in Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), the Robinson-Patman Act was adopted, Section 2(a) of which prohibits price discrimination which tends to "lessen, injure, destroy or prevent competition," and Section 3 of which declares it unlawful "to sell goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor." 49 Stat. 1526 (1936), 15 U.S.C. § 13 (1964); 49 Stat. 1528 (1936), 15 U.S.C. § 13a (1964).
Wyoming\(^2\) and a majority of states.\(^\text{3}^\) Although such statutes, popularly known as "unfair sales acts" or "unfair practices acts," take a variety of forms, in general they forbid sales below "cost" made with the purpose, intent or effect of injuring a competitor and destroying competition.\(^4\) These laws not only create difficult problems of application for the lawyer who must advise businessmen concerning pricing policies, but they pose the more significant question of whether in practical effect price competition is impaired at the expense of the consuming public.

Analysis of selling below cost is hampered by the infrequency of cases which explore relevant legal and economic issues in the context of the legislation. Still less is known about the extent to which blanket prohibitions of below cost sales affect day-to-day business conduct. The fact that the statutes have not generated substantial activity to date, however, does not mean they can safely be ignored. Indeed the

2. **Wyo. Stat.** §§ 40-24 to -33 (1957). As was true in other states, the Wyoming sales below cost act was combined with legislation proscribing area price discrimination. **Wyo. Stat.** § 40-23 (1957).


A compilation at 2 **Trade Reg. Rep.** ¶ 6571 outlines the scope of the acts. They generally apply to most industries and products within the state. Similar statutes prohibiting below cost sales of particular kinds of merchandise, principally tobacco and dairy products, have been enacted in at least thirty states, including many of the states with acts of general application. A chart summarizing these "special industry laws" may be found in 2 **Trade Reg. Rep.** ¶¶ 6575-6581. An act pertaining to a specific subject removes that subject from the provisions of an act of general application, at least where the specific act is subsequently enacted. **Henderson v. Hogue, Trade Reg. Rep.** (1956 Trade Cas.) ¶ 68492, at 71963 (Tenn. Ct. App. Aug. 23, 1956).

4. The statutes are given survey treatment in 1 **Callmann, Unfair Competition and Trade-Marks** 515-64 (2d ed. 1950), and **LaRue, Pitfalls for Price Competitors: State and Federal Restrictions on Below Cost or Unreasonably Low Prices**, 15 **W. Res. L. Rev.** 35 (1963).
implications of a failure of action may be as far-reaching as
action itself. This is particularly true with respect to Wy-
oming, where relative inactivity, coupled with the statute’s
built-in potential for unsound application, may ultimately
produce uneven and harsh decisions in the event of stricter
enforcement. In addition to matters of substance, restrictions
on selling below cost are worthy of examination because of
the judicial techniques they have fostered. Attitudes about
competition most assuredly affect the type of society in which
we live. They also influence the manner in which legal con-
cepts seek to preserve and maintain that society. The matter
of judicial response to the statutes will therefore be consider-
ed in connection with the more crucial problems created by the
legislation. The Wyoming statute will be viewed in the general
setting of legislative prohibitions on below cost selling.

HISTORICAL DEVELOPMENT

Injurious sales below cost were not actionable at common
law unless made with a malicious purpose to harm a particu-
lar competitor. Early attempts to legislate protection from
sales below cost attracted little attention. The anti-discrimina-
tion movement during the first decade of this century un-
doubtedly increased interest in price regulation as a legiti-
mate form of economic control. The price control device of
"fair trade," already well established in most states begin-
ning with California in 1931, was further accelerated in 1936

5. The cases start with The Schoolmaster Case, Y.B. 11 Hen. IV 47, Pl. 21
(1410), holding that trespass would not lie against a new competitor
(teacher) whose rates were substantially less than plaintiffs. The "malici-
ous purpose" doctrine is usually attributed to Tuttle v. Buck, 107 Minn.
145, 119 N.W. 946 (1909).

6. South Carolina, as a part of its antitrust legislation, in 1902 declared sales
at less than cost with the purpose of "driving out competition" or "finan-
cially injuring competitors" to be unfair competition and conspiracies to
form a monopoly. S.C. Laws 1902, ch. 26, § 19. Other states similarly
broadened their antitrust statutes. Ark. Acts 1905, ch. 1; Tenn. Laws 1907,
ch. 38; Idaho Laws 1911, ch. 215, § 4. The unenthusiastic response to this
approach is explained partly because the statutes failed to define "cost"
and partly because they were viewed as merely extensions of general anti-
trust policy. Rodgers, Unfair Sales Laws: Advantages and Objections, 38

Laws 1911, ch. 62, at 84-85, as amended, Wyo. Laws 1923, ch. 86, at 154,

8. Fair trade statutes enable a supplier of branded or trademarked products,
in free and open competition with goods of the same general class, to fix
by contract a minimum or stipulated resale price.
by the stamp of federal approval. The general unsuitability of fair trade laws to the grocery and drug industries, however, together with the growing practice of "loss leader" selling, encouraged trade groups to push for minimum floor price laws applicable to all products. With the demise of the NRA codes in 1935, perhaps the greatest impetus was given to the modern development of statutes prohibiting sales below cost.

The political explanation of the Wyoming act appears to be not unlike that of other states. Trade associations in the grocery field secured the adoption of a model act in California in 1933. These same groups deluged state legislatures with similar proposals during the late thirties. That the lobbying techniques employed were effective is evidenced by the fact that by 1939 twenty-four states had enacted such legislation, including Wyoming, which in 1937 incorporated the California model. An examination of the history of sales below cost statutes clearly reveals a lack of consumer representation in the formulation and adoption of the legislation. Nor does the swiftness of adoption in most states suggest that the laws are a product of critical, objective legislative investiga-

10. Fair trade laws, applying only to branded merchandise, do not limit price competition of bulk or unbranded products. See F T C, REPORT ON RESALE PRICE MAINTENANCE 274-333 (1945).
11. The term generally refers to the practice of selling certain items below cost or the normal markup for the purpose of attracting customers to the seller's place of business.
12. It has been suggested that enactment of sales below cost statutes is largely the work of pressure groups seeking a permanent substitute for the price controls of the N R A Note, 52 I A N Y. L. REV. 1142, 1146-49 (1939).
16. The Wyoming legislature was apparently so enamored with the California model that it saw fit to borrow even a typographical error. ("this act shall be literally [liberally] construed that the beneficial purposes may be served.") Wyo. Stat. § 40-33 (1957). The obvious error was recognized in Civic Ass'n. v. Railway Motor Fuels, 57 Wyo. 213, 116 P.2d 236 (1941).
gation. These considerations became particularly meaningful when the courts, presented with objections to the statutes, engaged in certain presumptions about legislative conduct concerning the need and effect of such legislation.

Coverage and Application

Unlike the majority of states with statutes of general application, the Wyoming act applies to sales by manufacturers and producers as well as retailers and wholesalers.\(^{17}\) The reasons for extension of the act to non-distributive businesses are not entirely clear, particularly since one of the immediate evils to be remedied by the legislation was loss leader selling at the retail level.\(^{18}\) One explanation may be that proponents of the legislation reasoned that desirable resale price levels could best be maintained if the retailer was precluded from buying below the producer’s cost. Or it may have been thought that this approach insured coverage of the vertically integrated producer selling as a wholesaler or retailer.\(^{19}\)

Offering or advertising to sell, as well as a sale, of “any article or product” at “less than the cost thereof” to the seller is unlawful under the Wyoming act, provided the offer or sale is “for the purpose of injuring competitors or destroying competition.”\(^{20}\) That the language “any article or product” is susceptible of broad interpretation is illustrated by a ruling that a restaurant meal sold at less than cost

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17. WYO. STAT. § 40-24 (1957): “It shall be unlawful for any person, partnership, firm, corporation, joint stock company, or other association engaged in business within this state . . . .” Inclusion of the terms “persons” and “association” was undoubtedly designed to permit trade associations to police the act. Nearly two-thirds of the statutes are limited to retailers and wholesalers. See 2 TRADE REG. REP. ¶ 6641.

18. “One of the chief aims of state laws prohibiting sales below cost was to put an end to ‘loss-leader’ selling.” Safeway Stores, Inc. v. Oklahoma Retail Grocers Ass’n., 322 P.2d 179 (Okla. 1957), aff’d 360 U.S. 334, 340 (1959). One writer suggests sales below cost acts may be effective only as devices for limiting loss leader practices. Grether, Experience In California with Fair Trade Legislation Restricting Price Cutting, 24 CALIF. L. REV. 640, 661 (1936).

19. Some statutes specifically cover this situation by definition. E.g., WIS. STAT. § 100.30 (2) (g) (1963): “The term ‘retailer’ shall apply to manufacturers who sell to retailers and who own or operate retail stores or sell direct to the public . . . .”

20. WYO. STAT. § 40-24 (1957). Although the applicability of the intent requirement (“for the purpose of injuring competitors and destroying competition”) to sales rather than offers of sale is not obvious from the phrasing of the section, it has been held applicable. State v. Langley, 53 Wyo. 332, 346, 84 P.2d 767, 772 (1938).
probably violates the act. 21 Most of the statutes which include producers within their coverage also prohibit sales of "service or output of a service trade" below cost. 22 The Wyoming act fails to include a general prohibition with respect to services. Rather, only specified services performed upon another's personal property are expressly subject to below cost restrictions. 23 It is possible this limited coverage of service trades was the result of mere inadvertence. 24 Although a significant number of statutes apply only to specified commodities, 25 the attempt to expressly exclude certain businesses from the statutes of general application has not always met with judicial approval. 26 The exclusion problem has not arisen in Wyoming since the statute applies, subject to stated exemptions to be noted, to all sales within the state.

