A Price-Fixer's Memoir—Exculpation and Revenge While Confronting the Antitrust Abyss: *An Essay on Threshold Resistance* by Alfred Taubman

Arthur D. Austin

I. A Short Prologue

"Hey, I wasn't guilty. And I wasn't about to beg for mercy. Sure, I was sorry all this happened. Sorry I had ever met with Sir Anthony Tennant. Sorry I hadn't listened to my closest partners when they warned me about Dede Brooks. Sorry Judge Daniels and the Justice Department had made it impossible for me to get a fair trial." (Alfred Taubman, Chairman, Sotheby's)[1]

United States v. Taubman[2] was a class-driven trial with a Henry James-Norman Mailer template: high art descends to the shopping mall. A *Wall Street Journal* article on the case was even entitled, *To Sotheby's Boss, Selling Art Is Much Like Selling Root Beer*,[3] a reference to the source of Sotheby's chairman Alfred Taubman's considerable wealth, shopping malls. Instead of testimony from accountants and economists duking it out over bookkeeping ploys and arcane marketing strategy, the public got haughty exchanges from specialists in wheeling and dealing Monets, Renoirs, and Warhols, while discussing price strategy. In 2005 I published an essay discussing Sotheby's implications for the price-fixing narrative.[4] Using Adam Smith's commentary as the anchor, I focused on conspiracy—the most troublesome issue in the pricing conundrum. Two years later Taubman has published a candid account of his experiences, *Threshold Resistance*—a raw glimpse into his reactions to a conviction as one of the alleged instigators of the most pernicious form of commercial deviancy. This Essay seeks to fathom the psychology and tactics of the hunted as he responds to the accusations of a trusted colleague while coping with what Justice Holmes called a "foolish law."[5]

Taubman's revenge motive owes a considerable debt to Dominick Dunne's *People Like Us* (1988), a best selling *roman à clef* that anticipated Taubman's problems through the fictional persona of Elias Renthal. Like Taubman, Renthal is a nouveau riche from the Midwest, barging into New York Society, inciting disdain as a "vile" person who "has no patience whatever for people who were not as concerned with the desire to make money as he was."[6] Taubman committed a

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[1] Alfred Taubman, Threshold Resistance 170 (2007).

[2] United States v. Alfred Taubman, No. 01 CR 429, 2002 U.S. Dist. LEXIS 6251 (S.D.N.Y. Apr. 11, 2002), *aff'd*, 297 F.3d 161 (2d Cir. 2002).

[3] Megan Cox, *To Sotheby's Boss, Selling Art Is Much Like Selling Root Beer*, Wall St. J., Sept. 18, 1985. The most extensive coverage of the tactics, strategy, and events of the litigation is Christopher Mason, The Art of the Steal (2004).

[4] Arthur Austin, *Adam Smith and the Inevitability of Price Fixing*, 55 Case W. Res. L. Rev. 501 (2005).

[5] Holmes added: "I have little doubt that the country likes [the Sherman Act] and I always say . . . that if my fellow citizens want to go to Hell I will help them." Holmes-Laski Letters 248–49 (Mark DeWolfe Howe ed., 1953).

[6] Dominick Dunne, People Like Us 73 (1988).

similar affront by acquiring Sotheby's, one of only two major full service art auction houses in the world. (The other, Christie's, is a relative newcomer, dating to 1766, compared to Sotheby's 1744 pedigree.) Chagrined at the book's deprecatory portrayal of Elias, Taubman demanded Dunne make changes.[7] If Dunne did so, they were modest and did not include the final embarrassment-Dunn's anticipation of Taubman's downfall: both Elias and Taubman were convicted of the most contemptible forms of commercial skullduggery—insider trading and price-fixing. A federal judge told Taubman that "[t]he law does not countenance a robbery,"[8] echoing Elias' rebuke: "Criminal behavior such as yours cannot go unchecked."[9]

Taubman's downfall was orchestrated by government lawyers who instigated a bitter brawl between Sotheby's and Christie's by invoking "amnesty," a strategy that favors the first conspirator willing to spill the beans on the others in exchange for the possibility of a favorable plea bargain.

