THE TANGLED ROOTS OF REGULATION IN MARKETING: A HISTORY OF THE COMMON CALLING

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ABSTRACT

This paper examines an ancient justification for the regulation of marketing and other dimensions of commerce: the concept of the common calling. The authors trace the roots of the common calling to medieval times, outline its eventual evolution into the common carrier, and discuss how policy makers through the years have used it to grapple with the often contradictory interests of both private enterprise and the public welfare.

INTRODUCTION

It is well-recognized that many of the laws which apply to present-day marketing activities have derived from what is called "common law." In the most basic sense, common law comprises "judge-made" law, the law which is not statutory but rather is determined by decisions made in cases. Common law in the United States derives from court-made law of England, and many statutes which regulate marketing find their ancestry in common law rhetoric and philosophy.

The purpose of this paper is to trace the origins of a specific theory of law, the "common calling," through its English common law inceptions and to show many of the impacts of the common calling as it has been interpreted in court decisions and applied in statutes related to marketing activities.

Enterprises recognized as common callings have from antiquity been identified as having peculiar positions in an economy. As a result, those enterprises have merited unique dimensions of governmental control. Vestiges of the common calling ideology, as it has survived interpretation and codification over the course of several centuries, continue to be manifested in the regulation of commerce.

COMMON CALLINGS: DEFINITIONS AND ORIGINS

Although specific origins of the common calling concept are murky, general beginnings are evident. The idea of the common calling seems to have developed as a result of the desire to control trade guilds and other monopoly-producing behaviors of merchants.

The theory of public callings was recognizable as the foundation for statutory law at a very early point in time. In Plantagenet England (1154-1485), the medieval system was beginning to break down, while what is called the "modern organization" was beginning to emerge. During this period, society and the economy began to dramatically change.

INNKEEPING

The innkeeper has, from the earliest time, been recognized as being engaged in a public employment and, therefore, as subject to the duty of one engaged in such employment. In the Middle Ages, there was a surprising amount of traveling; the roads, while nearly impassable for loaded wagons, supported considerable foot and horseback traffic. Transportation of food and goods was undertaken largely by packhorse. The roads were not only bad, but they were also infested with outlaws and robbers of many sorts. Between villages were long stretches of forest that were sanctuary to these outlaws. Attacks on travelers occurred most often at night. As a result, travelers carried the lightest weight necessary, and they had to secure protection at night from the robbers and other miscreants. At the proper place on every main road, houses were devoted to the business of providing food, drink,

and safe lodging. Thus was born the English inn (Jusserand 1961).

Because the innkeeper had undertaken a "public" business, the purpose of which was to provide sustenance, rest, and shelter, a public need was concerned. The "custom of the realm" then required innkeepers to provide these services to all, and in order to perform the services, the innkeeper had to furnish not only food and a tight roof, but also sufficient protection against the apparent perils of rural travel. To refuse shelter, to fail to provide food, or to permit brigands from outside to enter the inn would be a breach of his obligation and would render him liable to legal action. Because most of the guests at an inn slept in a common room, the innkeeper was also compelled to safeguard his lodgers from strange bedfellows within the inn (infra hospitium).

THE GUILD SYSTEM

The same set of obligations applied to all other types of enterprise. Given the limited number of trades and the shortage of craftsmen, trade guilds had eagerly set up monopolies: "... in 1180 no fewer than nineteen such adulterine, gilds [sic] were reported in London alone" (Salzman 1914, p. 225). Indeed, some professions were of critical importance and well into fifteenth century England, professional men of any sort were rare. For example, most often only one surgeon would be at hand in any one district, so that if he should refuse to bleed the patient, all might be lost. This was in part due to the "rudeness" of the time: education was the exception, so that necromancers, rather than physicians were the rule.

THE PLAGUE

Compounding this monopolistic situation was what amounted to a further reduction of the number of laborers. In 1348, the Black Death swept across England, eradicating a huge proportion of the population (Biddle 1995). Surviving laborers and tradesmen of all kinds found themselves in positions to exact any price they pleased for their services (Arterburn 1927).