Gifts, or offers or advertisements of gifts, made with the requisite anti-competitive intent are similarly prohibited by the Wyoming statute. 27 As a practical matter this means that any gift is unlawful assuming it can be shown that the donor-

23. Wyo. Stat. § 40-27 (1957); "Any person, firm or corporation who performs work upon, renovates, alters or improves any personal property belonging to another person, firm or corporation, shall be construed to be a vendor within the meaning of this act."
24. Most states adopting the California model incorporated the prohibition of sales of "service or output of a service trade." These states also included the Wyoming-type provision covering services to personality, but in a later section of the act, the exemption section, apparently as a means of broadening the definition of "service or output of a service trade" to assure coverage of laundries, dry cleaning businesses, repair shops, etc. See, e.g., Mont. Rev. Codes Ann. §§ 51-103, -107 (1961). Hence the Wyoming legislature may have intended to omit coverage of service trades entirely, but inadvertently neglected to delete the reference to services in the exemption section. This explanation seems plausible in light of the fact that only one other statute of general application, that of Utah, presently takes the services-to-personality approach, and the legislative history of the Utah act appears distinguishable. See Utah Code Ann. §§ 13-5-7, 13-5-12 (1953).
25. See note 3 supra, concerning the "special industry" or "special commodity" statutes, primarily covering tobacco and dairy products.
27. Wyo. Stat. § 40-24 (1957); "or give, offer to give or advertise the intent to give away a commodity or product for the purpose of injuring competitors and destroying competition." A gift to a competitor's customers of two weeks free laundry service violates this section. Laundry Operating Co. v. Spalding Laundry & Dry Cleaning Co., 383 S.W.2d 364 (Ky. 1964).
merchant intended to injure competitors and destroy competition. The area of difficult application of the gift prohibition is where, as a promotional scheme, a merchant advertises or sells one or more items with another item at a combined price, or one item is offered as a "gift" with the sale of another. The Wyoming act does not explicitly cover this type of activity. The trend of decisions generally indicates that in order to avoid violation of the statute, the selling price of the combination of items must at least equal the combined minimum statutory cost of each. The case of Eckdahl v. Hurwitz suggests that Wyoming will follow this aggregate cost approach. Plaintiffs sought to enjoin a competitor engaged in the operation of a "suit club" (a promotional scheme whereby a member pays nominal weekly or monthly dues which buy a chance in a suit drawing) on the ground that defendant was selling below cost. The Supreme Court affirmed the trial court's finding that "the whole or entire transaction must be considered, and the evidence shows that ... defendant made money on the entire transaction ... ."

There is disagreement as to whether or not the giving of trading stamps with the purchase of a product will reduce the sale to one below cost. If the net selling price is below cost after deduction of a sum equal to the value of the stamps, the statute would clearly appear to be violated.  

28. Proof an unlawful purpose appears to be without difficulty, at least as to gifts of small value. For example, "welcome wagon" gifts have been ruled not in violation of a statute similar to that of Wyoming, on the theory that there exists no intent to injure competitors or destroy competition. Opinion of Attorney General of Washington, Trade Reg. Rep. (1955 Trade Cas.) ¶ 68065, at 70443 (May 26, 1955).


30. State v. Tankar Gas, Inc., 250 Wis. 218, 26 N.W.2d 647 (1947), so holds, where the gift is tied to, or contingent upon the purchase of a greater quantity of the same goods. The effect of promotional activities on statutes prohibiting below-cost sales is considered in an annotation in 70 A.L.R.2d 1080, 1084-85 (1960).

31. 56 Wyo. 19, 103 P.2d 161 (1940).

32. Id. at 23, 103 P.2d at 162. Three years prior to this decision the Wyoming Attorney General's office took the position that operation of a suit club violated the act if a contributor to the club obtained a suit for less than the cost to the vendor. [1932-1940] Wyo. Att'y Gen. Reg. & Off'l Op'ns, 511-514 (April 12, 1937). This view has been accepted by other courts. Robinson v. Hayes, Trade Reg. Rep. (1950-51 Trade Cas.) ¶ 62731, at 64311 (Tenn. Ct. App. March 2, 1951).

33. See Clark, Statutory Restrictions on Selling Below Cost, 11 Vand. L. Rev. 165, 172 (1957). At least one state has so concluded, by amending its act to provide that trading stamps "shall be considered a reduction of the..."
less, many courts regard trading stamps as the equivalent of a discount for cash rather than a reduction in the price of the article sold.\textsuperscript{34} The matter probably still has some vitality in Wyoming in view of the stated exceptions in the recent legislation prohibiting the use of trading stamps.\textsuperscript{35} Should the question of whether the trading stamp must be taken into account in determining whether the below cost statute has been violated be presented to the Wyoming Supreme Court, it appears the court will follow the view that trading stamps are not devices which reduce the selling price of a product.\textsuperscript{36}

Not every sale transaction is subject to the prohibitions of the Wyoming statute. Judicial sales, sales of damaged or deteriorated goods, sales of seasonal or perishable goods to prevent spoilage or depreciation, and sales to close out all or any portion of an owner's stock for the purpose of discontinuing trade in such stock are exempt, provided prior notice

\textsuperscript{34} Safeway Stores, Inc. v. Oklahoma Retail Grocers Ass'n., 322 P.2d 179 (Okla. 1957), aff'd, 360 U.S. 334 (1959); Food & Grocery Bureau v. Garfield, 20 Cal.2d 228, 125 P.2d 3 (1942); Sperry & Hutchinson Co. v. Margette, 15 N.J. 293, 93 A.2d 9 (1953); Contra, Hogue v. Kroger Co., supra note 33; Cf., Note, 36 TEXAS L. REV. 691 (1958); 44 MINN. L. REV. 1185 (1960). The Wyoming act is silent on the deductibility of cash discounts. Most statutes do not permit reduction of cost to the buyer by deducting the cash discount. E.g., CAL. BUS. & PROP. CODE § 17026. This approach is, of course, based on the erroneous assumption that the buyer for cash and the buyer on credit have purchased identical commodities. See Clark, supra note 33, at 120. Absent a statutory prohibition, the cash buyer has been allowed to deduct the cash discount in computing his cost. People v. Lucky Stores, Inc., TRADE REG. REP. (1950-1951 Trade Cas.) ¶ 62623, at 63814 (Super. Ct. Cal. May 5, 1950). To refuse to permit the deduction may produce an unconstitutional cost figure. Cohen v. Frey & Son, Inc., 197 Md. 586, 80 A.2d 267 (1951).

\textsuperscript{35} WYO. STAT. § 6-224.2(a), (b) (Supp. 1965) wherein there is exempted from the prohibitions of the legislation, stamps or coupons issued and redeemable by manufacturers or a merchant "at face value, in cash or merchandise from the general stock of said merchant at regular retail prices at the option of the holder thereof."

\textsuperscript{36} In the opinion on rehearing in Steffy v. City of Casper, 357 P.2d 456 (Wyo. 1960), rehearing 358 P.2d 951, 964 (Wyo. 1961), upholding the constitutional validity of the Trading Stamp Act, the court, in discussing the reasonableness of the exception applicable to merchants, states: "In the case where a merchant issues and redeems his own stamps, either in cash or merchandise from his general stock, it amounts to nothing more than giving a discount on purchases from him . . . ."
of the particular type of sale is given to the public.\textsuperscript{37} General clearance sales of marked-down merchandise, however, are not excluded from the operation of the Wyoming statute.\textsuperscript{38} Nor are accommodation sales made by one retailer to another retailer or by one wholesaler to another wholesaler excepted.\textsuperscript{39} As is true with respect to the statute in its entirety, the Wyoming group of exemptions fails to reflect distribution techniques introduced since the date of original enactment of the legislation. That the statute has resisted amendment since 1937 seems incredible, particularly in view of the modern revolutions in retailing.

\textbf{THE ELEMENT OF INTENT}

Because sales below cost statutes impose criminal\textsuperscript{40} as well as civil sanctions, an intent to injure and destroy competition is deemed to be the touchstone of the legislation.\textsuperscript{41} Thus absolute prohibitions of all sales at less than cost, irrespective of the seller's state of mind, have generally not withstood constitutional objections.\textsuperscript{42} The fact that the courts are apparent-

\textsuperscript{37} Wyo. Stat. § 40-27 (1957). The section also exempts sales made "in good faith to meet the legal prices of a competitor," which will be examined separately below.


\textsuperscript{40} Selling at less than cost is a misdemeanor in Wyoming, punishable by a fine of not less than $100.00 nor more than $1,000.00, or by imprisonment in the county jail for a period not exceeding 6 months, or both. Wyo. Stat. § 40-32 (1957).


ly in agreement that intent is an essential element of a violation, however, does not mean that there is even minimum agreement as to the kind of intent which will make a sale unlawful.

The Wyoming act, it will be recalled, makes a sale below cost unlawful when made with the purpose "of injuring competitors and destroying competition." If this provision is literally applied by the courts it will invalidate practically every sale below cost. Assuming relative inelasticity of demand, a merchant who intends to increase his volume of business knows that he must do so at the expense of his competitors. If he is successful he will have taken business away from his rivals, thereby injuring them.

There is evidence that a general competitive intent to attract additional customers might possibly satisfy the statute in a given case. An early Colorado decision affirmed an injunction against sales below cost by engaging in the presumption that an actor intends the natural and probable consequences of his acts. That this proposition has some appeal today is indicated by a recent case which concludes as a matter of law that an intent to effect a gain in business is inseparable from a intent to bring about a competitor's corresponding loss of business. The opinion vividly demonstrates the elusive nature of the intent requirement. The court interprets the phrase "injuring competitors and destroying competition" to mean a reduction of competition at the expense

43. See note 20 supra. There is some variation in the wording of the proscribed purpose. E.g., the Nebraska statute prohibits selling below cost "with the intent, or effect, of inducing the purchaser of other merchandise, or of unfairly diverting trade from a competitor, or otherwise injuring a competitor . . . where the result . . . is to tend to deceive any purchaser or prospective purchaser, or substantially lessen competition, or unreasonably to restrain trade, or to tend to create a monopoly in any line of commerce." Neb. Rev. Stat. § 59-1203 (1960). The language "of inducing the purchaser of other merchandise" is obviously directed toward the use of loss-leaders. The Hawaii act simply prohibits a sale below cost "with the intent to destroy competition." Hawaii Rev. Laws § 205-4 (1955).