The Taubman trial was a classic New York Foley Square Event. Dede Brooks testified that Alfred Taubman, her boss and mentor, fixed auction commissions, a scheme she helped implement with her counterpart at Christie's. Both Chairmen refused to testify. (Sir Anthony Tennant was beyond the U.S. court's jurisdiction; Taubman, much to his later regret, opted not to take the stand). In the meantime the media peppered readers daily with tantalizing gossip, such as actress Sigourney Weaver's attendance to get pointers on how to play Brooks in an upcoming movie.[10] Taubman writes of "unconfirmed rumors" that Brad Pitt was to portray him.[11] Mr. Dunne made sporadic visits in the role of trial social chairman.

Taubman's downfall was orchestrated by government lawyers who instigated a bitter brawl between Sotheby's and Christie's by invoking "amnesty," a strategy that favors the first conspirator willing to spill the beans on the others in exchange for the possibility of a favorable plea bargain. The objective is to energize a Fink versus Fink confrontation in which the only winner is the government.[12] It is a practical application of the street wisdom that there is no honor among thieves—especially price-fixers.

Taubman's narrative is driven by the author's tenacious efforts to achieve total exculpation. He begins by describing his prowess in "threshold resistance," "the force that keeps your customer from opening your door and coming in over the threshold."[13] The importance of the *Threshold* motif was validated when, during the M & A binge of the 80s, Taubman outmaneuvered rival corporate raiders to buy Sotheby's. He took title to what he called a "rude, unresponsive, and often condescending" collection of art poseurs too jejune to deal with the challenges of changes in market techniques.[14] Drawing on his shopping mall successes, Taubman set out to change the "rules of the game."[15] For example, under Taubman, Sotheby's bypassed dealers to go directly to rich customers who were seduced by "celebrity" auctions. Taubman revised what had become standardized terms of credit—further subverting the established art auction process. His bourgeois

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[7] "Some details were so apt that Mr. Taubman demanded changes by Mr. Dunne." Leslie Eaton, *Knight Errant or Erring? Sotheby's Tale*, N.Y. Times, Apr. 27, 2000, at C1.

[8] Carol Vogel & Ralph Blumenthal, *Ex-Chairman of Sotheby's Gets Jail Time*, N.Y. Times, Apr. 23, 2002, at B1.

[9] Dunne, *supra* note 6, at 401.

[10] John Walsh, *How the Stage Fell in Love with the Art Trade*, The Independent, Apr. 2, 2002.

[11] Taubman, *supra* note 1, at 162.

[12] The objective is to "create a prisoner's dilemma whereby each player shares the same dominant strategy: to confess their participation in the cartel and turn state's evidence against their former cartel partners." The bait is amnesty to the first to reveal the illegal conduct. Christopher R. Leslie, *Antitrust Amnesty, Game Theory, and Cartel Stability*, 31 J. Corp. L. 453, 454 (2006).

[13] Taubman, *supra* note 1, at ix.

[14] *Id.* at 89.

[15] *Id.* at 103.

tactics incited the ire of traditionalists. "I was accused of turning Sotheby's into Bloomingdale's." He was, they charged, "malling the art world."[16]

II. Taubman Establishes His Antitrust Credentials

"Al, have you heard what's going on? Christie's is admitting to price-fixing with Sotheby's."[17] It was, according to Taubman's script, an unexpected affront to a distinguished career. When he confronted Dede Brooks about the *Financial Times* report she dismissed it "with subdued confidence."[18] Brooks was like family; her impressive pedigree—Yale, investment banking, ambition—was in tune with Taubman's marketing vision. Later, as reality registered, Taubman summed up: "All would be placed in jeopardy because of my misplaced trust in a key executive."[19]