THE STATUTES OF LABOURERS

Merchants attempted to obtain monopolies of the sale of their commodities, "and it was necessary to check their aggression by law" (Abram 1913, p. 81), so whenever there was evidence of monopolistic tendencies, the offending business or craft was regulated under the auspices of what was considered the public good. Edward III (1327-1377) was exceedingly enterprising in his commercial policy as shown by the statutes of his day. The most significant of these were the Statutes of Labourers, engaging applications of "public callings" beginning in 1349. The fundamental principles found throughout all of these statutes articulated the customs of the realm, and enunciated the fundamental elements of the common calling: all must work who are able, they must do so at a reasonable rate, and none could refuse to practice his calling to whomever sought it.

For example, there were frequent complaints of excessive prices to the point where the people petitioned Parliament and, in 1350, King Edward III responded by declaring a statute which was intended to constrain "hostelers and herbergers" to sell food at reasonable prices. In 1354, a further edict attempted to prohibit the "great and outrageous cost of victuals kept up in all the realm by innkeepers and other retailers of victuals, to the great detriment of the people travelling through the realm" (27 Edward III, ch. 3).

In 1363 it was enacted that handicraftsman should pursue only a single craft (37 Edward III c. 6). This was to prevent them from changing from one trade to another in order to avoid the restrictions of a particular trade. Further statutes prohibited forestalling, regrating, conspiracies to raise prices, guild ordinances to secure monopolies of trade, and other practices. Statutes also regulated prices and penalized all trades for refusals to serve. A very wide variety of businesses were considered "common;" indeed, virtually no business was considered beyond the scope of government control. This seems to have been the early test of a public calling (Adler 1915). Fitzherbert wrote in 1514 that "... it is the duty of every artificer to exercise his art rightly and truly as he ought" (p. 94). The duty to serve was the essence of the regulation of the time. This parliamentary and judicial control of business appears to have continued unchallenged well into the 17th century (Arterburn 1927; Adler 1914).

DEVELOPMENT OF COMMON CALLING DOCTRINE

As trade began to increase and royal power declined, the trade regulation continuum moved from tight restriction with minimal freedom to freedom of commerce under some restriction (Wyman 1903). Numerous common law cases began to enunciate laws in which tradesmen in private business could elect to supply a customer or not, whereas those in the public callings were compelled to serve anyone who tendered payment.

In 1670, Lord Chief Justice Matthew Hale wrote that the ports of England were touched by three types of rights. Hale denoted these as *jus regium, jus privatum,* and *jus publicum. Jus regium* was the prerogative of the king, which should be understood as more analogous to the interests of a centralized government than as a proprietary right held by the king qua king, as superintendent to the other two. This right allowed the nobility to assign what were known as "franchises." For example, when explaining why seaports could not be erected without royal permission, Lord Hale commented that

> the safety of the kingdom, the commerce of the kingdom ... are concerned in it. Merchants and seamen of all parts and quarters of the world are let into the kingdome publicly, and under the publick protection in a publick port; and consequently it is not within the extent of a jurisdiction palantine *de novo* to erect a publick port (Hale 1787, p. 53).

The interaction between Hale's two remaining types of rights introduced the concept of public interest in privately held business. While the operator of a wharf or dock was free to profit from his proprietary interest (*jus privatum*), Lord Hale held that the *jus privatum* was "cloathed and superinduced with a jus publicum" (p. 84). Lord Hale argued that the public right conflicted with and superseded the private right in ports inasmuch as:

1. They ought to be free and open for subjects and open for subjects and foreigners, to come and go with their merchandise ...

2. There ought to be no newe tolls or charges imposed upon them without sufficient warrant, nor the old inhanced ...

3. They ought to be preserved from impediments and nusances, that may hinder or annoy the access or abode or recess of ships, and vessles, and seamen, or the unlading or relading of goods.

In *The Analysis of Law* (1713), Lord Hale explained and developed the concept of a private business affected by a public interest. He wrote that actions arising under a theory of implied contract could be brought against "[p]ersons that undertake a Common Trust," including common hosts, common farriers, and common carriers. From Lord Hale's early writings come two important aspects of a private business that serves the public interest: the infusion of *jus publicum* into an otherwise private undertaking, and a duty to perform the service in a manner that complies with public expectations. Hale's explanations of common callings were to be used to a great degree in court decisions many decades later.

