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STANDARDS FOR ANTITRUST POLICY[†]

Alfred E. Kahn[*]

ACADEMIC economists have in the past frequently criticized the antitrust authorities for their inactivity and the laws themselves for their impotence in dealing with big business.[1] Recently, however, increasing numbers of them have been attacking antitrust policy from the opposite direction, asserting that the application of the laws is too strict and the zeal of enforcement agencies excessive and misdirected, in so far as the treatment of business size, integration, and competitive tactics is concerned.

A number of interrelated historical developments explain this relatively novel line of criticism. One was the depression of the 1930's, which reinforced a skepticism, earlier voiced by the "institutionalists," concerning the efficiency, stability, and recuperative power of an uncontrolled, purely competitive market economy and hence cast doubt on the basic validity of any attempt to limit monopolies.[2] A second factor has been the dynamism of the American economy since 1940, shared, and in some instances led, by its most clearly oligopolistic industries. Another factor has been the pressure, greatly intensified during the depression, on legislatures and courts to broaden the scope of "unfair competition" to the point where established business units are protected from competitive extinction, no matter how well deserved. All these developments have helped educate economists to the inadequacy of pure competition as a condition of effective market performance or as a goal of public policy. Recent antitrust suits and decisions,

[†] The writer wishes to acknowledge the helpful suggestions and criticisms of Joel B. Dirlam, and the inspiration of Myron W. Watkins.

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[1] See, *e.g.*, ELIOT JONES, THE TRUST PROBLEM IN THE UNITED STATES 493–98, 563 (1921); WATKINS, INDUSTRIAL COMBINATIONS AND PUBLIC POLICY 253–73, 289–91 (1927); KEEZER AND MAY, THE PUBLIC CONTROL OF BUSINESS 49–57, 95–96, 233–34 (1930); BURNS, THE DECLINE OF COMPETITION *passim* (1936).

[2] See, *e.g.*, New State Ice Co. v. Liebmann, 285 U.S. 262, 282, 292, 305–11 (1932) (dissenting opinion of Brandeis, J.); J. M. CLARK, STUDIES IN THE ECONOMICS OF OVERHEAD COSTS c. 21 and *passim* (1923); Hamilton, *The Anti-Trust Laws and the Social Control of Business* in THE FEDERAL ANTI-TRUST LAW, A SYMPOSIUM 3 (Handler ed. 1932); Boulding, *In Defense of Monopoly*, 59 Q.J. ECON. 524 (1945).

because they appear to some to have been guided by the norms of purely competitive market structure and behavior, have helped to crystallize these developing attitudes into open criticism of the Department of Justice and the Federal Trade Commission. Though no consensus representing a consistent critique of the laws has emerged, there is fairly widespread agreement that the economist's conception of workable competition calls for a reorientation of antitrust policy.

The present essay seeks to evaluate these latter-day criticisms by appraising the alternative standards for public policy which they suggest. The various possible standards are first outlined, compared, and evaluated — the approaches of both the "new" and the "old" Sherman Act and the alternative economic standards more recently suggested. There follows a consideration of the problems of public policy raised by the structure, market impact, and competitive tactics of big, integrated businesses, and finally an attempt is made, on the basis of this analysis, to set forth the kinds of legal standards that may best be applied to them.

What follows represents, in general, an affirmation of the theory of the antitrust laws and a defense of recent developments in their application to "big business." The defense is not unqualified — it could hardly be, in view of current uncertainties and inner contradictions. Nor is the intention to minimize the conflicts and problems which have inspired and in some measure justified recent criticisms. However, the argument springs from a feeling that many of the critics have themselves lost a balanced perspective. It is first contended that the law has not changed so much as some commentators have implied — though there has certainly been some tendency for the courts to dilute the rule of reason in line with earlier criticism by economists that the rule had been so interpreted between 1911 and 1933 as to render the laws impotent.[3] Secondly, it is argued that a recognition of the purposes and requirements of a "rule of law," and of the limited applicability of "economic" criteria, counsels greater moderation in these attacks.

[3] See the materials cited *supra* note 1 and Watkins, *Business and the Law*, 42 J. POL. ECON. 178 (1934). The conviction is now widespread among economists that the law attacks business size and integration or mere unexercised market power. See the remarks of Kaplan and Nourse, appearing in *The Economics and Legality of "Bigness,"* 5 CURRENT BUS. STUDIES, 22, 50 (1950); Adams, *Is Bigness a Crime?*, 27 LAND ECON. 287 (1951); Lilienthal, *Our Anti-Trust Laws Are Crippling America*, Colliers, May 31, 1952, p. 15.

I. LEGAL AND ECONOMIC APPROACHES TO THE MONOPOLY PROBLEM

A. The "New Sherman Act" — No Revolution

In a society grounded in individualism, the function of government consists very largely of setting boundaries to individual action. For the free enterprise area of the economy, the law merely fixes the rules of the game. The antitrust laws involve the Government in no entrepreneurial activity proper and require no detailed review of either basic investment commitments or run-of-the-mill business decisions. Instead, appropriately, they proscribe specific actions deemed socially undesirable: contracting, combining, or conspiring to rig the market, as well as monopolizing, discriminating, selling under tie-in schemes, and competing unfairly, whether in concert or independently. These prohibitions may be summarized as embracing the substantial elimination of competition by collusion or exclusion. Of these offenses "monopolizing" is by all odds the most equivocal. It might be taken to forbid mere possession of monopoly power and hence to outlaw a market situation rather than a course of conduct. In fact it has been clear, at least until recently, that monopolizing meant the acts incident to attempts to acquire or maintain substantial monopoly power.[4]

Has the "new Sherman Act" abandoned this conception of monopolizing? Does it now attack monopoly power itself, as many of its friends and foes alike proclaim? It would appear not.

The two cases in which the courts have come closest to condemning monopolies *per se* were those involving Alcoa[5] and the United Shoe Machinery Corporation.[6] However, both opinions explicitly confined their application of a greatly diluted rule of reason to companies approaching pure monopolies — accounting for something like 90 per cent in the first, "probably 85%" in the second, of the national supplies of a physically distinct product. Moreover, even in these extreme cases, the courts paid at least lip service to the necessity for sustaining a charge of monopolizing, rather than of mere enjoyment of a monopoly. "It does not follow because 'Alcoa' had such a monopoly, that it 'monopolized' the

[4] See Mason, *Monopoly in Law and Economics*, 47 YALE L.J. 34, 44 n.26 (1937); Watkins, *The Sherman Act and Enforcement — Discussion*, 38 AM. ECON. REV., PAPERS & PROC. 203, 206 (1948).

[5] United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

[6] United States v. United Shoe Mach. Corp., 110 F. Supp. 295 (D. Mass. 1953).

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ingot market . . . monopoly may have been thrust upon it."[7] In both cases, besides, there was abundant evidence of *conduct* on the part of the defendants indicating plainly an intent to make aluminum and shoe machinery their respective preserves. Except for the squeeze on fabricators, Judge Hand minimized this evidence in the *Alcoa* case. But Judge Wyzanski, while placing a very narrow interpretation on the "intent to monopolize" requisite for Section 2 conviction, plainly predicated his condemnation of United Shoe on his finding that the company had not attained and maintained its "overwhelming strength" solely by virtue of its "ability, economies of scale, research, natural advantages, and adaptation to inevitable economic laws." Rather, its "own business policies," its *actions*, while not inherently predatory or immoral, had "erected" substantial "barriers to competition." "[These] are contracts, arrangements, and policies which . . . further the dominance of a particular firm. In this sense, they are unnatural barriers; they unnecessarily exclude actual and potential competition; they restrict a free market."[8]

In the other leading cases, it is even more clear that the offense of monopolizing consisted not in the mere enjoyment of monopoly power, let alone "the displacement of inferior by superior business methods,"[9] but in an unreasonable course of conduct, involving a consistent effort to obtain or maintain market control by methods other than those of normal competition. In the famous *American Tobacco*,[10] *Paramount*,[11] and *Griffith*[12] cases, in which the Supreme Court held it sufficient for condemnation under Section 2, the monopolizing section, to show the existence of a power to exclude competitors, it added the proviso that the power had to be accompanied by an intent to use it. In all three, the existence of both the power and the requisite intent was found in a course of conduct — a history of the actual unreasonable use of monopoly leverage to exclude competitors from the market.

