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## A Program for the Antitrust Division

Richard A. Posner†

In two previous articles, I have criticized a number of facets of current antitrust enforcement policy, ranging from the attitudes of the enforcers toward their role, at one extreme, to specific provisions in merger guidelines issued by the Antitrust Division, at the other, and covering a good many points in between.<sup>1</sup> The articles are not wholly negative; they suggest both new enforcement mechanisms and new substantive policies. But they do not attempt to present a rounded program of antitrust enforcement. The present piece, drawing on the earlier suggestions but with a good many additions and some revisions, outlines such a program. For the sake of brevity, I limit my attention to the Antitrust Division of the Department of Justice, and I take its existing powers and resources as a given. Within these limits I have tried to be practical and specific, as well as reasonably comprehensive, and to consider philosophical as well as practical objections to the suggested program. Necessarily, many important details of the program have been omitted.

Presumptuous as such an exercise may seem, it is at least timely. It is fashionable nowadays to exhort institutions to re-examine the priorities under which they operate. Never has the Antitrust Division had greater reason to heed this exhortation. The rapid growth of the economy in recent years has not brought a corresponding increase in the resources of the Division.<sup>2</sup> At the same time, the Supreme Court's virtual abandonment of antitrust law to the discretion of the enforce-

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† Professor of Law, The University of Chicago. The author wishes to thank Kenneth W. Dam, Harold Demsetz, Kenneth G. Elzinga, Robert A. Hammond III, and George J. Stigler for their helpful comments on an earlier draft. Needless to say, they bear no responsibility for my errors and opinions.

<sup>1</sup> Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 STAN. L. REV. 1562 (1969) [hereinafter cited as *Oligopoly and Antitrust*]; Posner, *A Statistical Study of Antitrust Enforcement*, 13 J. LAW & ECON. 365 (1970) [hereinafter cited as *Statistical Study*].

<sup>2</sup> The total number of employees of the Division, and also the total number of its professional employees, have remained unchanged since 1962 (1967 ATT'Y GEN. ANN. REP. 105; letter from Donald I. Baker, Deputy Director of Policy Planning, Antitrust Division, to author, Oct. 2, 1970), while the Gross National Product (in constant 1958 dollars) has grown by more than a third. Computed from U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1966, at 322 (1966); U.S. DEP'T OF COMMERCE, SURVEY OF CURRENT BUSINESS 17 (July 1970).

ment agencies has vastly increased their domain, tempting them to fritter away resources in glamorous and political, but surely marginal, operations: consider the Division's late absorption with conglomerate power and organized crime. With the collapse of the conglomerate bubble the Division may have entered a period of drift and uncertainty.

The exposition of the program is in three parts: basic goals; specific enforcement policies designed to achieve those goals to the extent possible within the limitations of the Division's resources and powers; and the organizational machinery necessary for implementing the policies, and more broadly for managing the program itself. The basic framework will be recognized as that of "systems" or "cost-benefit" analysis, but applied loosely and nonquantitatively. My endeavor should not be confused with that of Oliver Williamson to develop a model for actually calculating the net social harm caused by a merger or other challenged practice.<sup>3</sup> Such a model, although it may have interesting heuristic properties, is quite impractical as an enforcement tool in the present state of economic knowledge. If cost-benefit analysis seems too pretentious a term to describe my procedure, then one can think of it as viewing antitrust enforcement in enterprise terms—asking what the likely output of antitrust enforcement (reductions in monopoly power, or the like) would be under various arrangements of inputs, and choosing those arrangements in which output will exceed input by the greatest margin. Alternatively, the approach may be viewed as seeking to maximize the efficiency of antitrust enforcement by discovering and implementing those policies whose net social product is largest.

## I. TOWARD PRACTICAL GOALS FOR ANTITRUST

Setting forth the goals of antitrust enforcement ought to be a straightforward enough process but is not. Before we can get to the goals themselves we must clear three hurdles. We must consider first whether it is proper to have goals of antitrust enforcement at all, other than the goal of challenging every violation of antitrust law or at least every per se violation. If the answer is yes, we must next consider whether it is proper, in fashioning antitrust goals, to exclude considerations other than economic efficiency, such as the merits of favoring small business or altering the distribution of income. If the answer is again yes, we must consider finally how to choose among schools of economic thought that disagree on the consequences for efficiency of various market practices and conditions.

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<sup>3</sup> See Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18 (1968).

A. *The Propriety of Regarding Law Enforcement as a Means Rather Than an End*

The program of antitrust enforcement proposed in this paper—indeed, the very idea of the Antitrust Division's adopting a programmatic approach—rests upon an instrumental conception of law enforcement. According to this view, public agencies should consider the enforcement of the laws committed to their responsibility not as an end in itself but as a means of advancing with maximum efficiency the fundamental goals behind the laws. As a corollary, the agency may properly decline to proceed even against clear-cut violations of law when the resources that would be required in proceeding against them could be utilized more effectively in other phases of the agency's work. Obvious as these propositions may seem, they are rejected (particularly the second) by those in charge of the Antitrust Division where, for example, it has long been proclaimed and to the best of my knowledge actual policy to prosecute any and all violations of the so-called *per se* rules, no matter how trivial.<sup>4</sup>

When Congress enacts a regulatory law, such as the Sherman Act or the later antitrust statutes, it normally wants compliance, of course; but that is an intermediate rather than a final end. Behind the law will be found some practical goal that the law is designed to achieve. It has been argued, for example, that Congress in the Sherman Act<sup>5</sup> forbade conspiracies in restraint of trade and other monopolistic practices to the end of increasing output in the industries that would be affected by the Act.<sup>6</sup> That was the purpose of the legislation; the specific prohibitions written into it were merely the means of its attainment. When deciding whether to commence a case or investigation, and in other judgments concerning the allocation of its resources, an enforcement agency should always ask which use of the resources in question will "buy" the largest quantity of the particular "good" (greater output, or whatever) that the statute is intended to "produce." This will sometimes entail not proceeding against clear, but unimportant, violations.

Several objections are made to this approach. It is said that enforcement officials have no authority to forgive violations; that their arrogation of the power to do so injects an unhealthy element of discretion

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<sup>4</sup> As the Division has many times stated: "The Courts have time and again held that price-fixing agreements are illegal *per se*. Such practices will continue to be prosecuted whenever and wherever they are found to exist." News release quoted in *THE FEDERAL ANTITRUST LAWS WITH SUMMARY OF CASES INSTITUTED BY THE UNITED STATES* 86 (1952-56 Supp.) (CCH ed. 1957). More important than that they say it is that they mean it.

<sup>5</sup> 15 U.S.C. § 1 *et seq.* (1964).

<sup>6</sup> See Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J. LAW & ECON. 7 (1966).

into law enforcement; that the notion of equal justice is offended; and that the moral authority of law is impaired. None of these objections is compelling.

If a legislature appropriated sufficient funds to enable an enforcing agency completely to extirpate an illegal practice, and the agency declined to proceed against all violations, the legislature could rightly complain that its will was being thwarted. But usually the funds appropriated are too limited to permit total enforcement. By so limiting the agency's resources, the legislature makes an implicit judgment, no less authentic than the initial and unqualified declaration of illegality, and perhaps more authoritative since subsequent in time, that there shall be less than total enforcement. Partial enforcement may take the form of responding inadequately to all complaints or not at all to some. If the latter course can in a particular instance be justified as a better approximation to the basic goals of the legislation, the legislature should not complain that its will has been overridden. It can and should insist that the agency justify the enforcement policy selected.

The objection to "discretionary justice"<sup>7</sup> is based upon the absence of standards—"discretion" being conceived as the opposite of "rule"—which opens the door to arbitrary and oppressive enforcement. The approach urged here avoids that objection because it furnishes a standard to guide the exercise of administrative discretion: the standard of efficiency. Of course, to be a meaningful check on improper discretion, a standard must be reasonably precise. An extensive literature expounding the application of cost-benefit or systems analysis—techniques for evaluating the relative efficiency of alternative programs—in a variety of public-administration contexts<sup>8</sup> suggests that the standard of efficiency does have content and is operational. But the reader must finish this paper before deciding whether an efficiency standard is, as I believe, reasonably clear and definite. Assuming it is, the objection based on notions of equal justice falls too. Equality in the administration of law requires only that similar cases be treated similarly. A rational and impartial ground for distinguishing otherwise similar cases is consistent with the principle of equality.

The final objection to the instrumental conception of law enforcement is that it undermines the moral authority of the law. To condone violations merely because prosecution is not cost justified is, one could

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<sup>7</sup> Forcefully expounded in K.C. DAVIS, *DISCRETIONARY JUSTICE—A PRELIMINARY INQUIRY* (1969).