Smith, Dowling, and Hale (1936) observed that as the power of the middle class increased during the 18th century, the desire to be free from governmental interference, and the industrial revolution, led to the entrenchment of *laissez-faire* economics in the promulgation of the Constitution of the United States. Paternalism and mercantilism were rejected, and state control of "private" business was deemed a violation of "inalienable rights." Gradually, the number of businesses considered common callings decreased; however, a recognition remained until at least the end of the 18th century of the exclusive public position of businesses such as transportation and innkeepers (Basedow 1983). By the 20th century, the common business concept was still applied to transportation and utilities. For example, in *German Alliance Ins. Co. v. Kansas,* a 1914 U. S. Supreme Court case involving insurance rates, Justice McKenna wrote that even though there is a public interest aspect to all commercial transactions, those of transportation and utilities are most unique, justifying their regulation.

DEVELOPMENT OF THE "COMMON CARRIER"

English and early American jurisprudence largely defined common carriers in the context of special liabilities attached to those that were defined as such. Although the liabilities of common carriers remained unsettled for some time (Angell 1849), a working definition of common carrier emerged as early as 1710 (*Ginsbourn v. Hurst*, 1 Salk. 249, 91 *English Reporter* 220): "any man undertaking for hire to carry the goods of all persons indifferently ... is ... a common carrier" (p. 220).

By the mid-1800s, working definitions had amalgamated into something of a standard. Chitty and Temple wrote in 1857 that to render a person liable as a common carrier, he must exercise the business of carrying as a 'public employment,' (Chitty and Temple 1857, p. 14-15).

Statutorily, Congress did not immediately resolve the confusion concerning common carriers of communications, but did enact the Interstate Commerce Act in 1887, codifying the duties and liabilities of transportation common carriers (ICA, 24 Stat. 379, ch. 104). Although the Interstate Commerce Act initially dealt exclusively with railways, it is integral to the history of communication common carrier law because it served as Congress' initial model for regulating communications (S. Rep. 781, 73d Congress 2d session, p. 2 [1934]), providing many of the definitions found in the Communications and Radio Acts.

Although Congress did grant the Interstate Commerce Commission the power to regulate telegraph companies, the matter of whether telegraph companies were considered common carriers did not arise. Further, the ICC's authority extended only to those telegraph lines that had been subsidized by the government. It was not until the passage of the Mann-Elkins Act of 1910 that telegraph and telephone providers were decreed to be common carriers (the Act does provide a list of services which are considered to be common carriers, however, the list does not provide a definition of the term).

RECENT INFLUENCES ON REGULATIONS IN THE UNITED STATES

The common or public calling theory has been invoked many times over the last two centuries. Courts at all levels have struggled to define what types of businesses comprise common callings; statutes which have employed the common calling terminology have most often bypassed specific definition but have embraced the concept.

It has required unmeasurable effort for courts to decide exactly what constitutes "public calling." However, it became important as some industries became very large, and the distinction needed to be made as to what degree these businesses would or could be regulated. In American common law, through many court cases, the tests which provided distinction between public and private business was disclosed through cases involving many industries which have since become known as utilities: gas companies, telephone, water companies, electric. Indeed, the progression from laissez-faire to regulated industries at many levels was manifested through these cases.

AMERICAN COURT DECISIONS: WHAT COMPRISES A "PUBLIC CALLING?"

Court decisions at the federal and state levels provide a circuitous route through varying philosophies as to what was appropriate government intervention in the affairs of business. By deeming a business a common calling, government could regulate many aspects of the business.

U.S. Supreme Court

The United States Supreme Court cases discussed below provide evidence of how the philosophy of the role of government has changed and how different business types have been included or excluded from the public callings and resulting government regulation. This occurred within the context of vast changes in the economy and in new technologies which affected many business practices.