44. Dikeou v. Food Dists. Ass'n., 107 Colo. 35, 106 P.2d 529, 534 (1940). The Colorado courts have since abandoned this view in favor of a requirement of a "specific intent" to injure. Perkins v. King Soopers, Inc., 122 Colo. 263, 221 P.2d 343 (1950). The Dikeou presumption has in essence been enacted into the statutes of many states. E.g., N.H. Rev. Stat. Ann. § 358:2 (1955): "Evidence of any advertisement, offer to sell or sale of any item of merchandise by any retailer or wholesaler at less than cost to him, as herein defined, shall be prima facie evidence of a violation of this chapter."

45. Laundry Operating Co. v. Spalding Laundry & Dry Cleaning Co., supra note 27.
of a competitor. The court then theorizes that it is permissible to intend to capture a competitor's business "if carried out fairly," but concludes it is "unfair" to divert business from a rival by selling goods for less than cost. The mere fact of a sale below cost is apparently decisive. In short the court in its attempt to apply the intent requirement eliminates intent as an element of liability.

Many of the cases, nevertheless, purport to distinguish normal competitive intent by stating that the statute requires a "specific intent." When such an intent exists is not apparent from the cases. For example, in one case an injunction prohibiting a retail grocer from selling milk below cost "for the purpose of injuring, harassing or destroying competition" was reversed on the basis of affidavits of defendant's competitors to the effect that they were not adversely affected by the sales. The statutory offense, of course, did not turn on the effect of the proscribed act, but whether the sale was accompanied with unlawful intent. Where a retailer advertised and sold two items at less than cost with the admitted intent to entice customers to his store so that they would purchase items other than the advertised loss leaders, it was held that this conduct at most was an attempt to attract customers away from competing stores and was not "predominately motivated by an intent to 'injure competitors or destroy competition.'" Other loss leader cases have reached the same result, even though the record contains defendant's admission that competitors were injured by loss of customers. If a defendant insists that his only intent was to increase his business, and he is successful in doing so, the court may in essence take judicial notice of the fact that of necessity the

46. Id. at 366.
47. E.g., in State v. Wolko, 250 Minn. 504, 85 N.W.2d 401, 404 (1957), the court talks about "some specific culpable purpose.
48. State ex rel North Carolina Milk Comm'n v. Dagenhart, 261 N.C. 281, 134 S.E.2d 361 (1964). The court apparently was influenced by defendant's argument that a retailer could not reasonably compete with a wholesaler who makes home deliveries of milk at fifty-five cents per half gallon, and therefore selling at forty-nine cents was "not against the public interest.
sales volume of competitors will be reduced.\textsuperscript{51} Evidence of actual injury may not be totally irrelevant to the issue of unlawful intent, but to equate these factors in connection with the statute in question is to in effect abandon the search for an essential element of the stated offense.

At least one case suggests that intent to injure competitors or competition is insufficient unless there is accompanying proof of intent to destroy competition for purposes of acquiring a monopoly.\textsuperscript{52} If a merchant's market position is declining, and he testifies that his pricing policies were defensive in the face of competitors' actions, this may persuade a court that legitimate reasons for selling below cost exist other than the purpose of injuring competitors or destroying competition.\textsuperscript{53} At the same time, testimony by loss leader sellers that the purpose of sales below cost was to increase sales from any available source, without intended injury to competitors, has blindly been accepted by courts without inquiry as to how this is realistically accomplished.\textsuperscript{54} A defendant must apparently directly solicit his competitor's customers on an individual basis before a clear case of unlawful intent is found to exist.\textsuperscript{55}

A number of states have sought to alleviate the plaintiff's burden of proof of unlawful intent by a statutory provision that proof of a sale below cost is either presumptive or prima facie evidence of such intent.\textsuperscript{56} The Wyoming act does not

\textsuperscript{51} Trade Comm'n. v. Bush, supra note 33, 259 P.2d at 306.

\textsuperscript{52} Simonetti, Inc. v. State ex rel. Gallion, 272 Ala. 398, 132 So.2d 252, 255 (1961).

\textsuperscript{53} State v. Wolkoff, supra note 47, 35 N.W.2d at 408.

\textsuperscript{54} E.g., Ellis v. Dallas, 113 Cal. App.2d 234, 248 P.2d 62 (1952); Sandler v. Gordon, 94 Cal. App.2d 285, 210 P.2d 314 (1949); Mott's Super Mkts., Inc. v. Frassinelli, 148 Conn. 481, 172 A.2d 381 (1961). The extent of a court's indulgence is indicated by this language from an opinion finding no unlawful intent: "There is no evidence that (defendants), in operating his business, had the intent to injure his competitors. He testified that he had no such intent; that his object was 'to make money.'" Acme Distrib. Co. v. Thoni, 23 Tenn. App. 638, 136 S.W.2d 734, 738 (1939).


\textsuperscript{56} See note 44 supra. See, e.g., COLO. REV. STAT. ANN. § 55-2-13 (1963); TENN. CODE ANN. § 69-305 (1955); ME. REV. STAT. ANN., tit. 10 § 1205 (1964). Such presumptions are, of course, rebuttable. Perkins v. King Soopers, Inc., supra note 44. Some cases indicate that a mere denial of unlawful purpose by defendant is sufficient to rebut the presumption. See Sandler v. Gordon, supra note 64.
contain any such device for facilitating proof of intent. Aside from constitutional problems,57 such presumptions further contribute to the confusion surrounding requisite intent.58 In fact they may operate to read the element of intent out of the statute, thereby permitting a violation to turn on the presumption arising from the sale below cost.59 Such a result of course undermines the purpose of requiring unlawful intent in the first place.

On the other hand, a statutory provision making a sale below cost prima facie evidence of a violation may be practically useless even in a fairly strong factual setting.60 In State ex rel. Thomason v. Adams Dairy Co.,61 the defendant was charged with giving away milk "with the intent and with the effect of unfairly diverting trade from a competitor or of otherwise injuring a competitor." The statute further provided that proof of such a gift was prima facie evidence of violation of the act. Defendant, a new competitor, admitted that as a promotional scheme to introduce its product, it distributed free milk to persons known to have previously purchased milk from other retail outlets in the area in the hope that these consumers would thereafter buy defendant’s product. The court found that plaintiff failed to sustain the burden of proof of defendant’s intent to unfairly divert trade from a competitor.62

The Wyoming cases fail to clarify requisite intent. The court in Eckdahl v. Hurwitz63 apparently misread the statute

57. Because of criminal sanctions in the unfair sales acts several cases have held such presumptions unconstitutional on the theory the burden is placed on the defendant to prove himself innocent of wrongful intent. E.g., Wiley v. Sampson-Ripley Co., 151 Me. 400, 120 A.2d 289 (1956); Motts Super Mkt., Inc., v. Frassinelli, supra note 54. Other courts have upheld such presumptions on the ground that a rational connection between the fact to be proved and the fact presumed exists. McIntire v. Borofsky, 95 N. H. 174, 59 A.2d 471 (1948); State v. Ross, 259 Wis. 379, 48 N.W.2d 460 (1951). Contra, Great Atl. & Pac. Tea Co. v. Erwin, 23 F.Supp. 70 (D.C. Minn. 1938). Cf., 1941 Wis. L. Rev. 425.

58. See, e.g., State v. Wolkoff, 250 Minn. 504, 85 N.W.2d 401 (1957), where the plaintiff made a prima facie case of unlawful intent but was unable to sustain it in view of defendants' testimony of "good faith."

59. This was the effect in Diehl v. Magic Empire Grocers Ass'n., 399 P.2d 460 (Okla. 1964).

60. A court may simply refuse to give effect to the presumption. See State v. Twentieth Century Mkt., 236 Wis. 215, 294 N.W. 873 (1940).

61. 379 S.W.2d 555 (Mo. 1964).


63. 56 Wyo. 19, 103 P.2d 161 (1940).
as requiring actual injury to a competitor, rather than a below cost sale made with the "purpose" of accomplishing that result. The court affirmed denial of an injunction on the ground there was substantial evidence in the record to support the trial court's finding of failure to prove defendant's conduct "injured competitors or destroyed competition." In addition to emasculating the intent requirement, this construction ignores the unambiguous section of the statute providing for injunctive relief without a showing of damage.

If the intent requirement is interpreted as satisfied only by proof of a malicious purpose to injure a competitor, then the statutes prohibiting selling below cost would seem to add little to prior law. The leading Wyoming case of State v. Langley, however, suggests that the selling below cost statute goes beyond the common law rule that solely malicious motives are actionable, and now prohibits sales made with mixed motives of gain and intent to injure. This analysis seems reasonable, and is supported by the cases, but as a working tool its usefulness has obvious limitations. Save for the firm clearly motivated by a predatory desire to eliminate competitors and thereby achieve a dominant market position, the motives of a seller are simply not subject to precise identification. Since mixed motives appear to co-exist in practically every reported case, and the cases which find an unlawful intent are indistinguishable from those which do not, even the notion that a specific intent to injure is required is apparently unsuited for meaningful application by the courts. Hence the whole issue of intent is without meaning.