<sup>8</sup> See, e.g., C. HITCH & R. MCKEAN, *THE ECONOMICS OF DEFENCE IN THE NUCLEAR AGE* (1965); R. MCKEAN, *EFFICIENCY IN GOVERNMENT THROUGH SYSTEMS ANALYSIS* (1958); Prest & Turvey, *Cost-Benefit Analysis: A Survey*, 75 *ECON. J.* 683 (1965); Schlesinger, *Systems Analysis and the Political Process*, 11 *J. LAW & ECON.* 281 (1968).

argue, to deny that there is an unqualified duty to obey the law. Were it necessary, I would argue that, with respect to a wide variety of public regulations, the duty to obey is not an unqualified one. Holmes' "bad man" conception of law,<sup>9</sup> under which the command of the law is conceived to be not that we obey but that we obey or suffer the consequences, seems to me highly persuasive in those situations where the offending conduct is not altogether devoid of social utility.<sup>10</sup> The prohibitions of antitrust law are of this type. Had we an adequate system of antitrust penalties,<sup>11</sup> so that the full social cost of an antitrust violation were borne by the violator, there would be no moral objection, I believe, to his committing the violation. Since, no matter how carefully the antitrust laws are administered, we cannot be sure that they will not occasionally forbid conduct having a net social product,<sup>12</sup> the recognition of a "right" to violate—providing the violator pays the full cost of his violation—is in society's best interests.

If it is correct that the function of legal norms and sanctions, in many settings and specifically that of the antitrust laws, is not to establish categorical prohibitions but to make the violators of legal rules bear the costs that their conduct imposes on society, then enforcement agencies are entitled to decline to enforce the law where enforcement is not cost justified in the light of alternative uses to which the agency could put its resources. The same conclusion can be reached without accepting any part of Holmes' approach: by distinguishing the duty to obey the law, which may be an unqualified duty, from the duty to enforce it, which cannot be unqualified if only because public agencies lack the necessary resources.

### B. *Economic Efficiency and Other Values*

Assuming the propriety of an approach to law enforcement that seeks to maximize the efficiency with which the relevant legislative goals are pursued, even at the occasional price of ignoring clear-cut violations, we have yet to consider what, in the present context, those goals are. As mentioned earlier, Professor Bork has argued that the framers of the Sherman Act, the basic antitrust statute, were concerned primarily

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<sup>9</sup> See O.W. HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167-75 (1920).

<sup>10</sup> By "conduct devoid of social utility," I mean conduct whose private benefits to the actor society has decided have a weight of zero in determining the permissibility of the conduct. A person acts wrongfully, I assume, if, weighing the benefits to him from a murder against the punishment and other costs that he will bear, and finding the former to predominate, he commits the murder.

<sup>11</sup> I have argued elsewhere that we do not. *Oligopoly and Antitrust* at 1588-91; *Statistical Study* at 395.

<sup>12</sup> Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 199 (1968).

with precisely the objection that a classical economist would make to monopoly: it reduces the value of output. A profit-maximizing monopolist will sell less of his product, and at a higher price, than would competing firms. Those who bought the product before it was monopolized but consider the new (monopoly) price too high will switch to substitutes that before the price increase they considered less desirable. The reduction in the monopolist's output thus diminishes the satisfaction of consumers. It is in this sense that monopoly reduces the overall value of the economy's output. Of course, those consumers who continue to buy the product after it is monopolized, but at a higher price, are dissatisfied too; but their loss is exactly balanced by the gains to the owners of the firm from monopolizing. Professor Bork adds that the concern with output constitutes the "main tradition" in the judicial interpretation of the Sherman Act.<sup>13</sup>

One may wish to dispute his weighting of the various strands in the legislative and judicial history of the Sherman Act but it is surely correct that concern with limitations of output (although usually not expressed in just those terms) has always been one of the important themes of antitrust law. The hard question is what weight the Antitrust Division should assign to other values in formulating its enforcement policy. I suggest none. Two objections to incorporating as antitrust standards such policy considerations as hostility to big business on moral or political grounds, or desire for a more equal distribution of income and wealth or to protect existing enterprises from being destroyed by competition, or commitment to Jeffersonian conceptions of the optimum organization of the economy seem to me decisive. The first is futility. The antitrust laws do not provide effective tools for bringing about an organization of industry that is inefficient in an economic sense, however much it is to be desired on other grounds. If, consistent with Judge Learned Hand's famous articulation of the social policies of the antitrust laws,<sup>14</sup> a monopoly were broken up into units that were smaller than the efficient scale of the industry, the resulting organization of the industry would be unstable. Some firms would expand their output to take advantage of the economics of scale and the least efficient firms would leave the industry. The antitrust laws cannot, in general, do more than temporarily retard the process by which an industry attains an efficient scale of operation.

My second objection applies less to judicial application of antitrust policy than to the enforcement policies of the antitrust agencies, but

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<sup>13</sup> Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE L.J. 775 (1965).

<sup>14</sup> *United States v. Aluminum Co. of America*, 148 F.2d 416, 429 (2d Cir. 1945).

it is with the latter that I am primarily concerned. There is no analytic procedure for weighing costs in economic efficiency against benefits in a more equitable distribution of income and wealth or in other social values. That is not to deny that these things are weighed by legislatures and courts, but the judgment involved is political (in a noninvidious sense) rather than technical or professional and the staff of the Antitrust Division is an inappropriate body for making broad political judgments.

My conclusion is that in the formulation of policy, certainly in areas where there are no hard and fast legislative or judicial rules of antitrust, the Antitrust Division had best confine itself to the economic criterion: maximizing the value of output. That is the course, it seems to me, of effectiveness and of professionalism. The rules that the Supreme Court has read into the Sherman Act by interpretation raise, however, an additional question. Suppose the rule that tie-in agreements are illegal *per se* can be justified only by reference to social policies other than concern with limitations of output—and therefore should never, on the foregoing analysis, have been adopted. It has been adopted, however, and its application involves no reference to those policies. Nonetheless, a judicial rule establishing that certain conduct is within a statutory prohibition does not obligate an enforcement agency, morally or otherwise, to bring cases challenging that conduct. The decision to prosecute properly depends on an ordering of priorities to govern allocation of the agency's limited resources and the courts have no authority to displace that judgment.<sup>15</sup> There is no rational principle that can guide the Division in deciding how much money to spend combating practices that reduce economic efficiency, and how much on practices that increase (or have no clear effect upon) it. A judgment to increase resources devoted to uncovering violations of the tie-in rule would have to be political, in the sense of lying outside of the professional competence of the Division's staff; and such judgments, I have argued, are to be avoided.

### C. *The Search for an Economic Consensus*

If it is desirable and proper that antitrust policy rest on a point of economic theory—prevention of monopolistic restrictions of output—then it is reasonable to turn to the economics profession for guidance in reducing the general goal to a set of usable guidelines. Unfortunately, the profession is deeply divided on the critical issues. Virtually

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<sup>15</sup> Although the government's control of antitrust litigation, once it is instituted, has been undermined by the decision in *Cascade Natural Gas Co. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967), which recognized a broad right of intervention in government antitrust suits. Probably, however, the decision is limited to cases where there is a prior judicial mandate, and at all events it has no application to the judgment whether to bring suit in the first place.



every initiative that the Antitrust Division has taken, or would take, has had or would have its defenders among reputable economists. The Assistant Attorney General in charge of antitrust will rarely be competent to evaluate competing schools of economic thought, and, if he is, he is likely to have his own *parti pris*.

The least unsatisfactory solution that occurs to me is for the antitrust chief (with the help of economist advisers) to identify those questions on which there is a consensus of professional opinion—a very substantial majority position (with mere numbers weighted by experience and distinction)—and to build his policy on that common ground. Not every economist believes that reciprocal buying is a monopolistic practice, although many do,<sup>16</sup> but perhaps there are some practices that all or substantially all economists condemn as monopolistic. As it happens, there is enough common ground among economists on the monopoly question to provide an ample as well as secure base for a program of antitrust enforcement.

The consensus approach is likely to be challenged on the ground that it gives 51 per cent of the votes in formulating antitrust policy to a minority school of industrial-organization economists, many of whom, as it happens, are or have been professors at the University of Chicago. But such an objection misconceives how professional opinions are formed. Academic economists writing in professional journals are unlikely to decide on nonprofessional grounds what kind of antitrust enforcement they would like to have and then concoct economic evidence to support their preferences. Any who did would quickly lose all standing in the profession and their opinions would rightly be ignored in the search for a consensus of professional economic opinion on a question. When a substantial number of highly distinguished economists agree with their brethren on a number of relevant points of antitrust policy, while disagreeing forcefully on others, the prudent antitrust administrator committed to the economic criterion of antitrust enforcement will channel enforcement resources to the areas of agreement and avoid areas where economic science is highly uncertain.