Several commentators have read the Supreme Court's decision in the *Tobacco* case as holding that "monopolizing" might consist in the mere joint power to raise prices and not merely in the power

[7] 148 F.2d at 429.

[8] 110 F. Supp. at 344–45.

[9] Adelman, *Integration and Antitrust Policy*, 63 Harv. L. Rev. 27, 50 (1949).

[10] American Tobacco Co. v. United States, 328 U.S. 781 (1946).

[11] United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948).

[12] United States v. Griffith, 334 U.S. 100 (1948).

to exclude.[13] Had the Court said this, the legality of all oligopolistic markets would truly have been jeopardized. But the issue before the Supreme Court was simply this: is actual exclusion of competitors necessary to establish a Section 2 violation? The Court said it was not; the Government had to prove only that the companies had conspired to obtain and maintain the power to exclude and had demonstrated an intent to use that power.[14]

B. Monopoly in Law and Its Rationale

The economic rationale of the law rests on two assumptions. The first is that the will to "get ahead," to outdo others — in short to compete — is so strong and so widespread that it needs only to be channelized by negative prohibitions. The second is that cost functions and optimum business size are such, in most industries, that out of fair rivalry the numbers of sellers and buyers emerging will not be so small as seriously to weaken the force of competition in the market. These assumptions have often been questioned[15] but seldom refuted on the basis of concrete examinations of the structural pattern and performance of specific industries. From these assumptions it follows that the law need only prevent the deliberate impairment, misdirection, or suppression of competition to protect both the public interest and the legitimate interests of business competitors.

The common law rules dealing with restraints of trade and unfair competitive practices were concerned less with protecting the consumer than with protecting businessmen from one another. The antitrust laws sought both ends, finding no incompatibility

[13] "The essence of the offense under Section 2, Justice Burton said, is whether 'power exists to raise prices or to exclude competition when it is desired to do so.'" Rostow, *Problems of Size and Integration* in BUSINESS PRACTICES UNDER FEDERAL ANTITRUST LAWS 117, 121 (1951) (hereinafter cited as 1951 CCH SYMPOSIUM).

[14] Rostow's quotation from the majority opinion is of course correct, but there is no support in this isolated dictum, considered in its context, for the implication that the Court held illegal the mere joint power to raise prices in the absence of conspiracy. Even Justice Douglas, speaking for the majority in the *Griffith* case, made it perfectly clear that the owner of the sole theater in a town, while certainly a monopolist, does not on that account alone offend against the Sherman Act. United States v. Griffith, 334 U.S. 100, 106–07. Compare this view with Adelman's statement, in support of which he cites this same case: "It is now established doctrine that 'unreasonable' control over any local market, or any significant area of interstate commerce, is illegal." *Integration and Antitrust Policy*, 63 HARV. L. REV. 27, 48 (1949).

[15] See, *e.g.*, GALBRAITH, AMERICAN CAPITALISM c. 4 (1952); Levitt, *The Dilemma of Antitrust Aims: Comment*, 42 AM. ECON. REV. 893–95 (1952).

between them. The recent critics of our antitrust policy argue, essentially, that the enforcement agencies have confused the two and in consequence weakened the force of competition. Unfortunately, as we shall argue below, the distinction between preserving competitors and preserving competition is by no means so clear or so easily drawn as is implied both by the rationale of the antitrust laws and by the contentions of those economists who have been criticizing antitrust enforcement agencies for failing to draw it.

C. The Market Structure Test of Monopoly

(*1*) *Its Nature.*—Economists have developed two fairly distinct tests of monopoly. One looks to market structure for evidences of those characteristics from which, according to the theory of the firm, undesirable results follow. The other criterion applies the maxim "by their fruits ye shall know them." It may begin by identifying structural impurities, but its primary emphasis is on the economic record, that is, market performance; only if the results are "bad" is the monopoly power deemed excessive.[16]

Of these two concepts, it was the former which alone underlay Professor Mason's well-known contrast of "monopoly in law and economics." Following Chamberlin, he observed that to the economist "monopoly" describes a market situation in which an individual seller has the power to influence price. Such exploitative monopoly power may arise without collusion or exclusion, the traditional legal evidences of monopoly. Conversely, illegal actions may fail to create the exploitative power which alone signifies monopoly to the economist. Though Mason judiciously made no such recommendation, one possible implication of the contrast he drew was that the focus of the "antiquated and inadequate" law should be altered to conform to the theory of imperfect competition, and of oligopoly in particular.[17]

Other economists have drawn this implication and have urged that antitrust policy ought to be directed not only against single sellers, but also against oligopoly or market power *per se*. Profes-

[16] The two tests are not mutually exclusive; it is seldom suggested that either be applied without consideration of the other. Both assume that a radically imperfect market structure will sooner or later produce a defective performance. However, it is clearly one thing to apply judgments to a market situation *per se* and quite another to attempt to evaluate the results, judging the structure mainly in terms of those findings.

[17] Mason, *Monopoly in Law and Economics*, 47 YALE L.J. 34, 39–46 (1937); see also Mason, *Methods of Developing a Proper Control of Big Business*, 18 ACAD. POL. SCI. PROC. 40 (1939).

sor Arthur Burns' monumental proof of the "decline of competition," which is really only a thorough demonstration of the absence of pure competition, concludes that direct public regulation is required to do the job which competition no longer does; on the other hand, Professor Eugene Rostow, finding similar tendencies in industrial structure and market behavior, argues that the laws should attack monopoly power *per se*, and has found in recent antitrust decisions evidence of such a trend.[18] Professor J. K. Galbraith has clearly declared that the antitrust laws are defective because they cannot reach non-collusive oligopoly,[19] and Professor M. A. Adelman has stated that "until and unless we decide that the real problem is market control and how much and what kind we ought to permit, the situation will remain confused." [20] Regardless of their differences, implicitly or explicitly the foregoing writers have adopted the first concept of monopoly distinguished above and have stressed the necessity of a structural transformation of markets — on the ground, as Professor George J. Stigler has put it, that "an industry which does not have a competitive structure will not have competitive behavior." [21]

(2) *Its Difficulties.* — It is ironic that many economists, trained in the Chamberlinian tradition, now chide the Department of Justice and the courts for having learned their lessons too well.[22] It is the author's thesis that the courts have not followed the lead of the theory of monopolistic competition as far as some critics (or friends) of recent decisions would have us believe, that they have been wise not to do so,[23] and that the antitrust laws will continue to play an effective role in preserving workable competition

[18] BURNS, THE DECLINE OF COMPETITION 564–65 (1936); Rostow, *The New Sherman Act: A Positive Instrument of Progress*, 14 U. OF CHI. L. REV. 567 (1947); Rostow, *Monopoly Under the Sherman Act: Power or Purpose*, 43 ILL. L. REV. 745 (1949).

[19] *Monopoly and the Concentration of Economic Power* in A SURVEY OF CONTEMPORARY ECONOMICS 99, 118–19, 127 (Ellis ed. 1948); AMERICAN CAPITALISM cc. 4, 5 (1952).

