The Monopoly Problem as Viewed by a Lawyer

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A suggestion for the application of law to the solution of a social problem always raises at least three questions. These are: (1) How serious is the need for some correction of the social problem? (2) How great will be the loss of freedom as the inevitable result of the application of the coercive power of law? (3) What are the foreseeable consequences, intended or unintended, of the legal means of the remedy which are proposed? In a sense all these questions—and they could be elaborated into many more—are but parts of one inquiry into whether the legal cure is not worse than the social disease. And it is, of course, natural that people will differ in their judgment as to their prediction of results. It is perhaps worthwhile reminding ourselves of these obvious questions, for they emphasize that the separate disciplines of the social sciences may not be able by themselves, and in isolation, to determine whether law ought or ought not to be applied in a particular way. In this connection we should remind ourselves that law is a blunt instrument, and some of the subtleties of theoretical analysis may be beyond the law’s practical performance.

In addition, so far as the subtleties of theoretical analysis are concerned, we must be aware that, when the intended or unintended consequences of law’s application are considered, the factors are numerous and complicated. For many reasons prediction is not easy. Inevitably, a decisive role is likely to be played by the basic presumption with which we approach suggestions for the application of law. The basic presumption, or the acracy with which suggestions for more law are accepted, will determine which side has the burden of persuasion.

The choice of the basic presumption concerning the proper role of law may be said to be closely related to the history of antitrust, which is the history of the use of law in a particular way. That history is not simple, and it includes many diverse and sometimes contradictory ideas and movements. It is perhaps an oversimplification to suggest that antitrust itself reflects a presumption against the use of law and in favor of freedom from law in the pursuit of trade. To be sure, the origins of antitrust reflect an opposition to the exercise of power by the government in interference with freedom of trade. The opposed governmental power manifested itself either in monopoly grants or in the misuse of grants by semigovernmental or semiprivate groups. But the underlying theory of antitrust is sometimes summarized not so much as an opposition to interference by the government through law with the freedom of trade but rather as directed against the usurpation of government-

tal power by private groups. Monopoly in its various forms in private hands was thought to be such a usurpation. So the underlying presumption of antitrust might be thought to be not so much against governmental power or interfering laws but rather as against that private power which when it reaches monopoly strength has the effect of law. A persistent theme in antitrust enforcement, however, has been to create a code of fair competition or at least to give relief to, or erect safeguards for, private parties who are considered injured by unfair tactics. And in this sense an underlying presumption of antitrust might be thought to be in favor of the use of law to interfere with trade if the result is increased fairness. So antitrust might be regarded, then, as but another instrument of law for governmental planning for, and interference with, the competitive economy.

Yet acknowledging the complexities of the history of antitrust, and the uses to which it has been put, there probably is agreement that the antitrust laws are supposed to be characterized as distinctive because they do not represent government planning for the economy. In this sense they are supposed to be non-regulatory. They are supposed to be based on freedom from law, both the private variety and the public, for a competitive economy. And such interference as the law inevitably brings is justified as the minimum interference or regulation made necessary because of the existence otherwise of monopoly. And possibly therefore we can say that the antitrust laws basically reflect a presumption that the burden of persuasion must be placed on the side of those who urge the application of law to a social problem. As I have suggested, it could be urged that this statement of the presumption reflected in antitrust is too far-reaching and that, indeed, all we know is that the antitrust laws are against some forms of private power on the somewhat dubious basis that private power is less good than public. But we must recall that the antitrust laws are not against private power in its numerous manifestations. At least until recently they were not even against economic power, nor, as has so often been said, do they justify interference to compel all competition that is possible. For the most part they are directed solely against monopoly and those restraints of trade which in antitrust history have come to be thought inextricably interwoven with monopoly. Thus the use of law and the role of government are narrowly confined, and this is supposed to be the distinctive feature of antitrust.