We can begin to delimit the area of concordance by distinguishing between two kinds of arguably monopolistic practice: the single-firm "abuse" and the horizontal "combination." An abuse, as used here, is a practice by which a single firm, without entering into any express or

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<sup>16</sup> For some dissenting views see Ferguson, *Tying Arrangements and Reciprocity: An Economic Analysis*, 30 LAW & CONTEMP. PROB. 552, 567-74 (1965); Stigler, *Working Paper for the Task Force on Productivity and Competition: Reciprocity*, in *Hearings on Small Business and the Robinson-Patman Act Before the Special Subcomm. on Small Business and the Robinson-Patman Act of the House Select Comm. on Small Business*, 91st Cong., 1st Sess., vol. 1, at 285 (1969) [hereinafter cited as *Hearings*].

implied agreement with competitors, seeks to increase its power over price and output. The firm may enlist the aid of noncompeting firms, such as suppliers or customers, as in exclusive-dealing and tying arrangements, but there must be no combination of competitors. In contrast, a combination case, as I use the term, is one where there is a conspiracy, merger, or other concert of action between competitors. This usage differs from that employed in the Sherman Act, whose combinations, conspiracies, and restrictive contracts may be vertical as well as horizontal.

The attempted distinction involves problems of characterization (most acutely with respect to resale price maintenance), but it serves to distinguish the area of consensus from the area of debate. Almost all economists in the relevant fields agree that horizontal combinations can restrict output; many economists, including some very distinguished ones, doubt that abuses can,<sup>17</sup> except in very unusual circumstances.<sup>18</sup> It follows, under the consensus approach here urged, that the Antitrust Division should with few exceptions confine itself to combination cases.

This may seem a breathtaking constriction of the Division's scope of activity. The excluded class includes vertical and conglomerate mergers,<sup>19</sup> arrangements subject to section 3 of the Clayton Act<sup>20</sup> (unless imposed by a conspiracy among competing firms), many single-firm monopolization cases such as the pending suit against IBM,<sup>21</sup> and

<sup>17</sup> The classic formulation of this position remains Director & Levi, *Law and the Future: Trade Regulation*, 51 NW. U.L. REV. 281 (1956). On specific abuses see, e.g., sources cited in note 16 *supra* (reciprocal dealing); McGee, *Predatory Pricing Cutting: The Standard Oil (N.J.) Case*, 1 J. LAW & ECON. 137 (1958), and Telser, *Cutthroat Competition and the Long Purse*, 9 J. LAW & ECON. 259 (1966) (predatory pricing); Bowman, *The Prerequisites and Effects of Resale Price Maintenance*, 22 U. CHI. L. REV. 825 (1955), and Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J. LAW & ECON. 86 (1960) (resale price maintenance); Bowman, *Tying Arrangements and the Leverage Problem*, 67 YALE L.J. 19 (1957) (tie-in agreements). The ideas of these economists have been adopted and applied in a variety of contexts by legal scholars. See, e.g., Bork, *The Rule of Reason and the Per Se Concept: Price-Fixing and Market Division—Part II*, 75 YALE L.J. 373 (1966); Liebel, *Toward a Consumer's Antitrust Law: The Federal Trade Commission and Vertical Mergers in the Cement Industry*, 15 U.C.L.A.L. REV. 1153 (1968). The recent report of President Nixon's Task Force on Competition and Productivity, a mixed group of lawyers, economists, and businessmen, recommended no enforcement activity in the area of abuses. The report (known as the Stigler Report) was submitted to the President in March, 1969, and is printed in *Hearings*, *supra* note 16, at 271.

<sup>18</sup> Such as were involved in *Standard Fashions Co. v. Magrane-Houston Co.*, 258 U.S. 346 (1922), discussed in Director & Levi, *supra* note 17, at 293.

<sup>19</sup> With the occasional exception of some market-extension, potential-competition, and substitute-competition mergers, properly classifiable as horizontal. See note 77 and accompanying text *infra*.

<sup>20</sup> 15 U.S.C. § 14 (1964).

<sup>21</sup> *United States v. International Business Machs. Corp.*, Civil No. 69 Civ. 200, [U.S. Antitrust Cases Summaries—1961-1970 Transfer Binder] TRADE REG. REP. ¶ 45,069, at 52,707 (Case 2039) (S.D.N.Y., filed Jan. 17, 1969).

many resale price maintenance cases. Although the emphasis in the Division's operations has always leaned heavily to the combination, not the abuse, case,<sup>22</sup> a marked change of direction is proposed. But if the reader accepts the proposition that the goal of antitrust enforcement should be to increase the value of output in the economy, and that in giving content to this strictly economic goal antitrust enforcers should be guided by the best professional economic opinion, then he should agree that it is foolish to devote substantial resources to extirpating practices about whose effects economists profoundly disagree, when, as we shall see, there is so much to be done about practices that all agree limit output.

The appeal to an economic consensus enables us not only to narrow our attention to horizontal combinations but also to establish priorities for enforcement attention within that broad area. At present, two questions relating to combinations are particularly controversial. The first is whether a limitation of output, similar to what would be brought about by a cartel,<sup>23</sup> is inherent in the very condition of a highly concentrated market, even if there is no collusion among the firms in the market. If the question is answered in the affirmative, as it is by many economists,<sup>24</sup> it seems to follow that the limitation can be removed only by changing the concentrated structure of the market, that is, by dismembering the largest firms.<sup>25</sup> If, on the other hand, as is implicit in the theory of oligopoly proposed by George Stigler,<sup>26</sup> noncompetitive pricing by oligopolists without detectable collusion is nothing more than a special case of cartelization ("tacit collusion"), then one can argue that the criminal and injunctive penalties used to control ordinary cartels can be used against oligopoly pricing as well and there is no need to have recourse to structural remedies.<sup>27</sup>

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<sup>22</sup> Since 1940-1944, cases involving an abuses charge have represented between 26 and 30 per cent of the total cases brought in each five-year period, and in many of those cases a horizontal combination is also charged. See *Statistical Study* at 396 (Table 22).

<sup>23</sup> "Cartel" as used in this paper means any "horizontal combination" as earlier defined that can fairly be characterized as a price-fixing agreement or the equivalent. Apart from the case of resale price maintenance, discussed later, there are a number of other ambiguous arrangements which may or may not be cartels depending on the circumstances. Customer and territorial limitations in distribution are examples. My own, not fully examined view is that they are analytically about the same as resale price maintenance, but I do not attempt an adequate treatment here. See Bork, *supra* note 17, for a useful discussion.

<sup>24</sup> Their point of view—the interdependence theory of oligopoly—is well summarized in the White House Task Force Report on Antitrust Policy (July 5, 1968) [hereinafter cited as NEAL REPORT], another report of a mixed lawyer-economist group. See *Hearings, supra* note 16, at 291, 296. J. BAIN, *INDUSTRIAL ORGANIZATION* (2d ed. 1968), contains a recent statement of the position by an economist (see especially p. 114).

<sup>25</sup> See NEAL REPORT, *supra* note 24, at 299-300, where such a proposal is made.

<sup>26</sup> Stigler, *A Theory of Oligopoly*, 72 J. POL. ECON. 44 (1964), reprinted in G. STIGLER, *THE ORGANIZATION OF INDUSTRY* 39 (1968).

<sup>27</sup> *Oligopoly and Antitrust* at 1575-92.

The consensus approach requires rejection of the interdependence theory of oligopoly and the structural solutions to which it points. Simple prudence dictates the same result, for the empirical foundations of the interdependence theory have lately been badly shaken.<sup>28</sup> This leaves open the question, which turns largely on issues of judicial competence, how far to push anticartel measures; we return to it in a later section.

The second controversy relating to combinations involves the definition and appraisal of "barriers to entry." The term is used in two different senses and it is important to distinguish them. It is used in a broad sense to denote any condition that would delay the immediate entry by new competitors into a market in which firms were charging a price above cost,<sup>29</sup> and in a narrower sense to denote a condition that imposes on a new entrant higher long-term costs of operating in the market than are borne by firms already there.<sup>30</sup> Large capital requirements are an example of a barrier to entry in the first sense, a regulatory policy barring new entrants (such as that of the Civil Aeronautics Board with regard to trunk-line carriers<sup>31</sup>) an example of a barrier to entry in the second sense.

The importance of the distinction lies in the fact that barriers in the first sense are transitory while barriers in the second sense need not be, so *prima facie* the latter are far more serious. In a market where established customer contacts are very important or where new products are heavily advertised, it may take a while for a new firm to get established; but there is no presumption that the costs of getting established are any higher than those which the established firms in the market bore, so there is no reason to expect that entry will not occur if a monopoly price is charged in the market. In a market where entry is in the grace of a regulatory agency, grudgingly bestowed, firms in the market may be able to charge monopoly prices indefinitely without entry occurring.

I do not mean to imply that a lag in entry may not be an important factor in whether a serious limitation of output is possible. It becomes necessary, however, to compare the probable length of the lag with the

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<sup>28</sup> See Brozen, *The Antitrust Task Force Deconcentration Recommendation*, 13 J. LAW & ECON. 279 (1970).

<sup>29</sup> This is apparently the sense in which it is used by Professor Bain. See J. BAIN, *BARRIERS TO NEW COMPETITION* ch. IV (1956).