[20] *Effective Competition and the Antitrust Laws*, 61 HARV. L. REV. 1289, 1317 (1948).

[21] *The Case Against Big Business*, Fortune, May, 1952, pp. 123, 167.

[22] An illustration is provided by Chamberlin's recent *Product Heterogeneity and Public Policy*, 40 AM. ECON. REV., PAPERS & PROC. 85 (1950). This paper reaches the astonishing conclusion that all industry and product boundaries are a "snare and a delusion." On this see the comments of Clair Wilcox, *id.* at 101.

[23] On both these contentions see Wright, *Toward Coherent Antitrust*, 35 VA. L. REV. 665 (1949); Wright, *Some Pitfalls of Economic Theory as a Guide to the Law of Competition*, 37 VA. L. REV. 1083 (1951).

only if the courts resist some of the policy implications of the new economic criticism as well as they have resisted the old.

The concept of workable competition strongly suggests the expediency of the traditional approach to antitrust problems in preference to applying a market structure test. If monopoly elements inevitably pervade the economy and are in some measure essential to a good performance, it would clearly be quixotic to attack monopoly power *per se*. If the courts were really prepared now to outlaw "the power to raise prices," as some enthusiastically read the recent *American Tobacco* decision,[24] few sellers would be exempt; the economy would have to be "purified" right out of the twentieth century. Yet there exists no generally accepted economic yardstick appropriate for incorporation into law with which objectively to measure monopoly power or determine what degree is compatible with workable competition.[25]

The scrutiny of the law might be directed at the sources of monopoly power, rather than toward the power itself. But these causal factors, similarly, are neither measurable nor, taken individually, unequivocal in their implications concerning the workability of competition. Whether their influence is, on balance, beneficent or harmful depends on a host of conditioning circumstances which defy incorporation into legal prohibitions: every market structure is in large measure *sui generis*.[26]

Product differentiation, for example, is often a means of competition that serves the public, providing minimum assurances of quality and catering to a real consumer desire for product improvement or variation. Difficulty of entry, when not deliberately

[24] See pp. 31–32 *supra*.

[25] The heart of the problem of policy would be to determine how much power to raise prices for how long is objectionable. Most proponents of this test would probably regard the cigarette industry as one exemplifying excessive market power. Yet even here the evidence is not unequivocal. Great stress has been laid on the flagrant price increases of 1931 by the large manufacturers. Yet the consequence was an increase in the market share of the ten cent brands, within a period of 17 months, from 0.28% to 22.78%, and a precipitate price retreat by the Big 3. American Tobacco Co. v. United States, 328 U.S. 781, 805–06 (1946). In the absence of predatory tactics or presumptive collusion, it is difficult to see how an acceptable law could have attacked this market structure directly.

One might frame only the most general market structure legislation, leaving it to administrative bodies to test impure structures on the basis of market performance. This suggestion is discussed *infra*.

[26] This is the conclusion which the present writer draws from Professor Joe S. Bain's excellent review *Price and Production Policies* in A SURVEY OF CONTEMPORARY ECONOMICS 129 (Ellis ed. 1948).

devised or imposed, or the concentration of patents scarcely provide a sufficient basis for antitrust action against firms whose monopoly power they may enhance. Similarly, there are serious dangers in setting upper limits to business size or market shares *ex ante.* They include: the difficulty of defining products and markets in a way that will be generally acceptable and will stay put; the risk of preventing unmeasurable economies of scale, including the economies of experience, technical skill, and research; the possible damping effect on business enterprise of such upper limits; the possible compatibility of oligopoly and forthright rivalry, particularly in innovation; the tendencies of giant business units constantly to change their product "mixes" and thereby to intensify inter-product and inter-industry competition.[27]

It does not follow that the market structure concept of monopoly has nothing to contribute to effective antitrust policy. It may supply guidance for legal remedies when a business has habitually indulged in practices which violate the law, by suggesting for removal market elements which may have fostered the illicit conduct. And the avoidance or offsetting of industrial concentration may very well assume a central position in guiding other Government policies which bear on business performance. It suggests the need for measures beyond the antitrust laws to curb and counteract the forces which help to generate monopoly power: revising the tax laws,[28] organizing technical research and assisting private, cooperative research organizations,[29] providing credit facilities for new ventures,[30] defining quality standards and enforcing grade labeling, underwriting full employment, ensuring sustained, adequate supplies and fair distribution of scarce raw materials, assisting private parties to resolve patent infringement controversies,[31]

[27] See notes 19 and 26 *supra,* and Kaplan and Kahn, *Big Business in a Competitive Society,* Fortune, Feb., 1953, supp., p. 1. A sampling of opinion among economists discloses a surprisingly general opinion that pure, non-collusive oligopoly is not the problem that has been popularly depicted. See, among others, Markham, *The Nature and Significance of Price Leadership,* 41 Am. Econ. Rev. 891 (1951).

[28] The unlimited deduction of advertising expenditures in computing federally taxable income, for example, is certainly questionable on economic grounds.

[29] Industrial research laboratories might help offset one of the economies of scale; consumer testing services might help dissipate the consumer ignorance which probably on balance augments monopoly power. See Scitovsky, *Ignorance as a Source of Oligopoly Power,* 40 Am. Econ. Rev., Papers & Proc. 48 (1950).

[30] Weissman, Small Business and Venture Capital cc. 3, 4 (1945).

[31] See Borkin, *The Patent Infringement Suit — Ordeal by Trial,* 17 U. of Chi. L. Rev. 634 (1950).

and so on. Such measures are, of course, not at all incompatible with the traditional focus of antitrust policy. On the contrary, as Professor Fellner suggests, they would further implement the traditional conception of unfair competition by attacking positively what the law already attacks negatively — competitive disadvantages not attributable to inefficiency.[32]

D. The Market Performance Test

(*1*) *Its Nature.* — Should antitrust scrutiny, then, be focused mainly on market performance? In 1949, Mason suggested an appraisal of an industry's performance as one possible way of deciding, at law, whether it was workably competitive.[33] More recently, Professor Clare E. Griffin has provided a judicious expression and elaboration of this thesis.[34] Both concepts, market performance and workable competition, are essentially pragmatic. How much competition, how many sellers, how standardized a product, how free an entry, how little collusion are required for workability? Enough, it is averred, to give the consumer a real range of choice, to ensure efficiency, to hold profits to reasonable levels, to yield technological progress and a passing on of its gains in lower prices while avoiding cut-throat competition. The law, these economists imply or openly suggest, should evaluate the economic results[35] in the light of the available alternative market

[32] Fellner, *Collusion and its Limits under Oligopoly*, 40 AM. ECON. REV., PAPERS & PROC. 54, 60–62 (1950).

[33] *The Current Status of the Monopoly Problem in the United States*, 62 HARV. L. REV. 1265, 1266–71, 1280–85 (1949).

[34] AN ECONOMIC APPROACH TO ANTITRUST PROBLEMS (Am. Enterprise Ass'n Monograph 441, 1951). See also U.S. DEP'T OF COMMERCE, EFFECTIVE COMPETITION (Report of Commerce Sec'y's Bus. Advisory Council, 1952) (hereinafter cited as EFFECTIVE COMPETITION).