What more persuasive way to distance oneself from the crime scene than by expressing shock at Christie's confession and Brooks' perfidy. To improve the credibility of his dismay at the seriousness of the accusations, Taubman sought to establish his antitrust credibility by bragging that "The Sherman Act was no mystery to me."[20] He emphasized his antitrust sophistication with a tale of making "quite a scene" when he encountered members of a trade association exchanging sensitive information. He challenged the government's smoking gun evidence, his twelve private meetings with Sir Anthony Tennant, Chairman of Christie's, over a four-year period. The government presented these meetings to the jury as the connection between the two Chairmen to the implementers of the scheme—Dede Brooks and Chris Davidge, Brooks' counterpart at Christie's. Taubman correctly identified the charges as "conscious parallelism" together with "plus factors."[21] Taubman claimed, however, that after he cautioned Sir Anthony on the dangers of any discussion referencing pricing, the latter "agreed immediately with my insistence that we stay far away from the subject of pricing. That was off the table."[22] Hence, by Taubman's account there were no plus factors.

Taubman failed to recognize that as duopolists Sotheby's and Christie's enjoy the same access to information about pricing, consumers, source of customers and art, identity of costs, while operating under circumstances conducive to collusion.[23] "I don't see why there had to be a conver-

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[16] *Id.* at 106.

[17] *Id.* at 146.

[18] *Id.* at 147.

[19] *Id.* at 140.

[20] *Id.* at 141.

[21] "However, parallel pricing, without more, does not itself establish a violation of the Sherman Act. Courts require additional evidence which they have described as 'plus factors.' Examples of these 'plus factors' include actions contrary to a defendant's economic self-interest, product uniformity, exchange of price information and opportunity to meet, and a common motive to conspire or a large number of communications." Wallace v. Bank of Bartlett, 55 F.3d 1166, 1168 (6th Cir. 1995) (internal citations omitted).

[22] TAUBMAN, *supra* note 1, at 143.

[23] "[C]onscious parallelism is devoid of anything that might reasonably be called agreement when it involves simply the responses of a group of competitors to the same set of economic facts—independent in that each would have made the same decision for himself even though his competitors decided otherwise. But the consciously parallel decisions of oligopolists in setting their basic prices, which are interdependent in that they depend on competitors setting the same price, are not nearly so easily disposed of on the ground that no agreement is involved." Donald F. Turner, *The Definition of Agreement Under The Sherman Act: Conscious Parallelism and Refusal to Deal*, 75 HARV. L. REV. 655, 663 (1962). Moreover, there is the "sand" from Footnote 59: "And it is likewise well settled that conspiracies under the Sherman Act are not dependent in any overt act other than the act of conspiring. It is the 'contract, combination . . . or conspiracy in restraint of trade or commerce' which § 1 of the Act strikes down, whether the concerted activity be wholly nascent or abortive on the one hand, or successful on the other." United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940) (internal citations omitted).

sation at all," opined a Sotheby's executive; "it's like two people selling tomatoes on the street. If one person raises or lowers their prices, the other one's going to follow."[24] And in this duopoly the Government had the ultimate proof of "plus" in the testimony of Brooks and Davidge connecting the two firms.

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III. *"The Sotheby's trial that began in November 2001 was one of the more elaborate legal he-said-she-said contests in corporate history."*[25]

The Elias Renthal-Alfred Taubman parallel ended when, unlike Elias, Taubman pleaded innocent.[26] To Taubman, it was a simple one-witness trial with a verdict riding on the testimony of former protégé Dede Brooks and the support of her Christie's counterpart. Brooks' credibility was undermined because "Alfred Taubman [was] Dede Brooks' get out of jail free card."[27] (It worked—she got six month's house arrest plus a $350,000 fine).[28] The obvious strategy for the defense would be a cross-examination emphasizing the questionable credibility of a turncoat employee—and one who owed her high profile career to the generosity of the accused. There was, however, a critical qualification: the success of this tactic depended on Taubman, the victim of the disloyalty, taking the stand to contradict the turncoat's accusations. This tactic was especially necessary because the case hinged on testimony about twelve private and unrecorded meetings.