<sup>30</sup> See G. STIGLER, *supra* note 26, at 67-70; Y. Brozen, *Capacity, Advertising, and Entry Barriers* (unpublished paper at U. of Chi. Grad. Sch. of Bus.). Brozen offers a refinement of the definition in the text, but it is unimportant to our discussion.

<sup>31</sup> See R. CAVES, *AIR TRANSPORT AND ITS REGULATORS—AN INDUSTRY STUDY* 169 (1962). The cost of new entry in that example is the cost of changing the policy, and from the standpoint of a prospective entrant is likely to be infinite.

probable duration of any enforcement proceeding undertaken to eliminate the condition responsible for the lag. Economists disagree, moreover, on the importance of various entry-retarding conditions. No one doubts that it would take longer to establish a new auto manufacturer than a new supermarket, but the real questions lie elsewhere. Does advertising make it easier or harder for a new entrant to get established? Harder, some say, because the new entrant must overcome the accumulated goodwill that advertising has created for the existing brands;<sup>32</sup> probably easier, say others, because the new entrant can ride the coattails of the existing firms, who have helped create public acceptance of the product,<sup>33</sup> and because the higher price that established firms must charge in order to cover their advertising expenses creates attractive opportunities for the new entrant to market his goods as off-brand or private-brand merchandise through retail chains that have their own reservoirs of consumer goodwill.<sup>34</sup> The difficulty of assembling capital for investments is another point of dispute.<sup>35</sup> The way such questions are answered has significant implications for the proper direction of antitrust enforcement. If advertising and capital requirements slow the rate of entry materially, as some believe, then there is a stronger argument for attacking practices that contribute to those conditions, such as a merger that permits more advertising by enabling economies of scale in advertising to be obtained, or vertical integration, which, if carried far enough in an industry, may force a new firm wishing to enter at one level to enter, with a larger investment, at both. Unfortunately, there is no consensus on these matters—which is a major reason why there is also no consensus on the significance of abuses. Many of them, like vertical integration, are plausibly sinister only if one believes that increasing the capital requirements for entry is likely to make a big difference in the speed of entry.<sup>36</sup> In contrast, there is general agreement that barriers to entry in our second, more limited sense are quite serious.

Donald Turner has suggested still a third sense in which the conditions of a market may impose a barrier to entry.<sup>37</sup> Even when the cost of entry is the same for the new entrant as for the established firm,

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<sup>32</sup> Comanor & Wilson, *Advertising Market Structure and Performance*, 49 REV. ECON. & STAT. 423, 425 (1967).

<sup>33</sup> Demsetz, *The Effect of Consumer Experience on Brand Loyalty and the Structure of Market Demand*, 30 ECONOMETRICA 33 (1962).

<sup>34</sup> Brozen, *supra* note 30, at 16-17, 21.

<sup>35</sup> See Stigler, *Imperfections in the Capital Market*, 75 J. POL. ECON. 287 (1967), reprinted in G. STIGLER, *supra* note 26, at 113.

<sup>36</sup> See, e.g., Blake & Jones, *Toward a Three-Dimensional Antitrust Policy*, 65 COLUM. L. REV. 422, 447-48 (1965).

<sup>37</sup> In his forthcoming treatise on antitrust law with Phillip Areeda.

there may be nonrecurring costs of entry, he believes, that will favor the latter. The established firms will already have incurred extensive start-up costs—in advertising, in making arrangements with distributors and suppliers, in developing the product, and in testing the demand for it—that the prospective new entrant has first to incur. Those are sunk costs to the established firms and they can ignore them in pricing. This gives them a built-in price advantage over the new entrant.

The argument is highly speculative. It reverses the common sense expectation that it is often rougher to be the first firm in an industry than the second because the second can learn from the mistakes of the first. It assumes, rather incredibly, that a firm can “coast” indefinitely on the initial advertising campaign, the initial product specifications, the initial distributor organization—as if firms did not, in fact, advertise continually, improve their products continually, and renew continually their contacts with suppliers and distributors.

Turner's most plausible example of a nonrecurring cost of entry is the premium that a new entrant must pay in order to borrow money for the risky venture of trying to penetrate a new market. Once the new firm has become established in the market, it can presumably renew the initial loan at a lower rate, while the new entrant will have to pay a higher. It is not so clear that this is in fact a nonrecurring cost. After all, the established firms will have to bring out new products from time to time and investment in them may be quite risky (the Edsel). Large multi-product firms, an important category of new entrants, may be able to make new investments at substantially reduced risk. A major source of entry, in a practical sense, is the expansion of smaller firms already in the industry, and they may not have to pay a substantial premium for expansion capital. But I am willing to grant Turner's assertion that a new entrant will face higher initial capital costs in order to point out an important offsetting factor: the expectation, which ought to justify incurring some risk premium, of abnormally high profits. Firms earning monopoly profits are unlikely to cut their prices to their costs in order to prevent or repel the entry of firms having somewhat higher costs at the start. The theory of the dominant firm (which applies with equal force to cartels, and for which there is some empirical support) teaches that the profit-maximizing strategy in the face of threatened entry is not to fix a price low enough to prevent entry from occurring but to fix a higher price, at which entry occurs.<sup>38</sup> The gradual contraction of monopoly profits

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<sup>38</sup> See Stigler, *The Dominant Firm and the Inverted Umbrella*, 8 J. LAW & ECON. 167 (1965), reprinted in G. STIGLER, *supra* note 26, at 108.

under the second response is preferable to their immediate disappearance under the first. If a new entrant has permanently higher costs than the existing firms in the market, there may be a price at which they can forestall entry indefinitely while continuing to enjoy some monopoly return, but since Turner assumes merely a temporarily higher cost for the new entrant, that strategy is unavailable.

A final point, passed earlier, can be resolved by reference to the consensus approach. We said that the economic test of an anticompetitive practice is whether it tends to make the value of output less than what it would be under competition. Some economists believe that monopoly has other important adverse consequences—on innovation, on technical efficiency, and on the quality of service.<sup>39</sup> But there is no consensus on these points; the effect on output is the only well established objection to monopoly.<sup>40</sup> One can find economists who doubt even that, but our standard is consensus, not unanimity.<sup>41</sup>

## II. SPECIFIC SUBSTANTIVE POLICIES

The previous discussion implies that antitrust enforcement should be concentrated against horizontal price fixing and regulatory barriers to entry—regulation being the principal barrier to entry on which most economists agree. Other horizontal practices, such as boycotts imposed by a group of competing sellers, are plainly appropriate objects of attack too, insofar as they are ancillary to price-fixing conspiracies. A policy of limiting horizontal mergers can also be deduced from concern with price fixing, but it raises special questions deserving separate treatment. Finally, control of entry is only one of the competitive problems raised by regulation; cartelization and horizontal mergers are others. Since the role of the Division is necessarily quite different in the regulated industries, these competitive problems are best discussed

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<sup>39</sup> See, e.g., Williamson, *supra* note 3, at 29-30, and sources cited therein.

<sup>40</sup> See *id.* at 30 n.8, and Posner, *Natural Oligopoly and Its Regulation*, 21 STAN. L. REV. 548, 577-84 (1969), for reviews of the relevant economic literature.

<sup>41</sup> The most serious challenge to the consensus view on this point is implicit in the view of William Baumol (and others) that firms even in highly concentrated industries invariably seek to maximize sales growth, rather than profits, and so are presumably uninterested in restricting output. See W. BAUMOL, *BUSINESS BEHAVIOR, VALUE AND GROWTH* 45-52, 96-104 (rev. ed. 1967). But the implications of the sales-maximization hypothesis for cartel theory seem, in fact, rather less clear than this summary suggests. In more recent formulations, Professor Baumol has stressed rate of growth of sales as the prime maximand, and has noted that this entails that profits be viewed as an "instrumental variable" rather than merely, as in the simple sales-maximization hypothesis, a constraint. *Id.* at 96. If profits play a key role in enabling rapid growth, as he believes, perhaps a sales maximizer would still want monopoly profits in at least some of his markets—an issue Baumol has not, to my knowledge, discussed.

together. Accordingly, our discussion of substantive policy is in three subparts: price fixing, horizontal mergers, and regulated industries.