In large measure this limited conception of the role of law as reflected in the antitrust laws was the reason that the revival of antitrust enforcement in the Robert Jackson and Thurman Arnold period was greeted with scepticism. Monopoly then was popularly regarded as a significant cause for unemployment and depression. The solution of the monopoly problem was regarded as particularly difficult because of the assumption, held by many, that new conditions of economic life required firms to reach monopoly size. A widely held view was that any attempt to deal
with this problem through antitrust would be an ineffective effort to turn back the clock. In the wake of the demise of the NRA many thought some new form of economic planning and control would have to be devised. Symbolically, antitrust enforcement, which gained formulation and momentum under Arnold, represented the alternative to planning and control. Antitrust came to portray the federal government’s interest in free enterprise, and this was a freedom from administrative regulation as well as from monopoly enterprise. To be sure, it was suggested that the new consent decrees were to become charters for industry and thus a constructive formulation of administrative rules for industry. But this promise was unfulfilled. Rather through many devices, in retrospect some good and some bad, the antitrust ideal was revived. The antitrust laws, at least in the abstract, became popular. The effect was to be seen not only in enforcement policy but in the substantive content of the laws themselves. As a result, in every subdivision of the laws, whether dealing with patents, price-fixing agreements, conspiracies, division of territory arrangements, or monopoly size as monopolizing, there was an expansion of legal concepts. The labor area was the one exception.

If the application of law to a social problem raises the question of whether the cure is worse than the disease, then the problem has to be faced in terms of the situation as it exists at a particular time. While there is a great deal of continuity of talk between the Arnold period and the present, there are numerous differences between the total situation as it is found today and the prior period. The connection between the monopoly problem and business cycle, depression, and unemployment no longer seems as decisive as it then did to many; indeed, the connection seems remote except for the possible accentuating effect of rigid prices. Perhaps therefore there is less of a felt need to do anything about the monopoly problem. Moreover, reflective studies do not show any recent significant increase in concentration; indeed, they do not show any significant increase since 1904. The sense of urgency previously present either has or should have disappeared. Further, if the greatest contribution of the Arnold period was the symbolization of the government’s interest in free enterprise as opposed to control through regulation, perhaps in the present setting this is no longer so much required. Moreover, it is no longer so clear what symbolic meaning is to be attributed to antitrust enforcement.

Probably what is regarded as the continuing monopoly problem today is the existence of economic power in firms of large size. Many of these firms are in industries where a relatively few firms have a major portion of the output. Thus oligopoly is thought to require special attention. And because the problem of economic power through size is hard to handle directly, in that economic power is hard to evaluate and that the allowable limits are not easy to determine, much attention has been centered on the causes and effects of this power, as, for example, mergers, price discrimination, exclusive arrangements, and unfair dealing with distributors. An initial question, of course, is whether this economic power means monopoly. So far as the law is concerned, firms of monopoly size which operate without economic justification or, more certainly, engage in exclusionary tactics are guilty of monopolizing and can be dealt with under the antitrust laws. Are these the firms which are thought to have undue economic power, or does that concept refer to firms beyond the scope of the present law’s reach? If the latter is the case, is this because the law’s definition of monopoly or monopolizing is out of step with the economic definition and is wrong? Or is economic power something beyond and above monopoly or monopolizing for economics as well as for law? These seem to be basic issues when the law approaches what is often described as the present monopoly problem.

It must be admitted at once that the law in action reflects uncertainty as to what illegal monopoly or monopolizing is. The law has sometimes appeared to incorporate the idea that illegal monopoly or monopolizing exists, at least when there is no justification, when a single firm through control of its own output can change the market price. The firm is then said to be engaged in a kind of price-fixing certainly as effective as illegal price-fixing arrangements between competitors dominant in an industry. This indeed might be thought to be the doctrine of the Alcoa case. But Alcoa, under the computation used, controlled 90 per cent of the output. The opinion states that such a percentage is enough to constitute a monopoly and goes on to say that it is doubtful whether 60 or 64 per cent would be enough. Yet a producer of that lesser amount and considerably smaller amounts would be able to change the price by curtailing his own production. His control would...

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not be absolute, of course, because at some level other products would be substituted; and, given time, competitors would increase their production. He shares these deficiencies, however, with firms of greater proportionate magnitude, although the effect of his action would not be so great or so lasting. Nevertheless, such a lesser firm could be regarded, although the law has not done so, as possessing illegal monopoly power.