IV. *"The question was whether they [the jury] credited the testimony of the two coconspirators that their principals met and agreed to fix seller's commission rates, and directed them to implement the details of such an agreement."*[29]

The decision to testify became more difficult, however, when it became apparent to Taubman's lawyers that their eighty-year-old client was having memory lapses, hearing problems, and instances of confusion.[30] This concern was compounded when the prosecution requested at least three days for cross-examination. Such a prolonged interrogation increased the risk that Taubman would display incriminating mental lapses. On the other hand, the defense was confident that their witnesses had undermined Dede's credibility by planting the "walking reasonable doubt" seed with the jury to justify a verdict for Taubman. Their surmise was endorsed by two mock jury trials conducted without Taubman's appearance that resulted in not guilty verdicts.[31]

According to one defense lawyer, "it was a very close call" that was ultimately settled by a jury expert who reasoned that "you can only hurt yourself . . . The jury *likes* him."[32] In other words, do

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[24] Mason, *supra* note 3, at 263.

[25] Alexandra Peers, *Tales of a Retailer: Doing Business with Conviction*, Wall St. J., Apr. 4, 2007, at D9.

[26] "The probation officer's report recommended no jail time, just probation and a fine. So I respectfully declined Judge Daniel's kind offer and kept my thoughts to myself." Taubman, *supra* note 1, at 170.

[27] *Id.* at 8.

[28] Mason, *supra* note 3, at 364.

[29] Taubman, 2002 U.S. Dist. LEXIS 6251, at *35.

[30] Mason, *supra* note 3, at 335.

[31] *Id.* at 336.

[32] *Id.*

not take a chance on a poor performance subverting the positive aura that his mere presence at the defense table had engendered. The jurors referred to the defense's jury consultant as "Eagle Eye" because of her role as an "expert" in jury selection.[33] She had the responsibility for analyzing the faces and mannerisms of the jurors "to detect whether they believed the prosecution's case or whether they were leaning toward the defense."[34] Like most jury experts she "prided herself on rarely losing a case."[35] Taubman's response: "I can't believe it's adequate for me not to take the stand and look them in the eye and tell them I didn't do it."[36]

As the architect of a $512 million private antitrust settlement from Sotheby's and Christie's based on the same script the Government was following, David Boies was a certified shadow expert, who, when asked how he would have handled the defense, advised the use of experienced executives to acknowledge the constant exchanges between CEOs.[37] Confronted with the twelve meetings between the two Chairmen: "You've got to have an explanation. It's like a morality play."[38] To Boies, a jury trial "is different."[39] He is right, with a modification: An *antitrust* jury trial is an abyss, with the ultimate verdict packaged in speculation.

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The abyss begins with an enigma—the 1890 Sherman Act that prompted Chief Justice White to interpret the prohibition of "every contract . . . in restraint of trade" to apply only to "unreasonable restraints" as defined by the "rule of reason."[40] The statute has a generality that encourages, or at the least tolerates shifting ideology-changing fashions of economic theory, the irrepressible seductive lure of populism, the landmines of state regulation, societal antitrust,[41] hip heterodoxy,[42] etc.—all infecting dialogue with mazy interpretations. As a respected judge once observed, "it is delusive to treat opinions written by different judges at different times as pieces of a jigsaw puzzle which can be, by effort, fitted correctly into a single pattern."[43] An indeterminate system even when stabilized by experienced judges descends into the abyss when a jury is added to the mix.

My experience in conducting four antitrust post-trial jury surveys has taught me that accurate predictions of jury verdicts are unattainable.[44] There are too many obstacles and imponderables. Comprehension is impeded by the intersection of competing voices, esoteric legal vocabulary,

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[33] *Id.*

[34] *Id.* at 320.

[35] *Id.*

[36] *Id.* at 336.