### A. Price Fixing

Although the framers of the Sherman Act were apparently concerned with artificial limitations on output, the statute is not drafted explicitly in those terms and its language has come to have a life of its own. The present meaning is that any agreement or conspiracy between competitors to control price is forbidden whether or not a limitation of output results or is likely to result.<sup>42</sup> The only proof of price fixing that is required or ordinarily offered is proof that the defendants conspired. The effects of the conspiracy are immaterial. It is thus evident that what the law is actually punishing is the attempt to fix prices and that the completed act—an actual restriction of output—is incidental.<sup>43</sup>

Since lawyers and judges usually know much more about conspiracy doctrine than about price theory, the displacement of emphasis from the economic consequences to the fact of conspiring is wholly natural. But it is inconsistent with a program designed to maximize the net social product of antitrust enforcement. Many attempts to fix price may have negligible consequences, while much serious price fixing may escape detection altogether because proof of overt communication is normally required to establish an attempt but such communication may not always be necessary to effectuate price fixing.<sup>44</sup>

The reasons offered for emphasizing the attempt to fix prices rather than the completed act are not convincing. It is said, for example, that businessmen would not attempt to fix prices in situations where they were unlikely to be successful. By forbidding the attempt, therefore, we prevent actual price fixing. And since price fixing has no social utility, no harm is done if attempts that would not have succeeded are sometimes punished. But while it is doubtless true that firms would not enter into price-fixing conspiracies if they were convinced they would not succeed, they may sometimes be mistaken, and such mistakes, even if rare, could account for a large proportion of the small number of price-fixing cases that the enforcement agencies bring. In addition, if the costs of price fixing (including punishment costs, discounted by the probability that the conspirators will not be apprehended or that any punishment imposed will be nominal) are low, conspiracy will be

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<sup>42</sup> ABA ANTITRUST SECTION, ANTITRUST DEVELOPMENTS, 1955-1968, at 2-5, 15, 19-24 (1968), contains a summary of the current law of section 1.

<sup>43</sup> Except in assessing damages in a private treble-damage suit. On the inadequacy of the present damages remedy see *Oligopoly and Antitrust* at 1590.

<sup>44</sup> The likelihood of price fixing without any provable collusion is assessed in *Oligopoly and Antitrust* at 1566-75.



a rational business strategy even if nine out of every ten attempts fail. Nor is it correct that there is no harm in pursuing attempts to fix prices that would not succeed. Enforcement resources consumed in marginal cases are unavailable for more important ones. There is some empirical confirmation of my fear that the Antitrust Division's enforcement of the price-fixing rule is indeed misdirected.<sup>45</sup>

A second ground for the emphasis of the law on the attempt to fix prices, rather than on economic effects, is that judicial (or quasi-judicial, if we were discussing the Federal Trade Commission) processes are ill suited to the resolution of the kind of complex economic questions that an "effects" case would frequently involve. But this observation, if sound, could justify, at most, the refusal of the courts to apply economic criteria, not the refusal of the enforcement agencies to use such criteria informally in deciding where to concentrate their resources.

The final justification offered for the emphasis on attempts is that we simply do not know enough about cartelization to use any other approach. This may be unduly pessimistic.<sup>46</sup> Economic data could, perhaps, be used to identify serious limitations of output due to express or tacit collusion. The inquiry would proceed in two stages. The first would consist of identifying those markets whose characteristics predispose them toward price fixing—markets, in other words, where a search for evidence of actual price fixing is most likely to be rewarded. The second stage would consist of applying certain tests in the suspect markets to determine whether output was or was likely to be restricted significantly. I own to considerable doubt, shared by economists with whom I have discussed the matter, that either step is fully practicable in the present state of economic knowledge. But the alternative of continuing to rely exclusively on the attempt approach seems to me even more dismal, and I can see no harm in experimenting with a new approach.

The predisposing characteristics have been discussed elsewhere,<sup>47</sup> and it is unnecessary to repeat the discussion here. The nature of the analysis may be indicated by describing a hypothetical market in which all of the

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<sup>45</sup> See *Statistical Study* at 410-11.

<sup>46</sup> For discussions of cartelization from a variety of perspectives see J. BAIN, *PRICE THEORY* 283-97 (1952); D. DEWEY, *MONOPOLY IN ECONOMICS AND LAW* 7-24 (1959); K. PRIBRAM, *CARTEL PROBLEMS—AN ANALYSIS OF COLLECTIVE MONOPOLIES IN EUROPE WITH AMERICAN APPLICATION* (1935); G. STIGLER, *supra* note 26. An approach to enforcement of the antitrust laws against cartels that is somewhat parallel to my own is Kuhlman, *Nature and Significance of Price Fixing Rings*, 2 *ANTITRUST L. & ECON. REV.* 69 (1969).

<sup>47</sup> *Oligopoly and Antitrust* at 1569-75, 1603-04; McGee, *Ocean Freight Rate Conferences and the American Merchant Marine*, 27 *U. CHI. L. REV.* 191, 197-98 (1960); cf. L. ZIMMERMAN, *THE PROPENSITY TO MONOPOLIZE* (1952). The phrase and concept originated with Aaron Director.

predisposing characteristics are present. Such a market would have only a few firms, each with a large market share. There would be no close substitutes. Entry by new competitors would be very infrequent. The product sold in the market would be homogeneous and standardized. The customers for the product would consist of a large number of small buyers. Demand would be stable and highly inelastic. The market would not be vertically integrated forward.<sup>48</sup> It would have a history of collusive practices. The list could perhaps be lengthened but the foregoing enumeration gives an adequate picture of the general approach. Not all of the characteristics will be present in any actual market, of course, and their proper weighting presents difficulty. But it may at least be possible to exclude from further investigation a number of markets whose attributes make it unlikely that price fixing will be attempted or, if attempted, succeed. One might still wish to devote some enforcement resources to those markets. When the benefits from violating the law are slight even if the violator gets away with it, it may be possible to obtain effective deterrence very cheaply by devoting just so many enforcement resources as are necessary to maintain a slight probability of detection and punishment.<sup>49</sup> The important point, however, is that one needs a method of distinguishing those markets to which to devote major resources from those in which the optimum commitment is much more limited, and the analysis of predisposing characteristics is such a method.

The second and more difficult stage of investigation is to discover whether output is actually being restricted in the markets where one expects it to be. The following kinds of evidence, arrayed in the approximate order of practical utility, appear relevant on this point.<sup>50</sup>

1. *Fixed Relative Market Shares.* If the major firms in a market have maintained identical or nearly identical market shares relative to each other<sup>51</sup> for a substantial period of time, that is good reason to believe that they have divided the market (whether by fixing geograph-

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<sup>48</sup> The enforcement of a price-fixing agreement is bound to be difficult where one of the members sells at a lower level in the chain of distribution than the others, for they will find it difficult to discover whether his prices are consistent with the cartel agreement. Suppose the cartel price to retail dealers is 10¢, and a vertically integrated member of the cartel, who sells only to the ultimate consumer, charges the consumer 13¢. The cartel members, in order to know whether or not this seller is cheating, must determine the reasonable spread between wholesale and retail price.

<sup>49</sup> The requirements of effective deterrence are discussed in Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968), and in Stigler, *The Optimum Enforcement of Laws*, 78 J. POL. ECON. 526 (1970).

<sup>50</sup> Some of these categories are also discussed in *Oligopoly and Antitrust* at 1578-83, but the present discussion should be considered to supersede the earlier one.

<sup>51</sup> The significance of the "relative to each other" qualification will become apparent in section 8 of this subpart.

ical zones or sales quotas or by an assignment of customers), and thereby eliminated competition, among themselves. Under competition, market shares will fluctuate as now one firm, now another, pulls ahead of its rivals in the struggle for customers and sales. Divisions of markets have of course figured in many Sherman Act cases;<sup>52</sup> the novelty is in regarding proof that market shares have been abnormally stable as sufficient to warrant an inference that the market has in fact been divided.

2. *Economic Discrimination.* Price discrimination, in the economic sense, occurs when similar goods are sold at prices that bear different ratios to the marginal costs of the goods.<sup>53</sup> Discrimination in this sense enables a monopolist or cartel, under certain conditions, to obtain larger profits than it could with a single price. One therefore expects to encounter the practice in markets where there is price fixing. And since price discrimination other than of a temporary or sporadic sort is inconsistent with competition, it is sure evidence of monopoly or price fixing.

There are several objections to relying on evidence of price discrimination to establish price fixing. The first is that if our goal is to maximize output we should encourage rather than discourage price discrimination, because a monopolist who utilizes discrimination may produce a greater output than one who sets a single price. However, unless price discrimination is perfect—the price of every sale computed separately on the basis of its marginal cost and elasticity of demand—one cannot be certain that output will be higher than under a single monopoly price.<sup>54</sup> Discrimination is never perfect. In decreasing-cost industries like electrical power, where some demands are highly inelastic and other, readily separable demands are highly elastic, discrimination may produce an output close to the efficient and at all events larger than under a single price. But there is no basis for assuming that the crude methods of discrimination employed in the usual market improve the allocation of resources. Also, price discrimination involves administrative expenses that, assuming there is no marked improvement in output, represent a loss from the social standpoint; and it may generate secondary inefficiencies.<sup>55</sup>

A second objection to reliance on evidence of price discrimination is that it may simply induce price fixers not to discriminate, thus pro-

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<sup>52</sup> E.g., *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951).

<sup>53</sup> A good example is the basing-point system in *FTC v. Cement Institute*, 333 U.S. 683 (1948).

<sup>54</sup> See J. ROBINSON, *THE ECONOMICS OF IMPERFECT COMPETITION* 190-95 (1933).

<sup>55</sup> As succinctly explained in Coase, *The Theory of Public Utility Pricing and Its Application*, 1 *BELL J. ECON. & MANAGEMENT SCI.* 113, 126-27 (1970).

viding merely symptomatic relief. Even so, since price discrimination is a method of increasing monopoly profits, its elimination would make price fixing less attractive, which should reduce its incidence.