The decision of the law not to regard such lesser firms as exercising illegal monopoly power probably reflects a judgment that the law should not interfere where the magnitude of the monopoly effect is not great. I note that Dr. Stocking in his article on the Cellophane case states that “detecting monopoly is simpler than measuring it” and that he quotes Fritz Machlup as being “probably correct” in concluding that “so many different elements enter into what is called a monopolistic position and so complex are their combined effects that a measurement of ‘the’ degree of monopoly is even conceptually impossible.” But I would question whether detecting monopoly for the purpose of bringing the coercive force of law to bear upon the matter can be so easily separated from the problem of its magnitude. The problem is of course illustrated by the Cellophane case, where one can accept the fact that in some sense Cellophane had control over 75 per cent of a “market” and yet conclude that the albeit imperfect substitutability of other products may limit the magnitude of control sufficiently, so that the coercive force of law need not be applied. It would be extremely difficult, as has been suggested, to measure the magnitude of the monopoly. But a Court possibly might be forgiven for recognizing the availability of near-substitutes which it has seen by visiting the 1952 Annual Packaging Show at Atlantic City.

The choice of the law then seems to be not to interfere with all monopoly power. The magnitude of the power is taken into account, although without much precision. I am not sure how Mr. Justice Reed can know, as he writes in the Cellophane opinion, that “one can hardly say that brick competed with steel or wood or cement or stone in the meaning of Sherman Act litigation.” It seems rather that in a given case they might be thought to compete. I believe the point is rather that the Sherman Act, on the monopoly side, is reserved for the more obvious cases of monopolies with magnitude. In this sense the percentage of market control and the availability of imperfect substitutes are both relevant. The question of monopoly profits has been considered less relevant; the law’s emphasis has been on price or production control and not on the presence of rewards. It should be said that the law, through concepts of attempts to monopolize and conspiracies to monopolize, and by emphasizing intent or particular abusive acts, has reached firms with monopoly power considerably less than that of the Alcoa type. It must be said also that it has not always known what to do with them after it has reached them. But it has never tried to reach all firms which can change the market price by curtailing their own production.

It is difficult to say that the choice should have been otherwise. For one thing we recognize and accept throughout the market many forms of minor monopoly power. The existence of minor monopoly power in the form of advantages of location or product differentiation has sometimes been used to argue the inevitability of monopoly power, both small and large. I do not see how this confusion is helpful, but it suggests that we really are not much concerned with the minor and more transient forms of monopoly of small magnitude. A more important point is that, once the law moves toward the less obvious cases of monopoly power, various difficulties arise. Not the least of these is that the law gets converted more and more into a kind of supervision of industry. This is particularly true if the industry’s cost structure, and the reasons for it, and the firm’s profits and the explanation for them are permitted or required to be an issue in the case. Presumably, the arguments of justification will become more difficult to evaluate, and the standard of application probably will be less clear than it is now. Although it would not help on the problem of market definition, a partial escape would be to suggest an arbitrary and, in this context, lower percentage rule and hold fast to it. But, even if this were feasible, the argument for this is less compelling when it has not been shown that concentration has significantly increased.