[37] *See* David Boies, Courting Justice ch. 9 (2004).

[38] Mason, *supra* note 3, at 348 (quoting Boies).

[39] *Id.*

[40] Standard Oil Co. v. United States, 221 U.S. 1, 60, 64–65 (1911).

[41] *See* Arthur Austin, *The Emergence of Societal Antitrust*, 47 N.Y.U. L. Rev. 903 (1972).

[42] Christopher Hayes, *Hip Heterodoxy*, The Nation, June 11, 2007, at 18.

[43] United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 342 (D. Mass. 1953). Judge Wyzanski relied on the expert counsel of economist Carl Kaysen, who subsequently published his analysis in Carl Kayser, United States v. United Shoe Machinery Corporation (1995).

[44] I have discussed these trials and surveys in Complex Litigation Confronts the Jury System: A Case Study (1984). *See also* Austin, *Second Trials*, Litig., Winter 1984, at 34.

Juror surveys in New Mexico and North Carolina (N. M. Natural Gas Antitrust Litg. v. S. Union Corp., 607 F. Supp. 1491 (D. Colo. 1984); Liggett Group, Inc. v. Brown & Williamson Tobacco Corp., 1990-2 Trade Cas. (CCH) ¶ 69,182 (M.D.N.C. 1990)) are discussed in Austin, *The Truth-and-Consequences of Jury Bonding*, Special Supplement to the N.J. L. J. (135 N.J. L. J.), Oct 4, 1993, at 26; *Another Viewpoint on Juries*, Nat'l L.J., Mar. 22, 1993, at 15; How the Dominant Juror Dominates, 21 Trial L.Q. 23, 23–24 (1991); and *The Jury System at Risk from Complexity, the New Media, and Deviancy*, 73 Denv. U. L. Rev. 51 (1995).

boredom, and what every litigator dreads: the unanticipated. In one case I studied, "a jury saw a lawyer writing a letter to his mother while a colleague was conducting an examination of a witness. From then on the entire jury disdainfully remembered this as the 'Dear Mom' incident."[45]

What do jurors expect from the marketplace and can those expectations permit a unanimous decision about alleged price fixing? The spectrum runs from left to right: from populism to a free market model, with contested hot points between. My first survey involved what I learned was an orthodox antitrust jury—a blue collar jury of high school, or less, academic profile. They hung five to one. The sole hold-out for acquittal was a staunch free enterpriser; her colleagues were dedicated populists. Hence the unpredictable composition from jury selection dictated the result. The second trial was a unanimous verdict by a united group of free market types. In all the surveys, jurors connected with the testimony by contouring the "facts" into their expectations of a "workable" market defined by ideological inclination.

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In the Sotheby's trial, there were several blue collar jurors—a postal worker, an aircraft mechanic, a subway token clerk, a forklift operator, a welfare worker, and a health care worker—but also a doctor, a gourmet store owner, and a Web site designer.[46] The profile reflects a populist, union perspective, guided by New York City "street" savvy. It was "not exactly a jury of [Taubman]'s peers."[47] One might nevertheless have expected the jury to sympathize with Taubman as the target of a government amnesty deal that allowed one crook to avoid jail by snitching on a former colleague. Taubman suffered the indignity of an Ivy League yuppie—his protégé—playing the role of the main prosecution snitch. To magnify the apparent unfairness, Taubman's alleged co-conspirator, Sir Anthony Tennant, was beyond the court's jurisdiction, leaving Taubman to take the hit. (Tennant denied in an interview with Mason that he—or Taubman—instructed anyone to fix prices.)[48] Because of his strategic importance, the Government maintained leverage over Tennant by not granting immunity, thereby assuring his refusal to enter U.S. jurisdiction to testify.