Finally, there is unfortunately a large probability of confusing competitive price cutting with price discrimination. Price differences resulting from changes in equilibrium may be difficult to distinguish from price differences due to monopoly power. But despite acute problems of characterization<sup>56</sup> and measurement there should be many cases where, though marginal costs cannot be determined precisely, it is reasonably clear that similar goods are persistently being sold at prices that are not in the same proportion to their marginal costs. Academic writers, at least, have not hesitated to infer price discrimination, typically from evidence presented in antitrust proceedings by lawyers whose knowledge of economic discrimination was probably shaky.<sup>57</sup> I shall discuss later some ways of improving the economic staff work on antitrust cases.

3. *Exchanges of Price Information.* In a market of many small sellers, the exchange of price information may serve the salutary purpose of reducing price dispersions based on inadequate knowledge and thereby improving competition. Where the sellers are few, however, the problem of inadequate knowledge is probably less serious—it is easier to keep tabs on the pricing of a few rivals—and the inference that complete certainty as to competitors' actual transaction prices is sought primarily to facilitate cartelization is much stronger. Systems of price exchange are pretty good evidence of price fixing in the second case, but not in the first; the Supreme Court has unfortunately got it backward.<sup>58</sup> Exchanges of price information may take quite subtle forms.

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<sup>56</sup> Among other things, monopolistic discrimination may be easily confused with peak-load pricing, with promotional price reductions, and with efficient pricing policies in decreasing-cost industries. Cf. J. HIRSHLEIFER, J. DEHAVEN & J. MILLIMAN, *WATER SUPPLY—ECONOMICS, TECHNOLOGY, AND POLICY* 88-93, 101-05 (1960).

<sup>57</sup> See, e.g., C. KAYSER, *UNITED STATES V. UNITED SHOE MACHINERY CORPORATION: AN ECONOMIC ANALYSIS OF AN ANTITRUST CASE* 145-46 (1956); J. MCKIE, *TIN CANS AND TIN PLATE—A STUDY OF COMPETITION IN TWO RELATED MARKETS* 58-64, 160-82 (1959); Adams, *The Steel Industry*, in *THE STRUCTURE OF AMERICAN INDUSTRY—SOME CASE STUDIES* 145, 168-69 (W. Adams ed. 1950).

<sup>58</sup> In *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921), the Court condemned an exchange of price information among members of the hardwood-manufacturing industry. The industry was quite atomized: the 365 firms that participated in the exchange operated only 5% of the total mills engaged in hardwood manufacture and accounted for only one-third of industry output. In *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563 (1925), however, an exchange of cost and price information among only 22 firms, which together enjoyed 70% of the relevant market, was condoned, despite circumstances strongly suggesting that the purpose of the information exchange was to facilitate price fixing. In the very recent case of *United States v. Container Corp. of America*, 393 U.S. 333 (1969), where an exchange of transaction prices was involved, the

Public discussions of the "right" price for an industry to maintain, conducted by the businessmen in the industry, and announcements of price increases far in advance of their actual implementation, may be stages in the formation and implementation of a cartel agreement, and should be scrutinized carefully.

4. *Regional Price Variations.* If a product is sold in separate geographical markets (like cement), and if prices are fixed in some of these markets but not others, one will observe a regional price variation. To be sure, such a variation may stem from factors other than price fixing; costs may be different in the different areas. But it should be possible in the usual case to correct for those differences. The method is of limited utility where the market for a product is nationwide (like locomotives); but comparison with foreign markets may be possible. In any event, most price-fixing cases have involved regional or local, rather than nationwide, conspiracies.<sup>59</sup>

5. *Identical Bids.* A useful method of proving price fixing is to show that identical sealed bids were submitted for a contract to supply a non-standard item. The qualification is important: if the item is standard, or composed of standard items, identical bids are consistent with competition because the bidders' costs may be identical. This method of proof is of course limited to sealed-bid situations, and moreover to those sealed-bid situations where the conspirators are not clever enough to rotate the low bid in the manner of the electrical conspirators.<sup>60</sup> Patterns of bidding should be studied for evidence of suspicious regularities; the inquiry will be much the same as suggested in the first section.

6. *Price, Output, and Capacity Changes at the Formation of the Cartel.* The formation of a successful cartel will be followed (in the usual case) by a rise in price and a reduction in output, unless demand for the product is increasing—an effect that can perhaps be netted out. Simultaneous price increases and output reductions unexplained by any increases in cost are therefore good evidence of price fixing. Notice once again that it is not necessary to determine what the firms' marginal costs are or what the competitive price and output would be. One simply observes price and output changes, and asks whether increases in costs or changes in demand explain them. Another clue is the unexplained creation of substantial excess capacity. When firms contract output pursuant to a price-fixing scheme, their previous capacity, geared to the larger competitive output, becomes in part excess; the history

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Court did attach weight to degree of concentration, but at the same time reaffirmed the hardwood decision.

<sup>59</sup> *Statistical Study* at 401 (Table 25).

<sup>60</sup> See Kuhlman, *The 'Phase of the Moon' Charts in the Electrical Conspiracy Case: A Curio*, 1 ANTITRUST L. & ECON. REV. 93 (1967).

of cartels contains some dramatic examples of this phenomenon.<sup>61</sup> When excess capacity arises suddenly, and cannot be explained by changes in demand or mistakes in planning, it is evidence of price fixing.

If the cartel is reasonably stable, capacity will gradually be reduced to a level appropriate to the reduced scale of output. If it is unstable and the participants are suspicious that it may break down, they may decide to maintain extra capacity in reserve; or they may do so in order to enhance their bargaining power within the cartel. In either event one would observe persistent excess capacity, which would be additional evidence of price fixing. But such evidence is likely to be ambiguous because of the difficulty of determining when nonutilization of capacity is excessive.

7. *Resale Price Maintenance.* Industry-wide resale price maintenance may be a sign of price fixing. Where the resale price is fixed, it is much more difficult for a manufacturer to cheat on the cartel: if he grants a secret discount to a dealer he will gain no additional sales; the discount will be a pure windfall to the dealer. But it is an ambiguous sign, because it might mean only that each of the sellers in the industry had decided that his own ends would be furthered by controlling the resale price of the product. The problem of characterization may be approached by considering under what circumstances a manufacturer might be better off controlling the resale price. The answer of economists is that he might be better off when the product is sold in conjunction with expensive services performed by the dealer, such as elaborate display.<sup>62</sup> A dealer might be tempted to dispense with the services and cut his price, thereby attracting sales away from dealers who continue to provide them. Inevitably, the amount of services provided would diminish. Resale price maintenance is a way of preventing such "free loading" and the consequent erosion of service. Where a product is not typically sold together with services, this explanation fails, and we can assume that the purpose of the industry-wide resale price maintenance is to facilitate price fixing among the sellers.

The same test should enable an enforcement agency to distinguish between resale price maintenance schemes imposed by a single seller for his own ends and resale price maintenance schemes nominally imposed by a single seller but actually imposed by his dealers to eliminate

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<sup>61</sup> Such as the closing down of many plants by the Tobacco Trust shortly after it bought them. See *United States v. American Tobacco Co.*, 221 U.S. 106, 174-75 (1911). For another example see D. DEWEY, *supra* note 46, at 14 n.7.

<sup>62</sup> See Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J. LAW & ECON. 86 (1960).

competition among them. If the product is not one sold with services, the latter inference can be drawn. On this basis, the Antitrust Division can proceed even in Fair Trade states (since the Fair Trade exemption does not extend to horizontal price fixing<sup>63</sup>); and it can be more discriminating than heretofore in its activity in areas not covered by Fair Trade.

To complete this discussion, I note that whether a resale price maintenance scheme is effectuated by an outright agreement or by a simple refusal to deal is of no consequence to the analysis; the effect is the same and it is effects that we are concerned with. I assume that, whatever the current vitality of the *Colgate* doctrine,<sup>64</sup> it would not be deemed applicable to a combination shown to be essentially horizontal rather than vertical. The doctrine concerns the right of a seller to choose his customers on any basis he decides, including the pricing policy of the customer. Where something more is involved, such as a horizontal combination inferable from other facts, the doctrine is inapplicable; that is the thrust of the decisions limiting it.<sup>65</sup>

8. *Declining Market Shares of Leaders.* The establishment of a monopoly price will attract new competitors to a market, for they will perceive opportunities for unusual profits. The existing firms could seek to repel entry by reducing their price to the competitive level, but, as mentioned earlier, they will do better by maintaining a supra-competitive price and allowing their market share gradually to decline. A long-term decline in the market shares of the leading firms in a market, accordingly, is a symptom of price fixing—but of course it is an ambiguous one, since the decline may be attributable to other factors. In some cases, perhaps, it will be possible to rule out the other factors.