[35] The courts, in seeking evidence bearing on the propriety of the firm's conduct in terms of the legal conception of monopoly, have always scrutinized the behavior of defendants. Professor Mason has apparently confused this traditional type of performance test with the purely economic appraisal which he recommends. Mason, *The Current Status of the Monopoly Problem in the United States*, 62 HARV. L. REV. 1265, 1272 (1949). There is little evidence that recent decisions (as distinguished from the decrees to which Mason primarily refers) have been seriously influenced by economic evaluations of the business record. The Supreme Court stressed the price gouging by the Big 3 cigarette companies in 1931, not in passing judgment on their economic performance, but because, it held, the "record of price changes is circumstantial evidence of a conspiracy." American Tobacco Co. v. United States, 328 U.S. 781, 804 (1946). And in the *Alcoa* case Judge Hand waived any consideration of the company's economic record as "irrelevant." United States v. Aluminum Co. of America, 148 F.2d 416, 427 (2d Cir. 1945).

structure and attack the structure only when the foregoing tests warrant it.[36] In legal terms, their suggestion is that the rule of reason be revivified, given an essentially economic content, and applied in all antitrust proceedings. The legality or illegality of all business structures and practices would then turn on their impact on the workability of competition, as judged in turn largely by economic results.[37]

(*2*) *Its Difficulties.* — Apart from devising judicial, administrative, or legislative remedies, a problem in connection with which comparative market performance under the condemned and the projected organizations is an inescapable consideration, the usefulness or validity of this criterion as the basic, self-sufficient guide to public policy is as much open to question as is that of market structure.[38]

[36] Markham, *An Alternative Approach to the Concept of Workable Competition*, 40 AM. ECON. REV. 349, 361 (1950). It is an exaggeration to imply that most proponents of the workable competition test suggest judging market structures exclusively in terms of performance. Most of them appear still to believe that it is possible to formulate certain minimum structural requirements, less rigid than pure competition, which will assure the most effective performance attainable. But an increasing number are finding an effective performance compatible with such impure conditions as to cast doubt on any attempt to formulate a structural norm. Heflebower, *Economics of Size*, 24 J. BUS. OF U. OF CHI. 253 (1951); Adelman, *Business Size and Public Policy*, *id.* at 269.

[37] Oppenheim, *Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy*, 50 MICH. L. REV. 1139, 1144–45 and *passim* (1952). Oppenheim, now co-chairman of the Attorney General's National Committee to Study the Antitrust Laws, would not confine the economic examination to an appraisal of market results ("accomplishments") alone; he insists on the necessity of considering "all of the relevant economic factors bearing upon the interaction of structure, behavior, and accomplishments in the particular case." *Id.* at 1190. The Business Advisory Council of the Secretary of Commerce came much closer to defining the rule of reason primarily in terms of an appraisal of economic performance. EFFECTIVE COMPETITION 17–18 (1952).

[38] Mason's suggestion is mainly that antitrust authorities make greater use of this criterion in selecting cases. Griffin, similarly, suggests its application mainly in choosing cases, framing decrees, and considering legislation. AN ECONOMIC APPROACH TO ANTITRUST PROBLEMS 45–48, 86–90 (Am. Enterprise Ass'n Monograph 441, 1951). Hence the area of disagreement between proponents of the performance and of the traditional tests may easily be exaggerated. Nevertheless, there are grounds for prohibiting certain predatory actions without exception and without regard to economic consequences, and therefore for selecting cases for reasons entirely apart from considerations of economic engineering. Moreover, if performance is to be relevant in the selection of cases, the courts must also use this criterion in determining the results. See *id.* at 90–92. And when we turn to the discussion of specific cases, we find among most proponents of this test a persistent undertone of criticism of recent prosecutions and decisions for attacking various restraints of trade without regard to mitigating evidence of "good" economic results.

First, it must be recognized that market performance is not necessarily a sign either of competition or monopoly.[39] It is a "way of looking at competition," in Mason's words, only in the sense that it looks for the results which idealized competition is supposed by static theory to achieve. And if the results are "good," the market which produced them becomes, *ipso facto*, "workably competitive." Such an approach has an obvious attraction. Ignoring the irrelevant forms, dismissing the complexities of traditional legal inquiries, it judges situations in terms of what really counts: their results. It accords with the plausible aphorism that there can be too much competition as well as too little. It recognizes the commonplace axiom that competition is, after all, not an end in itself. As for the aphorism, it is correct, though the cure for "too much competition" is not self-regulation of industry, but attacks on the circumstances which make it "too much" — consumer ignorance, the business cycle, the immobility of labor, and so forth. As for the axiom, while the general American bias in favor of competition is indeed rationalized largely by an expectation that in the long run it will produce the best economic results, it is also true that fair competition is an "end in itself." For it is indissolubly linked with the non-economic values of free enterprise — equality of opportunity, the channeling of the profit motive into socially constructive channels, and the diffusion of economic power.[40]

To put the matter bluntly, the market performance test looks at the wrong end of the process. The essential task of public policy in a free enterprise system should be to preserve the framework of a fair field and no favors, letting the results take care of themselves. Obviously, if the results go too far astray the legislative process may have to be invoked to reexamine and reconstitute the institutional framework, either in particular phases or in its entirety. Obviously, too, where it appears that it is some antitrust proscription which is responsible for the poor performance, that proscription should be revised. But the most arresting aspect of much of the current criticism of antitrust policy is the paucity of

[39] See Edwards, *Public Policy and Business Size*, 24 J. Bus. of U. of Chi. 280, 285 (1951); Lewis, in *The Effectiveness of the Federal Antitrust Laws: A Symposium*, 39 Am. Econ. Rev. 689, 703 (1949).

[40] See J. M. Clark, Social Control of Business (2d ed. 1939); Dirlam and Kahn, *Price Discrimination in Law and Economics*, 11 Am. J. Econ. & Sociol. 281, 287, 303–04 (1952) (Essays in Honor of Harry Gunnison Brown).

concrete economic evidence adduced to demonstrate that the kinds of market structure and behavior consistent with the antitrust laws fall short in their performance in ways which only a relaxation of those statutes will remedy.[41]

Yet on the basis of this sketchy evidence of public necessity, the proponents of a market performance test for antitrust would dilute if not eradicate the suspicion with which the law now regards the practices of collusion, coercion, and exclusion. They would permit business men to do these things provided they can at some future date, when and if called upon to do so, demonstrate in any of a great number of possible ways that the practices produced "good" economic results. In view of the weak punitive provisions of the antitrust laws, which most of these critics would further dilute by shutting the door to treble damage suits where the violations were not "wilful,"[42] it is difficult to doubt that the adoption of such a rule of reason would be regarded by the business world as an invitation to "reasonable cartelization" of the economy.

Most advocates of a "workable competition" test in antitrust law would deny that they would have the law look only to results. For example, the Business Advisory Council of the Department of Commerce states that "the government, instead of attempting the impossible task of deciding where Bigness is more or less efficient, should rely upon the powerful action of Effective Competition . . . ."[43] One interpretation of this statement might be that its authors would not have the determination of antitrust violations depend on an appraisal of the end results — for example, on the efficiency with which the defendants have operated. However, the Council goes on immediately to list some eleven separate tests that it would have the courts and administrative agencies apply before they can condemn any specific practices. The list is a grab bag almost all the components of which have this one thing in common: they are tests of market performance or results.

The insistence of economists on economic tests might be understandable if objective standards capable of commanding general acceptance had in fact been developed. Certainly the second deficiency of the market performance test as a substantive basis for

[41] See note 46 *infra.*

[42] EFFECTIVE COMPETITION 20 (1952). This proposal, standing alone, has much to recommend it. But to adopt it while at the same time increasing the uncertainty of the law by adopting market performance tests of reasonableness would go dangerously far in robbing the laws of their effectiveness.