Nevertheless, a scan of the heavy media coverage suggests the conclusion that a populist jury rejected this interpretation, instead viewing Taubman as a stereotypical capitalist who "malled" the country then retired to acquire status in New York Society by using his mall profits to acquire Sotheby's. For Taubman the Art-Society mask provided quick access to "a patina of culture."[49] The class factor, hyped on a daily routine by the Page Six New York press and reinforced by a flow of aesthete witnesses unleashed the populist attitudes of the jury.

He describes the jury's resentment in terms of *Threshold Resistance*:

> I could feel it every day . . . I saw it in their eyes as they glared at me from the jury box. They didn't like me or relate to me. They mistrusted everything about the auction business. The prosecutors had done an excellent job of making the selling of art sound downright sinful. I was not a legal expert, but I was pretty good at sizing up people and assessing threshold resistance. There was plenty of work to do before these folks could ever rule in my favor.[50]

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[45] Austin, *Second Trials*, *supra* note 44, at 36.

[46] Mason, *supra* note 3, at 320.

[47] *Id.*

[48] *Id.* at 348–52. He also rejected the Government's interpretation of a certain April 30 memo: This group of papers couldn't possibly constitute instructions, because it doesn't say go out and do anything. It's not addressed to anybody. *Id.* at 351.

[49] John Taylor, Circus of Ambition 64 (1989).

[50] Taubman, *supra* note 1, at 165.

Jurors gravitated to the sanctuary of their experience and intuition, following the logic of the "shadow witness" Adam Smith, who, the prosecution told them in closing argument, had observed in 1776 that when rivals get together, whatever the context, the conversation turns to conspiracy—or in "some contrivance to raise prices."[51] Taubman was furious when the judge "allowed the off-the-wall, prejudicial quote [from Smith] to be read to the jury."[52] The trial court determined that the quote was of no consequence because the issue of "pluses" from the direct testimony of Brooks and Davidge was clearly before the jury.[53] While that is a correct statement of the plaintiff's burden of proof for "conscious parallelism plus," it overlooks the problem that the Smith reference could sway a jury confronted with blurred evidence on a "plus" issue. The Second Circuit recognized the potential implications of the issue with a warning:

> Indeed, were this a case where the Government asked the jury to infer the existence of or a defendant's participation in a price-fixing conspiracy, we might well have vacated the conviction and remanded for a new trial. We now consider the Government to be on notice that future uses of a quotation such as the one used in this case might well prove fatal to its case. In the instant case, however, the Government relied on the overwhelming direct evidence of Taubman's knowledge of and participation in the conspiracy, as noted above. Accordingly, we conclude that, in the particular circumstances of this case, the inclusion of the Adam Smith quotation in the Government's summation was harmless.[54]

Nevertheless, Taubman missed the irony that he had created an Adam Smith trap for himself by participating in twelve clandestine meetings with a fellow duopolist. The fact that the contacts occurred created an aura of mystery and a subliminal message that orthodox antitrust jurors would pick up. "If you meet twelve times," the Sotheby's jury foreman said, "you must be up to no good. It's common sense." "No it's not," the lone hold-out persisted, "We're not moving from this room until it's a not-guilty verdict." The response: "If they weren't doing anything wrong, they should have had someone in the room."[55]

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[51] "Now, a long time ago, a famous economist by the name of Adam Smith wrote in an economic textbook, and that was around the time that Sotheby's and Christie's were getting into business, he wrote: 'People in the same trade seldom meet together even for merriment or diversion, but the conversation ends in a conspiracy against the public and in some contrivance to raise prices.' The Government went on to say: Now, Mr. Smith is not a witness here obviously, but the truth of his insight is demonstrated by the actions of Taubman and Tennant in this case. Focus on the evidence we put before you. It established the three things that the court will instruct the government must prove: that the conspiracy existed, that Taubman knowingly and intentionally was a member of it, and that the intent was to unreasonably restrain interstate trade." *Taubman*, 2002 U.S. Dist. LEXIS 6251, at *49 (internal citations omitted).

[52] Taubman, *supra* note 1, at 166.