9. *Amplitude and Fluctuation of Price Changes.* There is some basis in economic theory for believing that a monopolist or the members of a cartel will change prices less frequently, and in smaller amounts, in reaction to cost changes than the sellers in a comparable competitive market.<sup>66</sup> This is subject to so many qualifications, and has been so little studied empirically, as to be virtually useless from an enforcement standpoint at the present time, although one may hope that the situation will eventually improve. Surprisingly, the Supreme Court has on one occasion attached great weight to such evidence, with results that

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<sup>63</sup> See Miller-Tydings Act of 1937, 50 Stat. 693, amending 15 U.S.C. § 1 (1964).

<sup>64</sup> United States v. Colgate & Co., 250 U.S. 300 (1919).

<sup>65</sup> See, e.g., United States v. Parke, Davis & Co., 362 U.S. 29 (1960).

<sup>66</sup> McGee, *supra* note 47, at 228-29; *Oligopoly and Antitrust* at 1580-82.

make its pitfalls all too evident. The case is the second *American Tobacco* case.<sup>67</sup> In 1931, the major cigarette companies announced a six per cent price increase, even though the cost of tobacco was declining and there was a depression. To the Court, and to Donald Turner in an influential article discussing the case, this was unmistakable evidence of noncompetitive conduct. In his words, "One can hardly find clearer evidence of an absence of effective competition than an increase of prices in the face of declining costs and weakening demand."<sup>68</sup>

The initial peculiarity in this statement is that a rational profit-maximizing monopolist will never increase price in the face of falling costs, unless his previous price was not profit-maximizing, and there was no hint of that here. The monopolist's response to "weakening demand" may be more complex. If demand declines in volume but the elasticity of demand remains unchanged—one possible meaning of "weakening demand"—then a rational profit-maximizing monopolist will raise, lower, or not change his price depending on the shape of his marginal-cost curve.<sup>69</sup> He will lower his price only if he faces a downward-sloping marginal-cost curve, that is, if the cost of a unit of output declines as output increases. Since, as mentioned earlier, a cartel may be plagued with excess capacity, and since the existence of excess capacity implies that unit cost would be lowered by increasing output, it is not implausible to suppose that the marginal-cost curves of the cigarette companies may have been declining in the relevant region—but for one thing: there is no indication of any excess capacity among the major companies during this period.<sup>70</sup> Furthermore, there is no suggestion that the demand for cigarettes was decreasing at the time of the 1931 price increase.<sup>71</sup>

Let us consider now the effect on price of a change not in the volume of demand, for it appears that there was no such change in the relevant period, but in the elasticity of demand. If demand becomes more elastic, a profit-maximizing monopolist will reduce his price; if it becomes less elastic, he will increase his price. The gain from raising price in order to take advantage of greater inelasticity might outweigh the gain from reducing price to take advantage of lower costs (assuming they were lower), resulting in a net price rise in the face of falling costs and

<sup>67</sup> *American Tobacco Co. v. United States*, 328 U.S. 781 (1946). The present discussion corrects and amplifies my discussion of the case in *Oligopoly and Antitrust* at 1585-87.

<sup>68</sup> Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655, 661 (1962).

<sup>69</sup> For a concise explanation see Reimer, *A Comment on Oligopoly Pricing Practices and Economic Theory*, 38 J. BUS. U. CHI. 210 (1965).

<sup>70</sup> Cf. W. NICHOLLS, *PRICE POLICIES IN THE CIGARETTE INDUSTRY—A STUDY OF "CONCERTED ACTION" AND ITS SOCIAL CONTROL, 1911-1950*, at 78-79 (1951).

<sup>71</sup> Cf. *id.* at 84, 88.



weakening demand. Perhaps that is the case Professor Turner had in mind.

How likely is it that the demand facing the cigarette companies was becoming less elastic? One can speculate that in times of depression demands would generally become less elastic due to less frequent entry of new competitors into markets; but equally they might become more elastic because consumers shopped around more carefully among substitute products. In the case of cigarettes the second hypothesis seems more plausible. It was during the depression, and only then, that the position of the major sellers was seriously challenged. People were more interested in low-price substitutes for major-brand cigarettes than ever before or since. Entry was facilitated rather than impeded by the depression.

In sum, collusion, tacit or express, does not seem a compelling explanation for the 1931 price increase. The alternative explanation advanced in my previous article<sup>72</sup> seems as plausible (or implausible). The point is that price changes in response to changes in demand or cost conditions are highly equivocal evidence of monopolizing.

In limiting the foregoing list to economic items, I do not mean to exclude the more traditional sorts of evidence—evidence of conspiratorial meetings in hotel rooms, actual divisions of market, boycotts of customers who are buying from price cutters, phony patent-licensing agreements, and the like. The aim is not to displace but to supplement these methods of proof, not only so that the Division can distinguish between the abortive attempt to fix prices and the successful, but also so that it can proceed against violations that cannot be detected or proved by the older methods alone.

My use of terms like “proof” and “evidence” in this discussion may be misleading. The information upon which the Division proceeds in deciding whether to initiate an investigation or prosecution need not be the same as that used by the courts in deciding whether a violation has been proved. Much of the economic evidence described above could not yet be assimilated by the judicial process; certainly the Supreme Court’s past performance in the handling of economic questions in anti-trust cases affords no ground for optimism. The point is that the Anti-trust Division should use economic evidence in its enforcement decisions, although I would expect that if the program proposed here were implemented economic evidence relating to predisposing characteris-

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<sup>72</sup> *Oligopoly and Antitrust* at 1586-87 (a product improvement shifted the major companies’ demand curve upward and to the right while expenses associated with the improvement were simultaneously shifting the cost curve upward and to the left).

tics and to economically significant conduct would play an increasingly important part in the trial as well as selection of antitrust cases.

The decision to prosecute should not turn wholly upon the evidence, economic or otherwise, of a serious violation. The Division must also consider whether there may not be alternative remedies that are superior. Where a case involves a purely local market, for example, the Division should consider the capability of local authorities to proceed under state antitrust laws; this I believe is never done now. In other cases it should consider the ability and willingness of private plaintiffs to obtain adequate relief, now that private antitrust actions have become, to say the least, highly feasible.

My proposal to use more economic evidence in price-fixing cases probably implies an appreciably greater allocation of enforcement resources to the price-fixing area, and the ultimate question is whether the benefits in enhanced output are likely to exceed these additional costs. I believe so. Considering the number of programs that would be phased out under the proposals sketched in this paper, it is not clear that a net increase in the Division's resources is contemplated; indeed, I have assumed the resources of the Division to be fixed at their given level. Even though, as mentioned, the sanctions for price fixing are much weaker than one would like, they are not so negligible that a more effective method of detection and proof of price fixing would not produce greater compliance.<sup>73</sup> Nor am I troubled by assertions that cartelization may be good for the economy after all: they are rather thoroughly discredited among economists.

The most troublesome question in the assessment of the costs of a more vigorous attack on cartels arises if we assume, as we surely must, that the enforcement of the antitrust laws against price fixing can be, at best, only partially effective. As George Stigler has pointed out, the antitrust laws are most effective against the highly organized cartel, with its joint sales agency, sales quotas, and the like, because these devices are difficult to conceal<sup>74</sup>—although they crop up occasionally in antitrust cases to the present day.<sup>75</sup> At first blush, the suppression of the highly developed cartel appears to be an unequivocal good since such a cartel is likely to restrict output more. At the same time, it has one social advantage not shared by its covert and less effective cousin, the ordinary price-fixing conspiracy: it minimizes the production costs of the cartel's members. As discussed earlier, when a cartel is created and

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<sup>73</sup> See *Oligopoly and Antitrust* at 1591.

<sup>74</sup> Stigler, *The Economic Effects of the Antitrust Laws*, 9 J. LAW & ECON. 225, 236 (1966), reprinted in G. STIGLER, *supra* note 26, at 259, 270.

<sup>75</sup> See *Statistical Study* at 400 (Table 24).

output accordingly cut back, there may be problems in reducing capacity to a level appropriate to the new output, and where these problems are not solved the social costs of cartelization are all the greater. They can be solved more effectively by a well organized than a poorly organized cartel, so if the major effect of antitrust enforcement is to drive cartels underground it is possible that additional costs are generated that outweigh the welfare gains of a somewhat greater output.

Troublesome as this possibility is, I think we are obliged to assign no weight to it in devising enforcement policy. It calls into question any action against price fixing, and we have even better reasons for not using the antitrust laws against other practices, so if we took it seriously there would be no enforcement activity at all. Similar considerations oblige us to ignore the counsel of inaction implicit in some formulations of the "second best" problem.<sup>76</sup> Perhaps these are reasons for re-examining the very basis of the antitrust laws but they are not helpful in designing a program of antitrust enforcement.

### B. Mergers

Mergers to monopoly must be prevented lest our policy of deterring cartels be circumvented by the merger route. And since high concentration short of monopoly is one of the factors that predisposes a market to cartelization, a merger that creates or aggravates a condition of high concentration is also an appropriate object of attention. Some mergers may affect other predisposing characteristics, but for a variety of reasons such mergers are likely to be rare.<sup>77</sup> Beyond these modest limits, a merger enforcement policy cannot be justified by the criteria I am using.