[43] *Id.* at 16.

antitrust is its vagueness and uncertainty. The grounds on which the courts have for over fifty years refused to evaluate the reasonableness of prices collusively fixed still command respect today.[44] The adoption of vague tests of "public welfare"[45] could only weaken the legal safeguards of the competitive system, by providing antitrust defendants with an unlimited supply of legal loopholes. Economic results are to be used as a basis for acquittal only: no critic has yet suggested that a poor performance provides a sufficient basis for prosecution. If "efficiency," "progressiveness," and "usefulness for national defense" are to acquit a company or industry, the Government should presumably condone most instances of cartelization or monopolizing in the fields of electronics, chemicals, petroleum, and chain store distribution, regardless of whether the specific restraints had anything to do with the good overall performance.[46] If it is to be left to the courts or administrative commissions to determine whether, in the absence of the restraints, progress might or might not have been even more rapid, prices and profits even more reasonable, grave difficulties will be encountered because of the elusiveness of this test. The burden surely rests on the critics of the antitrust laws to demonstrate that those predatory or collusive actions which the law attacks are indeed requisite to a good performance. This is something they have for the most part failed to do.

E. *The Alternatives in a Free Enterprise System*

Only two general methods of regulating private business appear practicable. One is to establish fairly definite standards in

[44] See United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 331–32 (1897); United States v. Addyston Pipe & Steel Co., 85 Fed. 271, 283–84 (6th Cir. 1898), *modified and aff'd*, 175 U.S. 211 (1899); United States v. Trenton Potteries Co., 273 U.S. 392, 397–98 (1927); United States v. National Lead Co., 63 F. Supp. 513, 525 (S.D.N.Y. 1945), *aff'd*, 332 U.S. 319 (1947).

[45] Effective Competition 3 (1952).

[46] The antitrust laws may legitimately be criticized only if in attacking what they are supposed to attack they at the same time discourage vigorous and economically beneficent competitive efforts. Such an indictment has yet to be made of the leading cases under the "new" Sherman and Clayton Acts. The same is true of the much criticized *A. & P.* case, United States v. New York Great A. & P. Tea Co., 173 F.2d 79 (7th Cir. 1949). See Dirlam and Kahn, *Antitrust Law and the Big Buyer: Another Look at the A & P Case*, 60 J. Pol. Econ. 118 (1952); Dirlam and Kahn, *Integration Aspects of the A & P Case*, 29 Ind. L.J. 1 (1953). The economic case against even the Robinson-Patman Act has by no means been as conclusively documented as most of the critics of that Act seem to think. See Dirlam and Kahn, *Price Discrimination in Law and Economics*, 11 Am. J. Econ. & Sociol. 287 (1952).

statutory law, leaving businessmen free within those limits to pursue their own interest. So far as this writer can see, such standards can only be standards of *conduct*. In this case, legal uncertainties will arise only at the boundaries, though these boundaries may admittedly be vexatiously elusive.[47] It is difficult to envisage equally clear criteria of acceptable and unacceptable economic performance. Poor results may issue through no conscious actions or fault of the businessmen concerned. A progressive and efficient company may yet violate the law in ways which contribute little or not at all to its good performance or which may have kept the record of its industry from being even better.

The only effective alternative is to leave the maintaining of competition to an administrative commission, vested with broad and pervasive powers of investigation, reorganization, and regulation, industry by industry. Such a commission would have to decide, in each case, whether particular prices or profits had been too high or too low, capacity too great or little, progress in reducing costs, improving quality, and introducing new products too rapid or too slow; and it would have to be empowered, on the basis of such decisions, to fashion such alterations in business structure as might appear appropriate.[48] It is questionable whether any group is competent to make such decisions, whether such delegation of responsibility would be politically acceptable, and whether such a change would make for greater clarity and dependability of businessmen's expectations than the antitrust laws as they now stand.

II. Problems Created by Business Integration

If the law is sound in condemning actions rather than market power or inadequate performance, the problem of defining the actions which it should prohibit remains. The most vexatious problems arise in applying the traditional legal prohibitions to

[47] True, many of the actions that are prohibited are defined in terms of intent rather than clear-cut overt acts. But a company can in most cases avoid imputations of unreasonable intent by conscientiously acting like a fair, vigorous competitor before cases are brought. See the extremely interesting injunctions to corporation lawyers in Van Cise, *Practical Planning*, in 1951 CCH Symposium 103.

[48] Let the reader place himself in the position of a commissioner faced with the question of whether the quality of American movies was such as to justify governmental reorganization of the industry under a workable competition statute. The movie antitrust cases, it is submitted, were a good deal simpler to decide than this hypothetical question, and their underlying philosophy is far more compatible with a democratic and free enterprise system.

big, integrated business units. It has been recent antitrust developments in this area that have prompted the most vehement criticisms and represent our primary concern. Here we encounter the familiar dilemma of the "double standard," the ambivalence of the law in dealing with restrictive agreements on the one hand and proprietary concentrations of market power on the other. If the "economic" tests be rejected, the double standard is inevitable. The only circumstances in which antitrust proceedings against big business units or their organizers are warranted is when they overstep the rules of a free enterprise system: rules prohibiting monopolizing, either by collusion or by exclusion.

All types of business integration have in common the encompassing of a variety of operations — different products, different markets, different productive and distributive functions — under a single financial control. In addition a business may seek the advantages of integration by bargaining rather than financial consolidation. Some of the most significant and controversial developments in the antitrust field have been in the treatment of practices by which businesses have obtained preferential access to independently produced supplies and to independently operated market outlets. The Department of Justice and FTC have been attacking big, integrated business units for obtaining or exerting "unfair" competitive advantages over their non-integrated competitors, whether by persuasion or coercion of independent suppliers and distributors or by virtue of their integrated operations. The present section analyzes the unfair competitive advantages and opportunities for monopolizing conferred by integration and the problems of public policy in meeting these dangers. The final section attempts in general terms to explain and defend the application of the traditional antitrust criteria to integration and to the market practices which in a sense achieve the same results.

The basic antitrust dilemma in this area, which makes it impossible for public policy ever to adopt simple, objective, mechanically applicable, and universally acceptable criteria, arises from the fact that business size and integration almost inevitably confer certain "unfair" competitive advantages and give rise to corresponding possibilities of the extension of monopoly. The only necessary condition is the existence of substantial imperfections of competition in some of the fields in which an integrated company operates. The very fact that a company sells in a number of markets or performs a number of functions, in some of which it is subjected to weaker competitive pressures than in others, gives it a leverage and a staying power in its more highly competitive operations which have nothing to do with its relative efficiency there. The more favorable access to scarce raw materials which a vertically integrated company may enjoy is merely one variant of the general case, springing from imperfections of competition in the supply of these materials.[49] Similarly, the advantage enjoyed by a company with an accepted brand when it undertakes the sale of some new product may be entirely strategic, resting simply on consumer ignorance. And the elimination of competitors from a market opportunity which inevitably results from the absorption of a customer by a supplier confers a strategic advantage on the integrating firm, entirely apart from any resultant saving in cost, to the extent that market outlets for non-integrated suppliers are appreciably restricted in consequence.

If all competitors were equally able to integrate, no unfairness or danger of an extension of monopoly would enter. But inequity may be introduced by mere inequality in the ability of these companies to attract capital — an inequality which tends to be cumulative. It would not follow, from the fact that only similarly integrated companies might be able to compete with the dominant firms in aluminum, motion picture production and exhibition, and petroleum refining, that integration is the more efficient way of doing business in the social sense. The non-integrated aluminum fabricator, motion picture exhibitor, or oil marketer might suffer only the strategic disadvantage of less adequate access to supplies or markets. Thus, integration that links areas in which competition is already seriously defective to other areas accomplishes by financial consolidation something very much like what is accomplished by the tie-ins prohibited in Section 3 of the Clayton Act. In the same way, the mere fact of its importance as a customer or supplier offers to a large firm a corresponding opportunity for competitive advantages unrelated to efficiency, in access to supplies or markets, whether or not it actively seeks them.