The conclusion that the intent requirement should be removed from the statute is inescapable. Constitutional objec-

64. Id. at 20, 103 P.2d at 163.
65. See Wyo. STAT. § 40-31 (1957).
66. See note 5 supra. It has been suggested that unless a presumption of wrongful intent is held to exist by reason of a sale below cost, the state of the law has not moved beyond the "malicious purpose" doctrine. 47 YALE L.J. 1201, 1206 (1938). An early decision indicates the intent requirement may be regarded by the courts as nothing more than a test of predatory price-cutting. Balzer v. Caler, 11 Cal.2d 663, 32 P.2d 19 (1938).
68. Id. at 354, 84 P.2d at 775. The question of whether defendant sold below cost with unlawful intent was not properly before the court in the Langley case, however, since defendant entered a plea of guilty to a criminal charge of violating the act, thus admitting the elements of the offense, and thereafter filed a motion in arrest of judgment on grounds of unconstitutionality of the statute.
tions to this means of improving the statute could be met by eliminating the criminal sanctions at the same time. That criminal penalties are not an effective means of enforcing this law is demonstrated by the fact that criminal prosecutions are seldom instituted. 69 Aside from this consideration, the cases simply fail to reveal that the intent requirement furthers the avowed purpose of the statute of protecting the small merchant from price cutting by the large competitor. 70 The multi-product seller is likely to set his prices with a view to the prices of his multi-product competitors. Hence the ability of the intent requirement to protect the small, single-product seller is questionable. Moreover, if the economic consequences of price cutting are the reason for having such legislation at all, then the mental state of the price cutter is irrelevant. 71 Although the intent requirement may be supported as enabling the courts to mitigate an otherwise harsh statute, it can hardly be justified as contributing to the rational development of law respecting selling below cost.

THE RIDDLE OF COST

The most objectionable provisions of the statute relate to the determination of cost. The Wyoming act defines “production cost” to include “the cost of raw materials, labor and all overhead expense of the producer;” the “distribution cost” of a product means the lower of invoice or replacement cost “to the distributor and vendor plus the cost of doing business by said distributor and vendor.” 72 The “cost of doing business,” or overhead expense, is further defined to include:

[A]ll costs of doing business incurred in the conduct of such business and must include within [sic] limitation the following items of expense: labor, including salaries of executives and officers, rent,

70. Beyond the fact that the reported cases practically never involve powerful defendants, it would seem almost impossible to prove unlawful intent on the part of a large competitor who engages in the common practice of discount retailing. See State v. Langley, supra note 67, at 351-353, 84 P.2d at 774, for a discussion of the purpose of the statute.
71. See Clark, supra note 53, at 114.
73. This is apparently a typographical error, since the statute as originally enacted stated “without limitation.” See Wyo. Laws 1937, ch. 73 § 2, at 113.
legal rate of interest on capital, depreciation, selling cost, maintenance of equipment, delivery costs, credit losses, all types of licenses, taxes, insurance and advertising.\textsuperscript{74}

At the outset it should be noted that the cost provisions of the statute have not been altered in the nearly thirty years the statute has been in force. Since the nature of competition has obviously undergone change during this period of time, it would seem to follow that considerable changes in the nature of costs have occurred which require complete re-examination of cost factors in relation to the operation of statutory restrictions on selling below cost. Assuming the nature of market rivalry greatly influences the composition of costs, competitive objectives cannot reasonably be pursued in reliance upon outmoded beliefs about costs.\textsuperscript{75}

In computing overhead, or the "cost of doing business," it is apparently the intent of the statute to prescribe inclusion of the full and complete scale of costs incurred in the operation of the seller's business.\textsuperscript{76} The obvious thing the statute neglects to indicate is how these assorted components of cost are to be allocated to the product which is the subject matter of sale in question. In addition, the statute employs "invoice or replacement cost" as the base figure from which a legal price is to be calculated, but fails to give any indication as to how invoice cost is to be identified.\textsuperscript{77}

Most of the state statutes applicable only to the distri-

\textsuperscript{74} Wyo. Stat. § 40-24 (1957). If an article is purchased at a forced, bankrupt, close-out or other sale outside ordinary channels of trade, the invoice cost cannot be used as a basis for justifying a price lower than one based upon replacement cost (through ordinary channels of trade), unless the article is advertised and sold as merchandise purchased at such a sale and the quantity to be offered for sale is stated. Wyo. Stat. § 40-25 (1937).

\textsuperscript{75} The need for a study of the structure and behavior of cost is discussed in Massel, Competition and Monopoly 26-28 (1962).

\textsuperscript{76} The computation of cost must be made in good faith, and include only bona fide costs. McIntire v. Borofsky, supra note 57. The difficulties in computing a manufacturer's overhead cost are noted in Dooley's Hardware Mart v. Does 1-10, Trade Reg. Rep. (1962 Trade Cas.) ¶ 70227, at 75864 (Super. Ct. Cal. Jan. 31, 1962).

\textsuperscript{77} To avoid the problem of identifying the invoice price of particular goods, some states, e.g., Idaho, define "replacement cost" as the "cost per unit at which the merchandise sold . . . could have been bought at the nearest source of supply by the . . . seller at any time within thirty (30) days prior to the date of sale . . . if bought in the same quantity . . . as the . . . seller's last purchase of said merchandise." Idaho Code Ann. § 48-403 (Supp. 1966). A manufacturer's current list price may be used as the basis for establishing prima facie evidence of cost in some states. Minn. Stat. § 325.01(5) (2) (1961).
butive trades attempt to avoid definitional problems by use of a mark-up formula. A cost base of the lower of invoice or replacement cost, less trade discounts except discounts for cash, plus freight or cartage is established. The statute then requires a fixed percentage of the cost base figure to be added as representative of the cost of doing business in the absence of proof of a lower cost. Should a seller be unable to prove his actual cost of doing business, these statutes supply the figure. The end result is a legal minimum price determined on the basis of an arbitrary mark-up.

The Wyoming statute, although not of the mark-up variety, accomplishes nearly the same result by declaring an "established cost survey" to be competent evidence of a defendant's cost of doing business. As will be demonstrated shortly, once the cost survey is admitted into evidence for all practical purposes the issue of defendant's cost of doing business is foreclosed.

There is perhaps no better evidence of the inherent defect in the sales below cost statutes than the fact that devices to facilitate proof of cost, in some form or other, appear in most of the acts. The inclusion of such devices is simply an admission that proof of actual cost is impossible. The validity of this observation is readily apparent upon a moment's reflection. In the first place, the cost provisions of the Wy-

78. One of several fallacies in the formula is that of expressing the cost of doing business as a percentage of gross sales, when in fact the statute applies the percentage markup to an invoice base. Because overhead may be a specified percentage of gross sales does not mean it is the same percentage of invoice costs.

79. E.g., Wis. Stat. § 100:30(2)(A) (1963); Okla. Stat. tit. 15, § 598.2 (1961). The statutory mark-up for wholesalers is uniformly 2% of invoice cost. With respect to retailers, the mark-up varies from 4% in Pennsylvania to 12% in Arizona, although the great majority of such statutes adopt a 6% mark-up figure. Tennessee allows a mark-up amounting to not less than the "minimum cost of distribution by the most efficient retailer," which mark-up, in the absence of proof to the contrary, is deemed to be 6%. Tenn. Code Ann. § 69-302(a)(2) (1955).

80. Wyo. Stat. § 40-26 (1957): "Where a particular trade or industry, of which the person, firm or corporation complained against is a member, has an established cost survey for the locality and vicinity in which the offense is committed, the said cost survey shall be deemed competent evidence to be used in proving the costs of the person, firm or corporation complained against within the provisions of this act."
ming statute fail to precisely define relevant costs. Assuming more meaningful draftsmanship is possible, the fact remains that businessmen do not keep records from which the cost of each article sold may be accurately determined. To attempt to do so would not only be prohibitive from a point of view of accounting expense, but, to paraphrase one writer, a retailer who keeps records in sufficient detail to ascertain the cost of each item handled does not have to worry about the statute because he is too busy doing his accounting to make any sales.

More importantly, even assuming general agreement among accountants as to a method of assigning overhead to particular products, there is no rational way in which a great number of business costs can be segregated and then related to a particular item sold. Such business expenses as light, heat and salaries, commonly known as "joint costs," are difficult to apportion because:

[I]t 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.

81. The definition of the "cost of doing business" is merely tautological: "The cost of doing business or overhead expenses is defined as all costs of doing business incurred in the conduct of such business . . . ." WYO. STAT. § 40-24 (1957). Nor does the statute fix any period of time for the determination of overhead cost. The problems created by this omission are more apparent in periods of rapidly rising or falling prices.

82. The United States Supreme Court has recognized that meaningful cost data "cannot be obtained from ordinary business records." Automatic Canteen Co. v. FTC, 346 U.S. 61, 68 (1953). Cf. Taggart, The Cost Principle in Minimum Price Legislation 158, 8 U. OF MICH. BUS. STUDIES No. 3 (1938).

83. One reason for the lack of success of the "cost justification" defense under the Robinson-Patman Act is that "with rare exceptions the cost defense has proven expensive . . . ." TAGGART, COST JUSTIFICATION 543 (1969).

84. Clark, supra note 33, at 122.


86. See generally, the dissenting opinion of Judge Simpson in State v. Sears, 4 Wash.2d 200, 103 P.2d 337, 353-365 (1940). Cf., Borden Co. v. Thomason, 353 S.W.2d 735, 748-49, (Mo. 1962).