Munn v. Illinois. The common calling issue was at the center of a landmark 1877 Supreme Court case concerning due process regarding property, *Munn v. Illinois* [94 U.S. 113]. The case involved a 14th Amendment

challenge to state-level constitutional and statutory provisions which regulated the prices of large grain elevators in Chicago. The 7-2 split by the Court essentially reflected a debate of what constituted a "public" versus a "private" business. Writing for the majority, Chief Justice Waite held that certain businesses may be subject to legislative regulation because they are "clothed in the public interest," (p. 86) and were, in effect, common callings. In his dissent, however, Justice Field questioned the point at which a business becomes liable for the public interest. He said the Court's ruling meant anyone offering property for commercial purposes was subject to legislative "invasion of property rights" (p. 89).

Regarding the public interest, Justice Waite reached into a principle of English common law he said was unchallenged since written by Lord Chief Justice Hale in his 17th century *De Portibus Maris* (Law of the Sea). Justice Waite wrote:

> When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control (p. 84).

In defining a public or common calling or a common carrier, the Court seemed to imply two standards: governmental charter or "virtual monopoly" (page 86). Given their importance to the public, transportation entities such as ferries had long required governmental authorization and regulation. According to Justice Waite:

> ... if one owns the soil and landing-places on both banks of a stream, he cannot use them for the purposes of a public ferry, except upon such terms and conditions as the body politic may from time to time impose; and this because the *common good requires that all public ways shall be under the control of the public authorities* (p. 84, emphasis added).

The Court derived some of its arguments for the monopoly principle from *De Portibus Maris*. According to Lord Hale, a man is free to charge whatever he pleases for use of his non-government chartered wharf or crane, unless there is no other wharf or crane available. In effect, businesses without a monopolistic characteristic presumably are not common callings; businesses reflecting some dimension of monopoly are common callings and must be regulated. The *Munn v. Illinois* ruling also cited an 1810 case involving the London Dock Company [*Aldnutt v. Inglis*, 12 East, 5271, which used the term "virtual monopoly" (p. 539), and from which Justice Waite applied the following argument from Lord Ellenborough:

> There is no doubt that the general principle is favored, both in law and justice, that every man may fix what price he pleases upon his own property, or the use of it; but if for a particular purpose the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must, as an equivalent, perform the duty attached to it on reasonable terms (p. 537).

Even though it had apparently found a workable definition of a common calling, the Supreme Court hedged regarding the facts of *Munn v. Illinois*. The Court said the fourteen grain elevators in question "*may* be a 'virtual' monopoly" in their handling of large amounts of grain shipped through Chicago (p. 86, emphasis in original).

Other Supreme Court cases. The high water mark of the doctrine of legislative declaration in the law of public callings was reached in *Brass v. North Dakota* (1894), a case also involving grain elevators. The court in this case decided that the elevators, by legislative edict, were public callings, even though the elevators did not comprise a monopoly. In cases that followed, other types of business, including fire insurance (*German Alliance Insurance Co. v. Lewis* 1914) had an obligation to the public, through "practical necessity" and virtual monopoly. Through these cases, it is evident that the depth of government control could be expanded, in terms of simply applying the term "common calling" to a business, but also the breadth of the types of businesses which could be brought under the "common calling" definition could be greatly enlarged.

However, the trend seemed to begin to reverse itself, when, in *Wolff Packing Co. v. Court of Industrial Relations* (1922) the court held that a business could not be made affected with a public interest simply through legislative declaration. Instead, the court asserted that to fall under the public callings a business must be one of the following:

1) Carried on under a grant of privileges (for example, the provision of eminent domain) which expressly or implicitly imposed the duty of rendering a public service,

2) An occupation which had survived the period when all trades and callings were regulated,

3) Have a peculiar relation to the public because of the indispensable nature of its service and the control it might subject over prices.

This test established parameters for the implementation of the common calling theory.