The problem of public policy created by these strategic ad-

[49] The inelasticity of supply alone confers an advantage on the industrial firm producing its own materials in time of inflation. The preferential access which it enjoys may be the only imperfection of competition involved. See *The Iron and Steel Industry, Report of Monopoly Power Subcomm. of House Judiciary Comm.*, 81st Cong., 2d Sess. 32–34 (1950). In a buyer's market, of course, the advantage may lie with the non-integrated competitor. See, for example, the experience of Republic Steel, *id.* at 29.

vantages cannot be exorcised merely by demonstrating the absurdity of any attempt to attack all of them, and of outlawing integration *per se*. In strict logic, one may maintain that the root cause of inequity and possible monopoly power is the imperfection of competition in the less workably competitive fields in which the integrated firm operates rather than the integration which ties this operation to others. It does not follow, as some have suggested, that corrective government intervention may therefore properly be directed only against the offending stratum.[50] Where the imperfection is not practically remediable (if, for example, it springs from a patent monopoly, inexpansibility of supply of some basic material, product differentiation, or the limited size of a market) there may be no practical alternative to attacking instead the financial tie-in which permits one firm to carry the advantages over into other fields.[51]

Moreover, given preexisting competitive imperfections, integration may itself permit an extension or magnification of total monopoly power. True, if the separate components of a vertical integration had before joining been exploiting to the maximum any monopoly power they may have enjoyed, the mere combining of seller and buyer might not permit them to do any more. However, even here, the merging of interests might permit the further suppression of competition in one of the strata, a more selective exploitation of the less elastic demands for a monopolized raw material, and a mutual reinforcement of monopoly power by making more difficult competitive entry at both levels.[52]

This competitive leverage inherent in integration may appear in a number of possible forms and be exercised in a number of possible ways, though most of these practices may be employed by any wealthy competitor, integrated or not. The integrated

[50] See Spengler, *Vertical Integration and Antitrust Policy*, 58 J. POL. ECON. 347 (1950); Hale, *Vertical Integration: Impact of the Antitrust Laws upon Combinations of Successive Stages of Production and Distribution*, 49 COL. L. REV. 921, 940–41, 946–47, 952 (1949).

[51] See Comment, *Vertical Forestalling under the Antitrust Laws*, 19 U. OF CHI. L. REV. 583 (1952). Thus Professor Spengler's prescription, introducing more competition into the imperfectly competitive horizontal stratum rather than attacking vertical integration, represents a counsel of perfection.

[52] When manufacturers of complementary shoe machines, each enjoying a preponderant share of its market, joined in the United Shoe Machinery Co. and leased their products in a package, the monopoly power of each undoubtedly reinforced that of the others and made more difficult competitive challenges directed against any one of them.

firm may deliberately "manipulate its margins" so as to exert pressure on non-integrated rivals greater than they can cope with, even though their efficiency in the one field in which they alone operate may be superior to that of the integrated unit. Indeed, the margins of the integrated firm will be "manipulated" whether it wills it or not, under the impact of varying competitive pressures in its diverse fields of operation. The more profitable operations thus inevitably "subsidize" those in the more competitive fields. The "subsidy" permits a competitive "squeeze," the most dramatic instances of which arise out of vertical integration.[53]

The perplexing problem is that in their manifestations and exercise the competitive advantages stemming from gains in efficiency attributable to integration are in practice inseparable from the merely strategic advantages. For most of the former arise from the fuller utilization of a firm's capacity — whether measured by its physical plant, managerial talents, technological skills, or the ideas issuing from its research laboratories. The costs of the combined operations are always in some measure joint[54] and their prices and margins therefore subject to variation according to competitive conditions in their respective markets. Thus an integrated firm must, if it is to compete vigorously, charge little more than incremental costs in certain fields, and in this way again, in effect, "subsidize" its competitive operations there by allocating an otherwise disproportionate part of the overhead to other operations. It is impossible, therefore, for a large, integrated firm to exploit its socially acceptable advantages or even to meet competition, without at the same time exploiting those advantages which are purely strategic. Conversely, it may avoid violating the basic proscriptions of the antitrust laws only by a policy of conservatism and inertia which runs counter to another purpose of the law. A policy of eliminating the strategic advantages of integration would seriously undermine the vigor of competition itself, since a prime source of competition in modern capitalism is provided by the ability and desire of burgeoning

[53] For examples in the oil industry, see SEAGER AND GULICK, TRUST AND CORPORATION PROBLEMS 116–17 (1929); WATKINS, OIL: STABILIZATION OR CONSERVATION? 187 (1937); Dirlam and Kahn, *Leadership and Conflict in the Pricing of Gasoline*, 61 YALE L.J. 818, 848–49 (1952). Hale has given a thorough and perspicacious analysis of "squeezes," "subsidies," and the like, *supra* note 50, at 937–46.

[54] See J. M. CLARK, STUDIES IN THE ECONOMICS OF OVERHEAD COSTS 137, 141 (1923); Adelman, *Integration and Antitrust Policy*, 63 HARV. L. REV. 27, 28–32, 40–41 (1949).

giants to press aggressively into new markets — cutting across accepted channels of distribution, following the logic of their interests and technology vertically, horizontally, and circularly.[55]

Integration, moreover, performs a competitive function even where its advantages are entirely strategic. Spengler has demonstrated convincingly, for example, that where there exist in some of the intermediate product markets imperfections of competition which impose monopolistic surcharges on products as they move vertically toward the final consumer, vertical integration makes a reduction in price and an increase in output of the end product not only possible but profitable.[56] The easiest curb on monopoly power and the most effective cure for poor performance, the one most consistent with free enterprise, is freedom of entry. And this manifestly includes the right of an existing business to extend its operations into any area its managers see fit to enter — in short, to integrate.

The same dilemma confronts public policy in dealing with business practices. We want all firms, large and small, to bargain vigorously for supplies, to try to beat down the price. We want them to put pressure on their distributors to improve the latter's competitive performance, using the threat of contract termination if necessary. We want them to be able to make mutually binding, long-term contractual commitments, where these permit a more rational planning of operations over time and provide mutual benefits in terms of cost and service. We want all firms to be free to reduce their margins to meet or undercut a competitor's price, if their interests as competitors rather than as would-be monopolists so dictate. Price discrimination may be the only possible form of effective price rivalry in imperfect markets.[57]

[55] Thus the "coercive integration" which Professor Walter Adams would outlaw is, despite his disclaimer, practically all integration with any competitive impact: "Our bill would merely ban the kinds of integration which can be used — actually or potentially — for the coercion of competitors rather than for the achievement of competitively legitimate business objectives." *Is Bigness a Crime?*, 27 LAND ECON. 287, 293 n.21 (1951). However, Adams would allow an integrated firm to defend by showing that integration had enabled it to increase its efficiency or to pass on its cost economies in lower consumer prices.

[56] Spengler, *Vertical Integration and Antitrust Policy*, 58 J. POL. ECON. 347 (1950).

[57] Clark, *Toward a Concept of Workable Competition* in READINGS IN THE SOCIAL CONTROL OF INDUSTRY 452 (Am. Econ. Ass'n 1942); see also Copeland, *A Social Appraisal of Differential Pricing*, 6 J. MARKETING, PAPERS & PROC. AM. MARKETING ASS'N 177 (1942).