87. Clark, supra note 33, at 122. It is a commonly accepted fact that the allocation of joint costs must necessarily "be arbitrary to some degree." KAYSER & TURNER, ANTI-TRUST POLICY 122 (1965). In the opinion of one writer, "No accountant has been able to devise a method yielding . . . joint-cost figures
Even where a particular cost of doing business bears some tenable relation to the product involved, the task of allocation would appear futile. For example, a butcher’s salary should be reflected in the cost computations of various kinds of meat. Yet if the butcher spends less time preparing a frying chicken than a rolled roast an equal portion of the cost of his labor cannot reasonably be charged to each item. Obviously no seller is prepared to even attempt a definitive allocation of the butcher’s salary to the diverse items in the meat department. Nevertheless, the Wyoming statute, by requiring the “cost” of a product to reflect “all costs of doing business incurred in the conduct of such business,” (emphasis supplied), engages in the fiction that each element of overhead is rationally allocable to the sale in issue.

Carried to its ultimate conclusion, the cost determination philosophy of the statute requires a merchant to increase rather than decrease the price of goods he is unable to move. The longer an item must be inventoried, the higher its cost will be because of the apportioned overhead it accumulates. The result is that an originally lawful price eventually becomes unlawful because of a slow turnover.

The vagueness of statutory cost provisions has encouraged constitutional attacks, but with only modest success. The Wyoming Supreme Court in State v. Langley rejected the indefiniteness argument on the ground that “cost,” as used in the statute, means “what business men generally mean, which does not embody a dominance of arbitrariness and guesswork.” Hamilton, Cost as a Standard for Price, 4 LAW & CONTEMP. PROB. 321, 328 (1937).

88. The necessarily subjective approach such an allocation would entail exists “because there is no exact correspondence between the flow of activities and the flow of goods, and therefore the attribution of activities to goods must be based on standards that commend themselves to the good sense of the observer.” Edwards, op. cit. supra note 86, at 556.

89. The inadequacy of the belief that overhead can be apportioned to individual products becomes particularly striking in the case of the vertically integrated seller whose production and distribution operations must presumably be analyzed on separate functional levels. La Rue, Pitfalls for Price Competitors: State and Federal Restrictions on Below Cost or Unreasonably Low Prices, 15 W. RES. L. REV. 35, 44-45 (1963).


91. Unconstitutionality usually rests on the theory that cost provisions fail to sufficiently inform merchants of the type of conduct made criminal by the statute. E.g., Avella v. Almac’s, Inc., 211 A.2d 665 (R.I. 1965). The phrases, “cost” and “cost of doing business” have been held not fatally vague, at least where injunctive relief is sought. Flank Oil Co. v. Tennessee Gas Transmission Co., 141 Colo. 554, 340 P.2d 1005 (1959).
namely, the approximate cost arrived at by a reasonable rule." sup92 Although dictum, sup93 this proposition nevertheless indicates sympathetic awareness of the difficulties a merchant faces with respect to cost computation. The Langley court would further eliminate problems of cost definition by reducing the statute to a "good faith" test of illegality. sup94 In effect a merchant who is able to justify a price by any reasonable method of cost accounting, adopted in "good faith," does not violate the statute.

This approach is not with appeal. Though it is arguable the language of the act will reasonably bear such a reading, courts using this analysis would enjoy the flexibility necessary for reaching a correct result. sup95 This seems desirable in that at least the opportunity of making the statute accord with business reality exists. At the same time it must be recognized that the Langley rationale immunizes the act from constitutional challenge, and perhaps legislative revision, by encouraging the belief that the legislature has established an unobjectionable standard of "reasonableness" in cost ascertainment. sup96

The real significance of the Langley formulation becomes apparent, however, when it is realized the court is measuring a seller's "good faith" in terms of inferences to be drawn from his accounting methods, even to the extent of inquiring whether an accounting system is adopted with a view to forthcoming sales designed to violate the act. sup97 If, as Judge Blume

sup92 Supra note 67, at 365, 84 P.2d at 779.

sup93 Supra note 67, at 353-54, 84 P.2d at 775.

sup94 "[A]ll that a man is required to do under the statute is to act in good faith . . . . The statute, then, should not prove to be a burden to anyone who acts in good faith." State v. Langley, supra note 67, at 365, 368, 84 P.2d at 779, 781.

sup95 An alternative technique is to construe the cost provisions as requiring only that average costs over some reasonable period of time be shown. See, e.g., Borden Co. v. Thomason, supra note 86. The statute, of course, implies no such interpretation.

sup96 "If . . . cost is ascertainable, under reasonable methods, then such cost is purely a question of fact, definite and certain, and the standard of conduct set by the legislature . . . is definite and certain." State v. Langley, supra note 67, at 364, 84 P.2d at 779. This language has been widely quoted with approval. See, e.g., Farmington Dowell Prods. Co., Inc., v. Forrester Mfg. Co., 136 A.2d 542 (Me. 1957).

sup97 The Wyoming Supreme Court, in the Langley opinion, concludes: "Hence, if a particular method adopted by a merchant cannot, under the facts disclosed, be said to be unreasonable, and does not disclose an intentional invasion of the law, the method so adopted should be accepted as correct." Supra note 67, at 365, 84 P.2d at 779.
stated in *Langley*, the primary purpose of the legislation is to remedy the evil effect of sales below cost on the small merchant,\(^98\) then the test of cost read into the statute is totally unrelated to its policy. Presumably the accounting methods of the large chains are as reasonable as those of the sole proprietor and there is no reason for thinking one exercises less good faith than the other in the selection of accounting techniques. And, if the consequences of selling below cost are to be regulated by the legislation, it seems unrealistic to believe the objective can be accomplished by allowing the alleged offender to escape liability by merely approximating the costs upon which he determines price,\(^99\) however appealing this approach may be as a practical matter. Nor can the *Langley* formula be seriously urged if in application it is likely to involve nothing more than an examination of a seller’s intent to evade the statute.\(^100\) The expansibility of such a test in relation to accounting methods is readily apparent.\(^101\) And, finally, there is a lack of assurance in the cases that a seller’s attempt to approximate his costs will have predictable success even though the statute is construed as not requiring proof of actual cost.\(^102\)

The “approximate cost” interpretation, in the final analysis, has jurisprudential value in that it concedes the point that the cost provisions of the statute are of little practical value. In fact it suggests that the fictitious nature of the entire inquiry into “cost” must inevitably result in vague generalizations about reasonable methods of accounting adopted in good faith.

\(^{98}\) *Id.* at 351, 84 P.2d at 774.

\(^{99}\) Particularly when the courts are inclined to resolve all doubts or ambiguities in cost determination in favor of defendant. McIntire v. Borofsky, *supra* note 57.

\(^{100}\) The recent case of *Tri-Q, Inc. v. Sta-Hi Corp.*, 404 P.2d 486 (Cal. 1965) sustains a seller’s “educated guess” of his cost of production even though it was found he had no formal cost accounting system whereby even approximate cost could be determined. Essential to the decision was a finding that failure to adopt accounting procedures does not support an inference of intent to violate the statute.

\(^{101}\) One court has held that lack of a cost accounting system is not fatal to proof of damages occasioned by violation of the statute on the theory it is “unreasonable to make a precise accounting system an absolute requisite” since “allocation of ‘costs’ . . . quite often is set upon an arbitrary basis anyway.” *Laundry Operating Co. v. Spalding Laundry & Dry Cleaning Co.*, 383 S.W.2d 364, 367 (Ky. 1964).

\(^{102}\) See note 44 *supra* and note 120 *infra*. 
The Wyoming statute purports to ease proof of cost by providing that an "established cost survey for the locality and vicinity in which the offense is committed ... shall be deemed competent evidence to be used in proving the costs of the person ... complained against within ... this act."\textsuperscript{108} This section contemplates that a trade association in the industry of which the alleged offender is a member will police the act on the basis of an averaged cost estimate for the area in which the offender does business. Trade associations in the past have undertaken intensive enforcement campaigns in other states.\textsuperscript{104}

Aside from the requirement that the survey must be "established ... for the locality and vicinity in which the offense is committed,"\textsuperscript{108} no standards governing the making of a cost survey are set forth in the statute. Consequently trade associations enjoy substantial freedom in conducting their "surveys" and producing an industry cost figure, usually expressed as a percentage of net or gross sales.\textsuperscript{108} Some courts have demonstrated concern with respect to the reliability of survey methods and techniques.\textsuperscript{107} One court, however, has held that an association cost survey taken at a single plant in Los Angeles County is competent evidence of the costs of a merchant doing business in that area.\textsuperscript{108}

The only Wyoming case dealing with a cost survey fails to present a substantial factual question. In \textit{Civic Ass'n v. Railway Motor Fuels}\textsuperscript{109} a trade association of wholesale and retail dealers in gasoline and petroleum products in the Cheyenne area was organized for the purpose of enforcing the

\begin{footnotesize}
\begin{enumerate}
\item[103.] \textit{Wyoming Statutes} § 40-26 (1957).
\item[106.] For example, one of the earliest so-called "surveys," conducted by the Food & Grocery Bureau of Southern California, was a questionnaire merely asking: "Based on my total grocery sales for the year 1936, I find that my minimum cost of doing business is ....% of my net sales." Tannenbaum, \textit{Cost Under the Unfair Practices Acts}, 9 U. of Chi. Studies in Bus. Admin. No. 2, at 50-51 (1939).
\item[107.] \textit{E.g.}, a national cost list devised as a guide in fixing prices has been rejected as an "established cost survey." Johnson v. Farmer, 41 Cal. App.2d 874, 107 P.2d 959 (1940).
\item[109.] 57 Wyo. 213, 116 P.2d 236 (1941).
\end{enumerate}
\end{footnotesize}
sales below cost statute against known price cutters. The association undertook a cost survey to be used in evidence in the contemplated litigation. The court found the survey to be incomplete and inaccurate, and concluded that a self-serving statement of costs would not be given the evidentiary weight prescribed by the statute. Among the reasons given in support of the result were the fact that the cost survey was not made by an unbiased agency and the questionnaires returned by dealers who were also members of the association were not reliable. This rather startling analysis would appear to render invalid any survey conducted by a trade association itself. However desirable this construction may be, it obviously does not accord with the intent of the legislation. At a minimum the case suggests that a condition of admissibility may be a showing of independent expertise in the making of the survey.