But the argument often is made that special consideration should be given to the problem of oligopoly. Hence a distinction is made between the single firm of lesser monopoly size and power which exists in an area where there are many competitive firms of small size and the single firm which exists alongside of a few other firms of somewhat similar size. In the latter case it is suggested that an inherent propensity toward joint action permits or compels the aggregation of the several units so that a level of undoubted monopoly strength is visible. The law’s approach to this special problem could be accomplished either through a doctrine of conspiracy which would permit the aggregation or, without conspiracy, by treating the existence of the other firms as one of the circumstances of the market adding to the monopoly strength of each of the firms. Both the Paramount case and the second American Tobacco case came near to adopting or did adopt the first approach. The approach through the doctrine of conspiracy is made somewhat easier for the law, because conspiracy in antitrust cases need not be based on agreement, or at least the implied agreement can be found in a common concert of action, sometimes popularly described by the somewhat discredited phrase “conscious parallelism.” But the legal relief which would follow as the result of a successful case based on this theory need not curtail the power of the individual firm. The agreement or conspiracy can be treated as an illegal act appended to a position of otherwise legitimate power. On the other hand, a successful case brought on the theory that in the circumstances of the industry the
individual firm was guilty of monopolizing presumably would have to deal directly with the question of allowable power. Difficulties are involved under either theory. Under the doctrine of conspiracy the best evidence would appear to be specific agreements, whereas under the rationale for giving special consideration to the problem of oligopoly the specific agreements should be irrelevant. A large jump is likely to be involved in reasoning which moves from a finding of specific agreements on some matters to the conclusion that there is a general partnership in monopolizing among the firms. Indeed, the need to have specific agreements may suggest general rivalry and not inherent common action. If there is anything to this suggestion, the case for special treatment of the oligopoly situation, with or without conspiracy, is weakened. If the approach is made on a straight monopoly theory, the presence of oligopolies fashioned as a result of decrees in monopoly cases would be an abiding embarrassment. It is not unlikely this embarrassment would multiply as new distinctions would have to be made to justify more or less competition or larger or smaller size for various industries. Of course it can be said that such distinctions are inevitable when an antimonopoly law is applied. But the problems arising out of them seem less acute when the law is applied only to the firms of quite high percentage of market control. With such firms the monopoly effects are presumably great, and the argument in favor of dispensation for them, because of the efficiencies of scale, has a greater burden to overcome. As one moves downward in the scale of market control, however, not only will there be more cases, but the balance between curbing lesser monopoly effects and yet giving due regard to the efficiency argument will be harder to strike. Since the rewards of lesser monopoly power are less certain, size is more likely to have been caused by the requirements of efficiency. And if the monopoly power in the oligopoly situation is thought to rest on an inherent propensity toward joint action, unless a somewhat doubtful economic assertion is to be converted into an irrebuttable assumption of law, the issue of how much joint action there has been, and how much rivalry, will be present in all these cases.

It is obvious that many of these theoretical and practical difficulties arise out of a desire to curtail economic power, even though the economic power does not flow from a full monopoly position. It is the monopoly of the single firm occupying an industry, even though there is a problem of defining the market, which is more readily detected. And there is less reason then for measuring the consequences of the firm's position, for they can be predicted theoretically. And while the firm may be allowed to justify its position because monopoly was thrust upon it, not even the rule of reason requires an inquiry into effect. When monopoly restraints, however, are thought to encompass position and behavior further removed from the status and consequences of the single firm occupying a market, the law loses its guide for action. It finds itself, as Judge Taft stated in a related situation, in a sea of doubt, caught between the prototype of monopoly and that of competition. But in the main the choice of the law has been, as I have suggested, to reserve its scope of prohibition for the cases of more assured monopoly strength. It has chosen in the main to be an antimonopoly law and not a law in favor of all competition possible. Such a choice may leave untouched a large area of economic power, although perhaps it is somewhat difficult to know what is meant by this term.

In this situation a strong attempt has been made to change the law so as to prevent the creation of monopoly in its incipiency and so in this way to avoid for the future cases of lesser monopoly power. The attempt has been made also to curb conduct thought to be based upon and perhaps to further lesser monopoly power. I refer to the prohibition of mergers and other conduct such as price discrimination or exclusive arrangements which in the language of the Clayton Act may have the effect of substantially lessening competition or of tending to create a monopoly. The Clayton Act's prohibition of mergers has been strengthened, largely through the inclusion of asset acquisitions. The Robinson-Patman Act has jeopardized price differences. Section 3 of the Clayton Act has been interpreted to prevent, with some qualifications, exclusive dealing arrangements which cover a substantial number of outlets and a substantial amount of products. The new Automobile Dealer Franchise Act creates a new right of action to compel manufacturers to act "in good faith" in connection with dealer franchises. And there is a strong movement to have a law enacted which will require notification to the government, the furnishing of information, and a waiting period before a merger may be consummated.