[53] "The only disputed element of the charged offense was whether the defendant A. Alfred Taubman knowingly and intentionally became a member of that conspiracy. The direct evidence presented by the Government was testimony of both Brooks and Davidge that Taubman and Tennant, the chairmen of Sotheby's and Christie's respectively, met with one another on several occasions and agreed to eliminate competition on a number of levels, including fixing sellers' commission prices. Both Brooks and Davidge unequivocally testified that they were directed by their respective chairmen to work out the specifics of the illegal agreement." *Taubman*, U.S. Dist. LEXIS 6251, at *3.

[54] United States v. Taubman, 297 F.3d 161, 166 (2d Cir. 2002).

[55] Mason, *supra* note 3, at 343.

V. *"With a sliding scale based on value, there should be no problem because you cannot price-fix a unique object."* (Sir Anthony Tennant)

"Social gatherings are an occasion for one of the least structured, but not ineffective, forms of collusion."[56]

Taubman's thought of antitrust was aimed only at hard core cartels.[57] According to Taubman's Antitrust, so long as direct discussion of pricing was off limits, he could "welcome" Sir Anthony to my London flat . . . with tea, orange juice, scones, and a clear conscience."[58]

Tennant and Taubman both were successful Capitalists, Tennant the Chairman of Guinness brewing " and Taubman a shopping mall titan. But both had gravitated to Art, not as a business endeavor, but to assuage a passion to achieve success in a field transcending ordinary commerce, "[w]here everything is an individual work of art."[59] While capitalists may fix prices, devotees of Art seek beauty.

Antitrust, as a product of industrialization and smoke filled rooms was irrelevant to the Art.[60] There were, for the two Chairmen, no antitrust issues because, as Tennant observed: "you cannot price-fix a unique subject." And, in a market with only two major players," one had to meet."[61] To the bitter end Tennant asserted that the meetings were lawful and his duopolist friend was innocent. Neither of the hardnosed capitalists expected the catastrophic effects of testimony from the grave. It was a replay of the Gary Dinners, 1907–1911, which, under Judge Gary, President of U.S. Steel, rivals met monthly "to maintain to a reasonable extent the equilibrium of business, to prevent utter demoralization of business and destructive competition."[62] It was a cooperative arrangement, i.e., Gary mentioned a price and the "guests" followed, "fully realizing that cooperation was more profitable than competition."[63]

IV. Conclusion

Taubman's demise was assured when he elevated Dede Brooks to CEO, despite questions about her character. She was thus positioned to play a self-serving role in dealing with the antitrust investigation. By the time of a possible trial appearance, Taubman's health was too suspect to chance a strenuous rebuttal session on the stand enabling Brooks to throw him under the bus in exchange for a modest six-month home detention. ●

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[56] F. M. Scherer, Industrial Market Structure and Economic Performance 159 (1970).

[57] *See* Turner, *supra* note 23.

[58] Taubman, *supra* note 1, at 143.

[59] Mason, *supra* note 3, at 151.

[60] *E.g.*, The incorporation of people into "living art." For example, in one exhibit, three men were suspended from harnesses attached to a wall. In front of an audience they spray painted themselves with car paint. The philosophy: "You see . . . the traditional relationship of the viewer to a work of art is 'I can make any assumption I want to, critical of the work or the artist.' This piece challenges that view. You look at the paintings critically. They look at you the same way." Treban, *Not So Still Life*, Village Voice, Feb. 16, 1988, at 16 col. 2.

[61] Mason, *supra* note 3, at 349.

[62] Walter Adams, The Structure of American Industry 150 (rev. ed 1954). *See* United States v. U.S. Steel Corp., 251 U.S. 417 (1920).

[63] Adams, *supra* note 62, at 151 (quoting Adam Smith). "Judge Gary once explained that the 'close communication and contact developed at these dinners generated such mutual respect and affectionate regard' among steel industry leaders that all considered the obligation to cooperate and avoid destructive competition' more binding . . . than any written or verbal contract.'" Scherer, *supra* note 56, at 159.