The main objection to the cost survey is that it is inherently a price fixing device. It is common knowledge that trade associations exist because merchants believe the exercise of group pressure with respect to price and marketing policies will stabilize competitive conditions to the eventual benefit of all. Once established, therefore, the cost survey is conveniently susceptible to conversion into a uniform price list, which, in light of competitive pressures and policing activities of the interested trade association, is readily adopted by member competitors. Determination of cost on an industry basis is perhaps the most potentially dangerous activity.

110. Id. at 249-53, 116 P.2d at 250-51. Not only did the association employ misleading questionnaires, but it failed to use many of those returned in determining the cost of doing retail business in the area to be 26.05 per cent of net sales and the cost of doing wholesale business 9.8 per cent of net sales. No explanation was given for the failure to use all returned questionnaires. The court thought the survey was suspect because made by inexperienced surveyors with this very lawsuit in mind.

111. Id. at 251, 116 P.2d at 250.

112. "The sales below cost laws are nothing but authorizations for a rather crude type of collusive price fixing," Adelman, Integration and Antitrust Policy, 62 Harv. L. Rev. 27, 75 (1949).

113. The case of Los Angeles Laundry-Owners Ass'n v. Cascade Laundry, Inc., supra note 108, indicates the tendency of competitors to adopt new price lists, generally containing higher prices, based on the survey results.

114. The case of California Retail Grocers & Merchants Ass'n. v. United States, 139 F.2d 978 (9th Cir. 1944) demonstrates the effectiveness of association efforts to secure conformity to suggested minimum prices. The defendants in the case, a Sherman Act price-fixing prosecution, unsuccessfully contended their established prices were sheltered by the sales below cost statute because originally determined on the basis of cost surveys.
in which a trade association may engage. Average cost figures supported by the representation of industry-wide validity breed uniformity in accounting procedures and eventually uniformity in price.\(^{115}\) Thus merchants are encouraged to mark up their products in an amount sufficient to meet the cost of doing business figure produced by the survey, irrespective of what they consider their legitimate markup to be. The end result is a uniform markup which insulates the less efficient merchant from his more efficient competitors.\(^{116}\) Cost savings that might have been passed on to the consumer in the form of lower prices are thereby diverted to the merchant whose costs are lowest. Any influence low prices may have in encouraging greater efficiency, and hence lower costs, is dissipated. Aside from the fact that the uniform markup tends to reduce price competition, the potential for a uniform increase in price is dramatically apparent.\(^{117}\) These considerations assume increased significance in view of the legislature’s understanding of the explicit purpose of the statute “to foster and encourage competition, by prohibiting unfair and discriminatory practices by which fair and honest competition is destroyed or prevented.”\(^{118}\)

Assuming it is impossible to prove the actual cost of selling a product,\(^{119}\) it follows that if an “established cost survey” is available it is likely to be decisive evidence of defendant’s cost and the basis of the judgment.\(^{120}\) Thus the statute in practice tends to make a cost survey prima facie or presumptive evidence of cost, even though its language is

\(^{115}\) See generally, Burns, The Decline of Competition 47-55 (1936).
\(^{116}\) See generally, Comment, supra note 90, and Clark, Statutory Restrictions on Selling Below Cost, 11 VAND. L. REV. 105, 123-125 (1957), who concludes that the effect of the statutes is to require all sellers to mark their goods up at the same rate.
\(^{117}\) See Note, 57 YALE L.J. 391, 397-98.
\(^{118}\) WYO. STAT. § 40-33 (1957).
\(^{119}\) A summary of expert cost accountant testimony relative to cost ascertainment is found in Borden Co. v. Thomason, supra note 86, at 748-49.
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silent as to probative value. The courts have ignored the practical effect of cost survey provisions is evidenced by decisions sustaining the constitutionality of such enactments on the ground that they afford a defendant an opportunity to prove that his costs are, in fact, lower than the survey figure. Since the determination of actual cost is largely illusory, the cost survey, a product of private interests who cannot be expected to be impartial, is permitted to fix an absolute minimum legal price. In the final analysis a merchant who fails to conform to the price fixing arrangement engages in unlawful conduct.

**Remedies and Defenses**

Selling below cost in Wyoming may be enjoined, or made the subject of a damage action, by any "person, firm, private corporation or trade association." The word "person" has been broadly interpreted to permit a private citizen injunctive relief without a showing of injury or damage. This generally accepted construction would appear to be in doubt in Wyoming because of the decision in *Eckdahl v. Hurwitz*, which indicates actual injury must be shown to warrant the granting of an injunction. In addition to imposing criminal sanctions, the statute provides for forfeiture of the charter of corporate defendants. Any contract made in violation of the act is deemed illegal and unenforceable. Unlike a number of other statutes, the Wyoming act does not create an agency

121. A provision identical to that of Wyoming has been construed as merely creating a rule of admissibility of evidence and not prescribing that a cost survey shall be prima facie evidence. *State v. Sears*, supra note 86, 103 P.2d at 344. A statutory attempt to prescribe the weight or credibility of a cost survey has been held unconstitutionally arbitrary and indefinite. *Great Atl. & Pac. Tea Co. v. Ervin*, 23 F.Supp. 79 (D.C. Minn. 1938). Merely making a cost survey prima facie evidence is generally permissable. *McElhine v. Geror*, 207 Minn. 580, 292 N.W. 414 (1940).


125. 56 Wyo. 19, 103 P.2d 161 (1940).


with special expertise to administer and enforce the sales below cost prohibition.\textsuperscript{129}

A store manager or employee is as much subject to liability under the statute as a proprietor or owner.\textsuperscript{130} And relief may be sought against numerous competitors in a single lawsuit even though concerted action is not alleged.\textsuperscript{131} Since the Wyoming statute expressly grants immunity from criminal prosecution to defendants testifying in civil proceedings,\textsuperscript{132} self-incrimination is not a ground for refusing to testify in an injunction action.\textsuperscript{133} In general the courts have been permitted broad discretion in fashioning a decree enjoining further violations of the act.\textsuperscript{134}

There is little evidence in the cases that the damage remedy is frequently used, or that it is effective when used. Undoubtedly this is explained by the difficulties in proving actual damages. Those cases approving an award of damages offer little basis for evaluating the kind of showing necessary to support a damage claim.\textsuperscript{135} The damage concept is further confused by the tendency of courts to relate evidence of actual injury, generally in the form of loss of business, to the issue of intent to injure.\textsuperscript{136} The clearest cases for recovery are those in which direct solicitation of plaintiff's customers re-

\textsuperscript{129} Provision is made for limited enforcement by the Attorney General or local county attorney. \textit{Wyo. Stat.} § 40-29 (1957).


\textsuperscript{131} Socony Mobil Oil Co., Inc. v. Superior Court for the County of Providence, \textit{Trade Reg. Rep.} (1964 Trade Cas.) ¶ 71037, at 79111 (S.C.R.I. March 5, 1964).

\textsuperscript{132} \textit{Wyo. Stat.} § 40-31 (1957).

\textsuperscript{133} \textit{State v. Ross}, 259 Wis. 379, 48 N.W.2d 460 (1951).

\textsuperscript{134} An injunction may extend to a defendant's entire line of products, even though he sold only a few items below cost. \textit{Mering v. Yolo Grocery & Meat Mkt.}, 127 P.2d 985 (Cal. Dist. Ct. App. 1942).

\textsuperscript{135} One plaintiff was allowed to get the damage issue to the jury upon his testimony that since his variable costs amounted to about 50\% of gross sales, he could reasonably estimate that on the volume of business lost to a competitor selling below cost his cut-of-pocket loss was "approximately 50\%." \textit{Laundry Operating Co. v. Spalding Laundry & Dry Cleaning Co.}, \textit{supra} note 101, at 366-67.

\textsuperscript{136} Whereas a competitor's testimony that he has lost substantial business as a result of violations of the statute may be one of several factors used to raise a presumption of unlawful intent, it by no means follows that this vague testimony of injury by itself is persuasive on the damage issue. See \textit{Los Angeles Laundry-Owners Ass'n v. Cascade Laundry}, \textit{supra} note 108.
results in the diversion of business to defendant.\textsuperscript{137}

The view that any citizen may sue on behalf of the public for breach of the statute poses an interesting question with respect to the availability of the defense of "clean hands." Several cases have held that violations of the statute may be enjoined even though the party seeking relief is himself guilty of selling below cost.\textsuperscript{138} Since the defense that the parties are in pari delicto will not lie, a court may presumably enjoin both parties from further violations. The cases rest on the theory that violations affect and directly concern the public at large, and consequently unclean hands ought not permit the continuance of conduct declared by the statute to be against public policy.\textsuperscript{139}

Assuming there exist legitimate and convincing reasons for prohibiting selling below cost, the private lawsuit does not lend itself to effective enforcement. The benefit to a successful plaintiff is short-lived where the market consists of numerous sellers who frequently engage in sales below cost. Unless he is prepared to police the entire market, which is extremely unlikely, the private lawsuit cannot begin to protect either the public or the individual merchant from the alleged evil effects of sales below cost. Only state action against all violators would appear appropriate.\textsuperscript{140} Yet the cases suggest relatively little state prosecution has been un-

\textsuperscript{137} Laundry Operating Co. v. Spalding Laundry & Dry Cleaning Co., \textit{supra} note 101; Sandler v. Gordon, 94 Cal. App. 2d 254, 210 P.2d 314 (1949). The latter case awarded punitive damages on the ground that defendant, by surreptitiously acquiring plaintiff's customer lists and thereafter using them to solicit customers, was guilty of "oppression and malice." One statute permits recovery of treble damages. \textit{MONT. REV. CODES ANN. § 51.111} (1947).