Myron W. Watkins has pointed out to the author the desirability of distinguish-

Yet the threat remains that such activities may, in some circumstances, violate the essential rules of the free enterprise game, may drive out of business smaller competitors whose only deficiency is a strategic one, and may enhance or preserve monopoly power.

III. The Rule of Reason

A. *The Strategic Role of "Intent" in the Rule of Reason*

The basic and ineradicable difficulty in distinguishing between competitive and anticompetitive practices by integrated companies made inevitable the development of some kind of a rule of reason in antitrust jurisprudence. The rule has taken two forms. First, at least between 1911 and the *Alcoa* decision in 1945, the courts generally took the position that large firms, whatever their market control,[58] were to be judged primarily by this criterion: did the circumstances of their formation and the characteristic pattern of their market behavior evince an intent to monopolize? Second, the prohibitions of the Clayton Act were qualified by the cost-saving and good faith defenses and by the necessity for demonstrating a tendency substantially to impair competition.[59]

In applying the rule of reason to "monopolizing" cases under the Sherman Act, courts have laid heavy stress on the intent underlying the actions in question. As we have already indicated, the economic criticism of the antitrust policy springs largely from a dissatisfaction with such an allegedly subjective criterion. It is pointed out that it is often extremely difficult to apply, since the evidence is often equivocal. More important, the "new critics"

ing price differentiation and price discrimination: "Price discrimination is a price difference consciously designed to injure someone. It is seldom difficult to distinguish such a pricing policy from one designed primarily to benefit directly the one making the price cut. This is not a unique distinction. The law of torts is full of instances in which the whole issue of liability turns on intent."

[58] It would be an exaggeration to imply that the courts have devoted no attention to market structure, but there appear to be no cases in which that factor has been decisive.

[59] The discussion which follows makes no attempt systematically to differentiate Sherman and Clayton Act proceedings. Technically the same rule of reason cannot apply to both. The latter statute prohibits specified practices; hence its rule of reason must hinge not on intent but on substantiality of effect. On the other hand, the determination of whether a firm is in fact engaging in the vaguely defined practices condemned by the former act often, we shall argue, necessitates an inquiry into intent.

would probably agree among themselves that intent is an irrelevant consideration in economic rule-making. They feel that the antitrust laws should be framed in terms of objective standards, rather than what some of them take to be moral judgments, in terms of consequences rather than psychological motivation. The only relevant test, whether of integration or of competitive tactics, they would hold, is the persistence or suppression of competition as an effective force in the market. And their measure of the competitiveness of market is economic performance.[60]

Unfortunately, the "objective" standard — the vitality of market competition — is disturbingly elusive. Among economists urging its adoption are those who feel that the rule of reason of 1911 represented a departure from that test and those who feel it embodied just such a test, those who feel it was precisely by such a standard that U.S. Steel was exonerated in 1920 and 1948, and those who felt, with the Supreme Court minorities, that application of such an objective standard would have compelled a decree of dissolution.[61] The same range of opinion, using the same test, may be documented with respect to any number of other cases.[62]

[60] "What we need . . . is a painstaking examination of the economic facts of the individual case. Whether the competition offered by the firm in question was but an attempt to destroy competitors for the sake of a longer-run objective of monopoly depends less on intent than on the structure of the market, and the strength of actual and potential competition. And since every market contains elements of monopoly, the 'undue' or 'unreasonable' nature must be determined by their influence in restricting output, raising prices, stifling progress and innovation, and the like." Adelman, *Integration and Antitrust Policy*, 63 HARV. L. REV. 27, 49–50 (1949). Yet elsewhere Adelman seems specifically, and in the writer's judgment correctly, to disavow any suggestion that antitrust policy turn on the Government's determination of whether economic results are "good" or "bad." *Business Size and Public Policy*, 24 J. BUS. OF U. OF CHI. 269, 273 (1951).

[61] *Compare* KEEZER AND MAY, THE PUBLIC CONTROL OF BUSINESS 49–57, 95–96, 233–34 (1930), *and* STOCKING AND WATKINS, MONOPOLY AND FREE ENTERPRISE 304–10 (1951), *with* A. D. H. KAPLAN, BIG ENTERPRISE IN OUR COMPETITIVE SYSTEM c. 2 (unpublished manuscript in the Brookings Institution), *and* Carlston, *Antitrust Policy: A Problem in Statecraft*, 60 YALE L.J. 1073, 1076–80 (1951).

[62] It would be interesting to take a poll among economists asking them to choose, for example, between the conflicting appraisals suggested by the opinions of Justices Frankfurter and Jackson, Standard Oil Co. of Cal. v. United States, 337 U.S. 293, 309, 323 (1949), on the economic impact of exclusive dealing in the West Coast gasoline market: "it would not be farfetched to infer that their effect has been to enable the established suppliers individually to maintain their own standing and at the same time collectively . . . to prevent a late arrival from wresting away more than an insignificant portion of the market." "I am not convinced that the requirements contract as here used is a device for suppressing competition instead of a device

The fact is that economics offers no objective measure of the vitality of competition, in all its aspects, or any way of balancing its possible attenuation in certain respects or in certain markets against its intensification in other markets or in other respects. Economic analysis has devised no tests of the efficiency or inefficiency of integration; the determination must be left to the market, not to the Government. Nor does the "objective" standard proposed by the economist-critics of our antitrust policy meet the argument which gave rise to the Clayton and Federal Trade Commission Acts, that it may be desirable to forbid certain unfair actions before they have had an opportunity to do appreciable damage.[63] Nor, finally, does such a standard satisfy the need for rules of fair business dealing, entirely apart from any observable impact of unfair or inherently exclusionary tactics on market structure or performance. No one can say in what imponderable ways the unfair elimination of a single competitor weakens the vitality of competition among the survivors.

Thus we return to the traditional conception. The function of antitrust legislation can be only to see to it that no one attempts to stifle or pervert the process of competition by collusion, by unreasonable financial agglomeration, or by exclusion. Illegality must inhere in the act, not in the result, and the test of intent is only a means of defining the act.[64] In the words of Chief Justice White, in the *Standard Oil* decision, the antitrust laws condemn "all *contracts* or *acts* . . . unreasonably restrictive of competitive conditions, *either* from the nature . . . of the contract or act, *or* where the surrounding circumstances were such as . . . to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public *and* to limit the right of individuals, thus restraining the free flow of

for waging competition. . . . The retail stations . . . are the instrumentalities through which competition for this ultimate market is waged."

[63] Of course Congress did not prohibit the enumerated practices *per se*. See Lockhart and Sacks, *The Relevance of Economic Factors in Determining Whether Exclusive Arrangements Violate Section 3 of the Clayton Act*, 65 HARV. L. REV. 913, 933–40 (1952). Nevertheless it remains true that the required proof of even a "reasonable possibility" of overall harmful consequences weakens the prohibition of practices which experience and logic demonstrate to have certain anti-competitive effects.

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

commerce . . . ."[65] The quest for an explanatory intent does not involve psychoanalysis. The question is not: "Why did A *really* do what he did?" but simply: "What was A really doing? Was he competing — or suppressing competition?" "To what kind of activities may one most reasonably attribute the formation and growth of Company B — to technological imperatives, vigorous competition, and 'satisfied customers,' or to anticompetitive manipulations?" The attempt is simply to provide a logical ordering and interpretation of the objective record in order to ascertain whether the course of action shown is one condemned by law. Intent must be inferred primarily from the overt acts actually committed, interpreted in the light of the surrounding circumstances.