State court cases: an even broader umbrella. The various state courts also had to decide which businesses had undertaken public callings. The New Jersey Court of Errors and Appeals explained that "a business, private at its inception, may become affected with a public interest, [and] it is immaterial" whether the "public" nature of the business was defined legislatively or in the judiciary (*McCarter v. Firemen's Insurance Co.* 1909, p. 379). A variety of transportation forms were brought under the common carrier definition. Taxicabs were almost universally held to be common carriers (*Melconian v. City of Grand Rapids* 1922; *McKellar v. Yellow Cab Co.* 1921), as were express companies (*Buckland v. Adams Express Co.* 1867). However, interpretations varied as to the status of freight forwarders: that they were common carriers was decided by courts in Iowa (*J.H. Cownie Glove Co. v. Merchants' Dispatch Transport Co.* 130 Iowa 327, 1906) and Washington (*Kettenhofen v. Globe Transfer & Storage Co.*, 70 Washington 645, 1912), while the Illinois court decided to the contrary (*Blair v. American Forwarding Co.* 1911, 159 Illinois Appelate 511).

While early common law definitions of "common carrier" assumed that the entity in question actually carried "something," during the middle and late 19th century some commentators and courts struggled to incorporate telegraph and telephone service within the domain of the common carrier concept. Metaphorically, the new communications technologies also were found to be "like" transporters, with much of the equivocal distinction. A telephone company was deemed to be a "common carrier of news" in one state court (*State v. Nebraska Telephone Co.* 1885). A court in the state of Vermont determined that telegraph and telephone were compelled to serve all impartially, because they were "common carriers of speech for hire,, (*Commercial Union Telegraph Co. v. New England Telephone & Telegraph Co.* 1888). Other states, however, were to determine that telephone and telegraph companies were not common carriers, but could be regulated instead on the basis of the privileges which they were granted in terms of eminent domain (*State, Trenton, etc., Turnpike Co. v. American etc., News Co.* 1881).

OBSERVATIONS AND CONCLUSIONS

The theory of common callings, as it has continued to be applied in both judicial and statutory law, has had a vast impact on marketing regulation. From a historical perspective, it is perhaps most important to recognize that common law is not the "source" of the common calling theory. Rather, common law has been the vehicle through which the theory has been carried and manifested. Statutes using the theory have often failed to directly define a "common calling," yet the term and its implications as imparted through the judiciary continue to be dramatic in their impacts. As Wyman (1921) wrote:

> [Tlhe constitutional validity of legislative control is conclusive evidence of the persistence of the common-law principles regulating public employments. The common law persists from age to age, and though the instance of its rules may seem to change as old conditions pass away and new conditions arise, its fundamental principles remain (p. 17).

New or unconventional technologies may demand creative applications of well-developed legal doctrine.

Policy makers have had to use varied levels of abstraction in applying the common calling theory to a particular industry. For example, in the late 19th century, electricity was deemed to be "like" gas, and telephones were "like" stagecoaches, in terms of their common calling status. In 1903, Wyman wrote:

> It is at present time difficult to predict what branches of industry will eventually be held of such public consequence as to be included in the category of public callings, because in the last few years the field has been extended so widely before our very eyes (pp. 166-167).

While the 19th century comparison of telephones to stagecoaches today seems quaint, contemporary observers are no more sophisticated when faced with new technologies. For example, consider the internet. Obviously a common carrier, this emergent communication system presents policy makers with knotty problems regarding open access (for children, for instance), alleged addiction, freedom of expression, privacy, security, pornography, stalking, and fraud. The Victorians described their telephones as being like stagecoaches, but what have we determined the internet to be like?

Technological competition -- creative destruction -- may come from within an otherwise "common" calling industry. For example, post-World War II development of microwave transmission systems, digital computers, and satellite communications negated the economies of scale which were thought to be an intrinsic characteristic of common carrier communications. *Munn v. Illinois* made Hale's "virtual monopoly" an integral basis of American business regulation. Wyman (1903) also argued that virtual monopoly makes a business a public calling, imposing on the business the peculiar duties of providing reasonably priced, undiscriminated service to all. However, Adler (1914) argued that "[u]nder a true interpretation of the common law all *business is public,* and the phrase 'private business, is a contradiction in terms" (p. 158, emphasis added).

Despite common law and statutory decisions regarding the common calling and its responsibilities with respect to society, there has been no clear definition of a "common calling.,, In some aspects, an exact definition may not be possible, and perhaps not desirable, similar to metaphorical situations surrounding "pornography" or "anticompetitive behavior." That is, it often cannot be defined, but we know it when we see it.

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