\textsuperscript{139} It has been held that a plaintiff may avoid the unclean hands defense by seeking declaratory judgment relief as to his right to sell at a stated price. \textit{Hogus v. Kroger Co.}, 356 SW.2d 267 (Tenn. 1962).

\textsuperscript{140} An alternative to a single action against a group of alleged violations would be a series of individual actions. One case brought against a comparatively small merchant by the Attorney General was continued from time to time to enable plaintiff to commence similar actions against larger competitors of defendant; a temporary injunction was conditioned on prompt and vigorous prosecution of defendant's competitors. \textit{State v. Applebaum's Food Mkt.}, \textit{TRADE REG. REP.} (1960 Trade Cas.) \textnumero 69790, at 77123 (Dist. Ct. Minn. June 14, 1960). Several states have created agencies to undertake enforcement litigation. See for example, \textit{MONT. REV. CODES ANN. § 51.111} (1947); \textit{UTAH CODE ANN. §§ 13-2-1 to -25} (1953).
undertaken, apparently because of the difficulties of fair and uniform enforcement.\(^{141}\)

A more serious impediment to the effectiveness of the private lawsuit is the statutory defense of selling below cost "in good faith to meet the legal prices of a competitor."\(^{142}\) If a seller comes within the requirements of the exemption, he has a complete defense irrespective of the existence of other statutory elements of violation.\(^{143}\) Cutting price to meet competition is not, however, without legal risk. The only price a seller is entitled to meet is a "legal" one "as herein defined." Since the act does not separately define legal price, it can only mean one that is not below cost and is not made with the intent of injuring competitors and destroying competition. The merchant who seeks to meet competition is therefore burdened with the hopeless task of ascertaining his competitor's intent as well as his competitor's costs. The elusiveness of the intent requirement has already been noted, and it is difficult to see how a merchant can be expected to gauge his competitor's costs when he is unable to determine his own. Recognizing this dilemma, the courts have been inclined to construe the "legal" price provision to mean the defense is satisfied if a merchant merely believes in "good faith" that the price he meets is legal.\(^{144}\) Under this construction the fact that the price met may turn out to be illegal is immaterial.

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141. Denver Post, Feb. 2, 1966, p. 25, col. 1, quotes the Utah Attorney General to the effect that, even though it is common knowledge the law is being violated on a wide scale, he is reluctant to select a few merchants for prosecution when there is no "means of uniform enforcement." The attitude of most state enforcement agencies is probably accurately reflected in an opinion by the Wyoming Attorney General's office in which it is conceded state prosecutions are "likely to prove unsatisfactory," hence private injunctive actions by "persons directly interested" are recommended as "the most satisfactory procedure." [1932-1940] Wyo. Att'y Gen. Rep. & Off'l. Op'ns., 511, 513 (Apr. 12, 1937).

142. Wyo. Stat. § 40-27-1 (1957) expressly excepts from the operation of the statute any sales "in an endeavor made in good faith to meet the legal prices of a competitor as herein defined selling the same article or product in the same locality or trade area." This "meeting competition" defense is discussed in Comment, 12 Sw.L.J. 482 (1958).


Selling Below Cost

The first objection to a construction which dilutes the legal price requirement is that liability must turn on the essentially subjective test of "good faith." This is not objectionable assuming the test is meaningfully applied in terms of the policy of statute. The cases, however, indicate that good faith exists in practically any situation short of actual knowledge that a competitor's price is illegal.\textsuperscript{146} There is apparently no obligation to even attempt to investigate the legality of a competitor's pricing conduct.\textsuperscript{148} It follows that in the absence of a workable minimum standard of reasonable belief of legality, a merchant is entitled to violate the statute simply because his competitor did it first. The first price cutter may be subject to liability, but in practical effect he has immunized the price reductions of his competitors. In short, save for the obvious situations of an illegal price, a statute represented as essential to the protection of competition from sales below cost really means that selling below cost is acceptable so long as your competitor does it.\textsuperscript{147}

On the other hand, a literal interpretation of the meeting competition defense is equally unrealistic. Aside from insurmountable problems of proof, forcing a merchant to compete at his peril does not encourage price competition. Nor is it

\textsuperscript{146} Safeway Stores, Inc. v. Oklahoma Retail Grocer's Ass'n, 322 P.2d 179 (Okla. 1957), aff'd 390 U.S. 334 (1968), found a lack of good faith because of knowledge the price being met was illegal. One case seems to suggest good faith is established by a merchant merely proving his competitor's prices, and then testifying his price cuts were necessary to economic survival. State v. Wolkoff, 250 Minn. 504, 85 N.W.2d 401 (1958). Compare State v. Penny Super Mkt., Inc., TRADE REG. REP. (1960 Trade Cas.) ¶ 69663, at 76629 (Dist. Ct. Minn. Feb. 1, 1960); State v. Kohn, TRADE REG. REP. (1960 Trade Cas.) ¶ 69664, at 76630 (Dist. Ct. Minn. April 24, 1958). Continuing a reduced price after a competitor abandons his lowered price has been held to negative any possible inference of good faith. People v. Pay Less Drug Store, supra note 143. But waiting six weeks to meet a competitor's reduced price is not evidence of lack of good faith. Northern Cal. Food Dealers, Inc. v. Farmer's Mkt., Inc., TRADE REG. REP. (1956 Trade Cas.) ¶ 68402, at 71723 (Super. Ct. Cal. June 29, 1956). Generally the courts are content to discuss the good faith requirement in vague and obscure terms. See State v. Sears, 4 Wash.2d 200, 103 P.2d 337 (1940).

reasonable to subject a merchant to expensive litigation in the event his competitor's price turns out to be illegal. In view of the necessity to meet prices quickly in a highly competitive industry, the good faith test can never be anything more than a hindsight test.\textsuperscript{148} And a requirement of legal price engages in the questionable belief that a merchant will, and in fact does, investigate his competitors' prices before meeting them.

A further problem of meeting competition is presented by the requirement that the price met be in connection with "the same article or product in the same locality or trade area."\textsuperscript{149} If the provision is literally interpreted, product differentiation would operate to the competitive disadvantage of the merchant who carries the higher cost brand, as opposed to a competitor who retails relatively low cost brands.\textsuperscript{150} To avoid this result, the word "same" has been broadly construed to mean "similar" or "comparable."\textsuperscript{151} Although there is little authority to support it, a test of cross-elasticity of demand, or relative substitutability, has been urged as best suited to give recognition to competitive products.\textsuperscript{152} There is merit to this suggestion. The statutory word "same" surely contemplates close physical similarity, but some latitude among competitive items with physical differences must be recognized in order to permit the act to function at all, particularly since a decline in the price of one differentiated product tends to bring a decline in the price of a rival product. The difficulty is that the common tests of functional interchangeability with respect to end uses,\textsuperscript{153} particularly as applied to market defini-

\textsuperscript{148} See Comment, 12 Sw. L.J. 482, 503 (1958), wherein it is suggested that the meeting competition defense could be made more realistic by eliminating the "good faith" and "legal" price requirements.

\textsuperscript{149} Wyo. Stat. § 40-27 (1957). Other statutes permit a merchant to meet the price of a competitor who is selling "substantially the same article or product." E.g., Idaho Code Ann. § 48-407 (1947).

\textsuperscript{150} For example, a chain operation may sell a product of its own manufacturer under its private brand, whereas an independent competitor may only be able to carry standard brands with higher costs; hence he may be foreclosed from competing with the chain's brand because of the cost disparity.

\textsuperscript{151} Northern Cal. Food Dealers, Inc. v. Farmers Mkt., Inc., supra note 145.

\textsuperscript{152} Comment, 58 Mich.L.Rev. 905, 918 (1960); Comment, 12 Sw.L.J. 482, 495 (1958).

\textsuperscript{153} The interchangeability test is discussed in United States v. E. I. duPont de Nemours & Co., 351 U.S. 377 (1956).
tion problems in the monopoly and merger cases,\(^{154}\) are not relevant to the underlying theory of the legislation under consideration. The sales below cost statute is not primarily concerned that conduct may have an impact on general competitive conditions.

**Some Thoughts about Policy**

The continued appeal of statutory restrictions upon selling below cost does not admit of simple explanation. It seems there exists a broadly shared conviction that failure to make price provide for a seller’s cost is inherently evil, that it is anti-social conduct. Such a view may be explained in part as a manifestation of the long recognized tendency among competitors to denounce as “unfair” almost any attempt to compete on the basis of price.\(^{155}\) Or perhaps the obvious economic objections to the statute are deemed insignificant in light of the overriding moral doctrine of competition it embraces.\(^{156}\) Uncritical acceptance of the alleged purpose of the legislation by courts and legislatures would seem to support this view. For example, the opinion of Judge Blume in *State v. Langley* demonstrates genuine concern that nothing less than a way of life is at stake in the statute.\(^{157}\)

The statute presupposes that there is seldom any legitimate commercial reason for selling below cost. The defect inherent in this assumption is that price must in all cases insure at least a return of costs. Price-cost relationships only have meaningful significance when measured over a long per-

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156. Professor Homer Clark suggests these statutes enact “a moral and ethical philosophy, not an economic system,” and that no longer is “the old-fashioned ideal of the businessman as a hard-driving competitor who gets ahead by cutting his costs and his prices” attractive to us. Clark, supra note 116, at 187.