Most individual business acts — merging, agreeing, or competing — provide on their face, at best, no more than equivocal evidence of their underlying character or aim. Accordingly, it would be the height of folly either to sanction or to proscribe them *per se*. "Suppressing competition" cannot be defined as clearly as "sneezing." It can only be inferred from a complex series of actions and consequences. A state medical association expels some doctors for "a breach of medical ethics." A publishing company which owns a morning and an evening newspaper refuses to accept advertisements in either one separately. A number of cement manufacturers quote identical delivered prices. A chain store reduces its margins in a particular locality at a particular time. A pipe line company owned by an oil refiner establishes minimum tenders. A man standing in front of a bank which is being robbed whistles loudly when a policeman comes into view. How does one decide when to exonerate, when to condemn these acts or courses of conduct? The logical test, it might appear, would be an evaluation of their objective consequences. But, as we have argued, in the first place the consequences are often impossible to trace. To take only one example, how can one tell whether a competing newspaper might have been born had it not had to contend with a large competitor charging advertisers a unit rate? Secondly, there are no scientific stand-

[65] Standard Oil Co. v. United States, 221 U.S. 1, 58 (1911) (italics supplied). The "new Sherman Act" has altered this doctrine essentially by changing the "and" which we have italicized to "or" and by weakening the necessity, implied in the foregoing quotation and what follows it, of demonstrating a substantial achievement of monopoly power.

ards for drawing the line between desirable and undesirable consequences, even where they are traceable. Finally, it may be desirable in certain circumstances to prohibit such actions, regardless of whether there are demonstrable, or even probable, evil economic consequences. It is not ridiculous for the Government to argue, of certain actions, that "survival of competitors does not exonerate the defendants. For a case to fall within the Sherman Act, it is not necessary for the defendants to have succeeded in what they intended to do." [66]

The inescapable conclusion is that, from a practical standpoint, the criterion of intent alone "fills the bill" for a sensible antitrust policy in such cases. Why did the loiterer whistle? Why was the doctor dismissed? Why did one firm buy out another? [67] The point is not to ascertain whether the business units in question were driven by some sort of collective neurosis but simply to ascertain *what* they were doing. Was the loiterer helping to rob the bank? Were the cement companies systematically suppressing competition? Were the chain stores or the refiners exerting their leverage to squeeze out competitors?

Thus a host of actions, themselves individually unexceptionable, may form together a consistent pattern, explicable and condemnable solely on the basis of the general policy which they seem to mirror. Only if it is a fact that the man's whistle was part of a broader plan can his participation in the robbery legitimately be inferred. Only as part of a price-fixing conspiracy may an individual act of price reporting or freight absorption be objectionable. As Justice Holmes said a half century ago, "The plan may make the parts unlawful." [68] A recent decision states, in the same vein:

> While it must be admitted that not all of these acts are prohibited, nevertheless, we must view them in the broad panorama of other acts

[66] Brief for Plaintiff, p. 11, United States v. Oregon Medical Society, 95 F. Supp. 103 (D. Ore. 1950), *decision for defendant aff'd*, 343 U.S. 326 (1952).

[67] In this connection the court may be justified in considering "the relative efficiency of integrated and non-integrated" operations, see Adelman, ***The A & P Case: A Study in Applied Economic Theory***, 63 Q.J. ECON. 238, 246 (1949), but only in order to ascertain intent. All the Government may reasonably ask is whether the act was reasonable: were the companies merging in order to compete better, in acceptable ways, or less; were they competing or monopolizing?

[68] Swift & Co. v. United States, 196 U.S. 375, 396 (1905). In a later case Holmes asserted that "the intent alleged would convert what on their face might be no more than ordinary acts of competition . . . into a conspiracy of wider scope . . . ." Nash v. United States, 229 U.S. 373, 378 (1913).

> and their association with each other to note, not only the effect — but to pierce the veil for evidence of intent. . . .
>
> It is clear then that the intent . . . to dominate this industry by monopoly is obvious and that the result of the . . . conspiracy was to restrict competitors which latter is illegal under the Sherman Act.[69]

The quest for a unifying and underlying intent is in most of these cases inescapable, even though the statute seems to say, simply and objectively, "these things you may not do."

B. *Supplementary Economic Criteria*

It does not follow that an intent to suppress competition is or should be either a sufficient or a necessary basis for condemnation. Intent unaccompanied by overt action cannot be made the basis of judicial action. It must be accompanied, first, by the power to restrain or exclude, and, second, by some evidence that the power has been or, barring interference, will be exercised. But no "systematic economic assessment" of market power is required.[70] As always the primary evidence is the actions of the defendants. As Judge Taft put it 55 years ago: "The most cogent evidence that they had this power is the fact, everywhere apparent in the record, that they exercised it."[71] Objective consequences or lack of them are surely relevant, as well, in determining whether actions were reasonable or unreasonable. Indeed, where, in certain cases, the evidence of power and its exercise is clear, and where the consequences are both sufficiently manifest and plainly objectionable, it has not and should not have been necessary to demonstrate a "specific" illegal intent.

But where the external evidence both of actions and results is equivocal — and we have argued it is inevitably so in most cases of business integration — an investigation of intent is and always has been essential. As Chief Justice Hughes observed: "Good intentions will not save a plan otherwise objectionable, but knowledge of actual intent is an aid in the interpretation of facts and prediction of consequence."[72] Or as Justice Lurton stated, more

[69] United States v. Besser Mfg. Co., 96 F. Supp. 304, 313 (E.D. Mich. 1951).

[70] See Adelman's argument to the contrary, *Dirlam and Kahn on the A & P Case*, 61 J. Pol. Econ. 436 (1953), and the reply by Dirlam and Kahn, *id.* at 441.

[71] The Judge went on to add: "Of course, if the necessary result is materially to restrain trade . . . the intent with which the thing was done is of no consequence." United States v. Addyston Pipe & Steel Co., 85 Fed. 271, 292 (6th Cir. 1898), *modified and aff'd*, 175 U.S. 211 (1899).

[72] Appalachian Coals, Inc. v. United States, 288 U.S. 344, 372 (1933).

positively: "Whether a particular act, contract or agreement was a reasonable and normal method in furtherance of trade and commerce may, in doubtful cases, turn upon the intent to be inferred from the extent of the control thereby secured over the commerce affected, as well as by the method which was used." [73]

Thus economic considerations are by no means irrelevant in the rule of reason. Market power and economic consequences must be considered. But they are not decisive. Mere unexercised power to exclude, the mere exclusion of competitors which occurs when a supplier consolidates with a customer,[74] the mere power to influence price [75] all remain and should remain free from condemnation. And the relevant consequences to be appraised are not the effects of the defendants' actions on economic performance, but those implied in the traditional legal criteria of monopolizing: the mutual suppression of rivalry or the unfair exclusion or threatened exclusion of competitors.

There is no disposition here to minimize the difficulties in imputing the intent that renders the acquisition or exercise of market power and the exclusion unreasonable. But no equally acceptable alternative presents itself. The difficulties inhere in the situation. Only to the extent that we are prepared to outlaw specific practices or situations *per se* can a consideration of intent be dispensed with. Since, on balance, it would be clearly destructive of competition itself to apply any such blanket condemnation to business integration, inquiry must be made in each case to determine whether power has been unreasonably attained or used. Central to such an investigation must be an inquiry into the underlying intent. Where investigation discloses unreasonably collusive or unfairly exclusive tactics, those acts cannot, consistently with a free enterprise system, be condoned because of the absence of clear evidence that they have actually diminished the force of competition in the market or contributed to a poor economic performance, narrowly construed. This is the only "workable" rule of antitrust policy.

[73] United States v. Reading Co., 226 U.S. 324, 370 (1912).

[74] See United States v. Columbia Steel Co., 334 U.S. 495 (1948).

[75] See *supra*, pp. 35–37.