The attempt to have more stringent prohibition of mergers—and the pre-merger notification bill must be regarded as an attempt both to supervise and to prevent—is presumably based on two arguments. The first is that any merger reduces the number of competitors. This argument has force, of course, only if it is assumed that the reduction makes for a difference worth talking about. The second argument is that growth through merger is likely not to be the most efficient growth responding to the economies of scale. But of course there may be genuine economies of scale in growth, even though the growth is through merger. And assuming the existence of what is called a relatively few firms, the resulting capacity of the industry may be more appropriate if growth is through merger. Since it is not possible or desirable to prohibit all mergers, some standard will have to be used by the law in prohibiting particular mergers. That standard undoubtedly must relate to market control, although it might encompass questions of efficiency and capacity in the industry. The central question surely is not whether the growth takes place through merger but rather the result of the merger in terms of power and possible justification. Separate antimerger legislation must proceed upon the basis, however, that power which is allowable when obtained through internal growth may
be denied to growth through merger, because the means used create a presumption concerning motive or effect.

Actually the standard used for the prohibition of mergers in the Clayton Act is most unclear. Perhaps the most that can be said about it is that the standard is intended to go beyond the Sherman Act but not too far. The allowable limits of economic or monopoly power are to be decreased when mergers are involved. But the Clayton Act applies not only to horizontal mergers but to vertical and conglomerate as well. The inclusion of vertical integration is understandable, since there is a widely held belief that vertical integration gives a leverage for the creation of greater monopoly power. It may be suggested that this theory is usually wrong except in the unique case where vertical integration in foreclosing an outlet to a competitor happens to place a greater cost on the competitor than on the acquiring company by this maneuver. The inclusion of conglomerate mergers suggests that the antimerger legislation need be not about monopoly power at all but about size or some economic power which is hard to define or to understand and therefore will be equally hard to enforce. But probably what is intended is a general move downward in the scale toward lesser monopoly power, although why such power should be more dangerous in the hands of a firm operating in several industries rather than in only one is not easy to explain.

The justification for special antimerger legislation is not obvious. The justification does not ring true if it is based on any special inadequacy in the relief given by courts when monopoly has been achieved through merger. On the contrary, the difficulties of obtaining adequate relief are greater when monopoly is achieved through internal growth. Nor can it be said that special legislation was required so that the law would give special scrutiny in monopoly cases to those instances where the growth was through acquisitions, for this always has been the emphasis under Section II of the Sherman Act. Perhaps it will be said that mergers should be prevented, since they lead toward concentration, although the results of the mergers do not always show up as a monopolized market, because there are countervailing tendencies. But, if this is so, then there is less need for governmental intervention. The difficulty for the law, in any event, is that antimerger legislation, while emphasizing a means of growth, attempts to infuse into the law a double standard of market control. This division of standards is not reinforced by new learning reflected in new concepts of market control. It is a different and more divergent double standard than has existed to some degree in the Sherman Act up to now. It will be difficult to maintain such a double standard. It has been said that the idea is not so much to have a double substantive standard but rather to have the courts and the Federal Trade Commission prevent individual mergers on the basis of more doubtful proof. This suggests a dubious limitation of freedom, in that generally we would not want to have courts accept doubtful proof, particularly when it has not been shown that mergers have resulted in a significant increase in the level of concentration almost since the turn of the century.

I do not wish to overemphasize the newness of the tendencies to push the antitrust laws into operation against the lesser forms of monopoly or economic power. These tendencies have existed for a long time. But it is becoming much more difficult to understand what is meant by the non-regulatory character of the antitrust laws. The antitrust laws are non-regulatory only when they are not in frequent interference with business decisions—when the laws are reserved for cases of larger monopoly power and for traditional restraints such as price-fixing thought to have the same effect as larger monopoly power. The curtailment of exclusive arrangements and the regulation of pricing policies under the Clayton and the Robinson-Patman acts, the regulation of mergers (horizontal, vertical, and conglomerate) and the suggested pre-merger notification bill, the special act requiring good faith behavior of automobile manufacturers in connection with franchises—all these reflect a movement to convert the antimonopoly laws into fair-practice regulatory statutes. Regulation exists even when there is not prohibition. It includes the continual or frequent government inspection of business practices in formal hearings, with the necessity for justification, for the submission of data and the requirement of delay. Perhaps, then, there is reason to pause before a law which has symbolized free enterprise is converted into but another congeries of regulatory statutes for the control of business,