157. 53 Wyo. 332, 351-52, 84 P.2d 767, 774: “we still have with us the independent merchants . . . . They have hitherto been considered as part of the ‘backbone’ of every community radiating their influence throughout the length and breadth of the state, maintaining not alone fair competition, but adding to, and upholding, the moral fibre of the communities, upon which, in the long run, the existence of the commonwealth depends. The legislature has the right, we think to give . . . . them a chance to remain a pillar of support, thus at the same time giving an opportunity for the maintenance of individualism, still of importance in our day, and which, except for such legislation, might be entirely crushed.”
period of time.\textsuperscript{158} Businessmen, like everyone else, live in the short-run, not the long-run. Consequently, employment of the so-called "cost protection" principle as the determinant of short-run price policy prevents the market from performing its primary function of guiding the allocation of resources according to criteria of productivity and consumer demand.\textsuperscript{159} Denial of the economic function of price on the ground that competition is protected and encouraged seems indefensible, at least if there is any basis for the belief that price has some impact upon competition.

This discussion has sought to demonstrate that the effect of limiting the impact of the market on the pricing function may be to encourage price rigidity and, in fact, price increases.\textsuperscript{160} Although it is undisputed that a state may constitutionally regulate price,\textsuperscript{161} the curious thing about the sales below cost statute is that it is neither enacted or enforced as a price fixing statute.\textsuperscript{162} Nevertheless, the price fixing feature of the Wyoming statute may assume greater future importance in view of the fact the Supreme Court, in \textit{Bulova Watch Co. v. Zale Jewelry Co.},\textsuperscript{163} has declared unconstitutional the Fair Trade Act.\textsuperscript{164} Strict enforcement of the sales below cost statute, in the absence of the ability to prove actual cost, may produce much the same effect as resale price main-

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\textsuperscript{158} Kayser & Turner, Antitrust Policy 62-65 (1965).

\textsuperscript{159} See Comment, 57 Yale L.J. 391, 397-98 (1948), where it is contended that prices both below and above cost are necessary to a short-run allocation of resources, and that to freeze prices at the level of cost "is to foster the twin evils of high prices and low production." See Stocking, Workable Competition & Antitrust Policy 39 (1961): "the workability of imperfect competition depends on the flexibility of prices with changing costs..."

\textsuperscript{160} See generally, Hamilton, Cost as a Standard of Price, 4 Law & Contemp. Probs. 321, 328-33 (1937) and McNair, Marketing Functions and Costs and the Robinson-Patman Act, Id. at 336-38. A summary of an FTC survey described in FTC Report on Resale Price Maintenance 861-2 (1945) is discussed in Comment, supra note 159 at 417-18. It is interesting to note that the survey found that, with respect to "loss leader" practices in the grocery industry in Southern California, leader prices prior to the adoption of the sales below cost act were seldom if ever below invoice cost, whereas prices of many items not previously employed as loss leaders were increased after the adoption of the act. The price-fixing nature of the legislation has been recognized by some courts. \textit{E.g.}, State v. Packard-Bamberger & Co., 16 N.J.Misc. 479, 2 A.2d 699 (1938).

\textsuperscript{161} Nebbia v. New York, 291 U.S. 502 (1934).

\textsuperscript{162} The understanding of the Court in State v. Langley, 53 Wyo. 332, 335, 84 P.2d 767, 775 (1938) is commonly expressed: "The legislature by the statute here in question, sought, not to fix prices, but to prevent ruinous price cutting, by which competitors might be injured and competition be destroyed."

\textsuperscript{163} 371 P.2d 409 (Wyo. 1962).

\textsuperscript{164} Wyo. Stat. § 49-8 to -17 (1957).
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tenance legislation. Hence the rationale of the fair trade decision would appear relevant to the matter of selling below cost.

The theory upon which the Wyoming fair trade case turns is that the "non-signer" provision of the Fair Trade Act constitutes price fixing by private parties in that it "leaves to the uncontrolled and uncertain discretion, option and whim of private parties the determination of a retail price suitable to their own interests and for their private benefit, without any regard for the welfare of the public and in derogation of the public's right to a voice in the matter . . . ." It is submitted that a more accurate description of the effect of the sales below cost statute is not to be found. At a minimum the theory of the case impairs the rationale upon which the constitutionality of the sales below cost statute was sustained in State v. Langley. That this observation has force is further evidenced by the fact that one of the reasons urged by Judge Blume in Langley for sustaining the sales below cost act was that such legislation is analogous to fair trade acts which "have been upheld as constitutional."

The Wyoming Court's treatment of the issue of validity of selling below cost is not unexceptional in comparison with the general judicial approach to the subject. The crucial point is that the manner in which the issue is phrased is decisive. So long as legislatures and courts view the problem as one of power to prohibit sales below cost such legislation will flourish. When the statute is examined in terms of actual or probable effect it is likely to be recognized as undesirable class legislation resting on fictitious underpinnings.

165. The non-signer clause, set forth in Wyo. Stat. § 40-14 (1957), in essence permits a seller to enforce a resale price maintenance contract against any person within the channels of distribution of the seller's product, irrespective of the fact such person is not a party to the fair trade contract.
167. State v. Langley, supra note 162, at 360, 84 P.2d at 777. This argument by analogy has greater significance when it is noted the court's opinion cites as authority a number of fair trade cases. To complete the exercise in applied jurisprudence it should be further noted that the court in the fair trade case draws heavily on the pronouncements of Judge Blume's opinion in State v. Langley even though the two cases, of course, reach different results. If the sales below cost statute is recognized to be price-fixing legislation, it is likely to be struck down by a court that has found fair trade legislation unconstitutional. See, e.g., State v. Wender, 141 S.E.2d 359 (W. Va. 1965).
168. The opinion in State v. Langley is addressed principally to the broad question of whether the legislature in enacting the statute exceeded permissible constitutional limits of power.
Moreover, it is seriously to be doubted that isolated sales below cost have any measurable effect on competition or competitors. Assuming such conduct does in fact injure individual competitors, it should be recalled that our economic system has never warranted that all individual participants are to be held harmless from injury. In fact a system guided by impersonal forces must necessarily cast aside those unable to survive the rigors of the market place. It is precisely at this point that the philosophy of the blanket prohibition against selling below cost breaks down. The general objective of our existing regulatory system is to "promote competition in open markets." The focus of this national economic policy is on the preservation of competition, not competitors. Maintenance of competitive market structures is the means selected to effectuate this policy; the concern is "with substantial impairment of the vigor or health of the contest for business, regardless of which competitor wins or loses." The statute under consideration runs counter to this policy in that it seeks to insure survival of competitors and certain forms of business organization. Regulation proceeds from essentially private agreement without any workable standard of administrative control.

The only justification for permitting the sales below cost statute to equate protection of competitors with protection of competition is that, without such a statute, predatory price cutting and loss leader selling are not subject to effective means of control. Experience with the statute fails to support the conclusion that it has accomplished its avowed purpose. The cases indicate that only systematic selling below cost in pursuance of a design to increase domination or injure or eliminate a competitor will predictably result in actual enforcement of the statute. If this is so, then such predatory conduct is within traditional regulatory framework. It is

170. Courts have recognized that if the health of the competitive process is to be assured, primary attention cannot be given to "the individual competitor who must sink or swim in competitive enterprise." Atlas Bldg. Prods. Co. v. Diamond Block & Gravel Co., 269 F.2d 950, 954 (10th Cir. 1959). See generally, BAIN, INDUSTRIAL ORGANIZATION 477-540 (1959). It has been suggested, however, that the Robinson-Patman Act as a whole is inconsistent with the Sherman and Clayton Acts. Adelman, Effective Competition and the Antitrust Laws, 61 HARV. L. REV. 1289, 1327-50 (1948).
171. Anheuser-Busch, Inc. v. FTC, 289 F.2d 835, 840 (7th Cir. 1961).
actionable under the common law doctrine of unfair competition.\textsuperscript{172} It may also violate the Wyoming statutes proscribing local and area price discrimination,\textsuperscript{173} or the Wyoming constitutional prohibition of monopolies.\textsuperscript{174} Selling below cost may constitute a contract in restraint of trade in violation of Section 1 of the Sherman Act,\textsuperscript{175} or may be evidence of monopolization, attempted monopolization, or a conspiracy to monopolize in contravention of Section 2 of the Sherman Act.\textsuperscript{176} Further, a sale below cost is violative of the "unfair methods of competition" and "unfair practices" provisions of Section 5 of the Federal Trade Commission Act,\textsuperscript{177} if made with intent or effect of injuring competition.\textsuperscript{178} It may be a price discrimination in violation of Section 2(a) of the Robinson-Patman Act,\textsuperscript{179} and has been held to come within the "unreasonably low price" prohibition of Section 3 of that Act.\textsuperscript{180} The advantage in the general antitrust approach is that sales below cost may be viewed in their full setting rather than in the context of impact upon a particular merchant or class of merchants. The broader approach also permits consideration of general economic conditions, which have changed dramatically since the time pressure groups gained acceptance of their statutory schemes to create a cost floor for price.

**CONCLUSION**

It has been suggested that two general methods of regulating private business conduct appear practicable.\textsuperscript{181} One is to establish fairly definite standards in statutory law, leaving businessmen free to pursue their own interests within those limits. The other is to leave the maintenance of competition to an administrative commission vested with broad and pervasive powers. The legislation considered here departs from both these forms of control. In the event total elimination of the statute is not possible, and half a loaf must be accepted,

\textsuperscript{172} See note 5 supra.
\textsuperscript{173} Wyo. Stat. § 40-18, 23 (1957).
\textsuperscript{174} Wyo. Const. art. 1, § 30; art. 10, § 8.
\textsuperscript{178} Miller & Co. v. FTC, 142 F.2d 511 (6th Cir. 1944).
\textsuperscript{181} Kahn, Standards for Antitrust Policy, 67 Harv. L. Rev. 28, 41-42 (1953).
perhaps a statute simply prohibiting sales at “unreasonably low prices” would be least objectionable. The strength of such a formulation is that it enables the courts to develop a meaningful discussion of the problem. The dialogue at present is largely irrelevant.