I have suggested elsewhere some merger guidelines consistent with the foregoing conception of the appropriate scope of an antimerger policy<sup>78</sup> and there is no need to repeat them. A question that cannot be avoided here, however, is whether such a constriction of scope can be squared with the relevant enactment, section 7 of the Clayton Act.<sup>79</sup> The history of the Sherman Act indicates a concern with limitations of output. Can the same be said of the much later enactment (section 7,

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<sup>76</sup> The theory of the second best teaches that where misallocations of resources exist in many markets in the economy, an attempt to correct one of them may actually lead to an even worse misallocation. See Lipsey & Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUDIES 11 (1956).

<sup>77</sup> The most likely would be a merger that, by eliminating a potential entrant, made it less likely that raising price above a competitive level would attract new entrants promptly. But usually there are many prospective entrants, and the effect of eliminating one is likely to be negligible. See Posner, *Conglomerate Mergers and Antitrust Policy: An Introduction*, 44 ST. JOHN'S L. REV. (Special Ed.) 529, 531 (1970).

<sup>78</sup> *Oligopoly and Antitrust* at 1598-1605.

<sup>79</sup> 15 U.S.C. § 18 (1964).

insofar as it applies to mergers, dates only from 1950) with a different history? The answer, I believe, is yes, because section 7 contains no definite standard, and none can be extracted from the legislative history. The enforcement agencies have been left pretty much at large. The Supreme Court has read the provision most expansively,<sup>80</sup> but as discussed earlier the enforcement agencies are not bound by expansive readings.

The most vocal supporters of the bill to amend section 7 to reach mergers articulated goals frequently at variance with the economic goal of greater output.<sup>81</sup> Some of them, indeed, evidently wanted to preserve atomistic markets for reasons having nothing to do with the economist's idea of competition. Those who spoke for the bill were a minority, however, and it is questionable whether their views can automatically be ascribed to the majority that enacted the law. There is a specific reason, moreover, for discounting those views. When the bill was debated, there was virtually no history of using the antitrust laws against mergers, other than mergers to monopoly of the kind involved in the old trust cases. The FTC, to whom enforcement of section 7 had been assigned as part of an informal division of responsibilities with the Antitrust Division, had been completely hamstrung in proceeding against mergers by judicial decisions.<sup>82</sup> The Division itself had brought few cases.<sup>83</sup> The principal reason offered for amending section 7 was to enable the FTC to act.<sup>84</sup> In this context, the discussion of standards was necessarily imprecise and even unreal. Congress left it to the courts and the agencies to find their way between limits too vague to provide much guidance.<sup>85</sup> To be sure, one committee report expressly states that vertical and conglomerate mergers were subject to the amended statute;<sup>86</sup> doubtless Congress did not want to create additional loopholes (such as the one that had precluded the FTC from proceeding against mergers) by barring proceedings against certain kinds of mergers at the threshold. It does not follow that it established standards under which challenges to vertical and conglomerate mergers would be common.

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<sup>80</sup> See, e.g., *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966).

<sup>81</sup> Their views are recounted in Bok, *Section 7 of the Clayton Act and the Merger of Law and Economics*, 74 HARV. L. REV. 226, 233-38 (1960).

<sup>82</sup> See *Arrow-Hart & Hegeman Elec. Co. v. FTC*, 291 U.S. 587 (1934); *FTC v. Western Meat Co.*, 272 U.S. 554 (1926); *United States v. Celanese Corp. of America*, 91 F. Supp. 14 (S.D.N.Y. 1950); cf. *FTC v. Eastman Kodak Co.*, 274 U.S. 619 (1927).

<sup>83</sup> See *Statistical Study* at 407 (Table 30).

<sup>84</sup> S. REP. NO. 1775, 81st Cong., 2d Sess. 3 (1950); H.R. REP. NO. 1191, 81st Cong., 1st Sess. 5 (1949).

<sup>85</sup> The committee reports, *supra* note 84, are in fact notably bland about the standards that were to govern liability under the amended statute.

<sup>86</sup> H.R. REP., *supra* note 84, at 11.

The only point at which it may be difficult to draft merger guidelines that comply with the goal of greater output without doing violence to legislative purpose is in deciding whether to allow a defense of economies of scale. It is of course net output that we wish to maximize. If a restriction in output to which a merger might lead would be more than offset by the increased output in other markets that the merger would bring about by releasing additional resources, it would be inconsistent with our standard to bar the merger. Unfortunately, there appears to be no method of measuring economies of scale that could be used in a judicial proceeding.<sup>87</sup> Moreover, the relevant cost savings are not the entire savings resulting from the merger: one must subtract, after discounting to present value, the cost savings that would have occurred anyway, in time, even had the merger been barred, as the firms in the industry sought other ways of reaching efficient scale. That is even harder to measure. The intractable character of the economies question makes every merger case risky (in contrast, it is usually safe to assume that a cartel is not a means of increasing efficiency). Only if major horizontal mergers were occurring over a broad range of highly dissimilar industries would we be reasonably secure in ignoring possible economies of larger-scale operation and banning all such mergers, on the plausible ground that it would be most unlikely for the efficient scale of production to be everywhere changing in the same direction. In the usual case we must assign economies of scale either dispositive weight or no weight at all and there is unhappily no wholly satisfactory basis for either choice.

### C. *A Note on Monopolization*

The reader may be surprised at the omission of single-firm monopolies from the list of areas in which the Division should be active. The reason is that, save possibly for some monopolies created by patents, I do not consider it a fruitful area of antitrust enforcement—and not because the single-firm monopoly, outside of regulated markets, is nowadays virtually nonexistent.

The creation of a monopoly by merger has long been barred by the Sherman Act,<sup>88</sup> and section 7 of the Clayton Act makes the prospect that such monopolies will arise in the future wholly remote. That leaves two possible types of monopoly to worry about: monopolies created by

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<sup>87</sup> See *Oligopoly and Antitrust* at 1594 & n.86.

<sup>88</sup> At least since 1920, when *United States v. United States Steel Corp.*, 251 U.S. 417, was decided by the Supreme Court. To be sure, the defendant was exonerated; but by the time of suit, its market share had fallen to 40%, and the Court intimated that a suit initiated promptly upon the creation of the Steel Trust would have met with greater success.

merger a long time ago that have somehow persisted, without further mergers; and monopolies, recent or ancient, created by the growth of a firm from within. As to any monopoly that has persisted a long time, regardless of how it was originally created, only three explanations of its persistence seem possible. The first is abuses, which we have already discussed (and rejected) as a basis for antitrust enforcement. The second is efficiency: either the market can support only one firm, or one firm is better managed than any rival. And the third is governmentally imposed entry restriction. Regulated monopolies involve special legal problems and I postpone discussion of them to the next section, except to note here an important subcategory of the governmental barrier to entry: patents. To the extent that patent protection does more than provide an appropriate incentive for innovation, it can bring about unjustifiable monopoly results; and it is not an inappropriate office of antitrust enforcement, in my judgment, to chip away at unwarranted invocations of the patent laws. The subject is so complex, however, that I shall say nothing more about it here.

The important point, at least where governmental protection against new entry is not involved, is that the persistence of a monopoly for a long period of time is (unless one believes in the importance of abuses) *prima facie* the result of efficiency. Unless economies of scale dictate monopoly or the monopolist consistently and substantially outperforms all rivals, the inevitable effect of his monopoly price will be attraction of new entry and gradual contraction in his share of the market. This assumes that the costs of a new entrant will not be markedly higher than the costs of the monopolist, but in the absence of patent or other governmental protection against new entry, the assumption, for reasons stated in our earlier discussion of barriers to entry, seems an appropriate one. It also assumes, properly in view of the merger law, that the monopolist is not permitted to acquire new entrants.

To be sure, if entry on a large scale takes a long time, a monopolist, whether or not particularly efficient or favored by economies of scale, might retain a dominant position for a considerable period, albeit it would gradually erode. Perhaps, therefore, the antitrust agencies should intervene to produce more quickly the result that would eventually flow from the natural working of market forces. The merits of this course depend on the relative speed of market and legal processes in reducing high concentration to a tolerable level; and empirical study suggests that legal processes do not work significantly faster.<sup>89</sup> They are probably

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<sup>89</sup> *Statistical Study* at 417 n.50 points out that while the average length of a monopolization suit is 8 years, the average period during which a market remains highly concentrated is only 10.

more costly too.<sup>90</sup> The use of cumbersome and expensive structural remedies against recently formed monopolies likely to fall of their own weight seems especially dubious.

The cartel, like the single-firm monopoly, carries within it the seeds of its own destruction. The monopoly price charged by the cartel will attract new entrants, reducing the returns from cartelizing, making administration and enforcement of the cartel more difficult, and leading eventually to the cartel's collapse. It does not follow that legal action against cartels is also futile. The legal remedies against cartelization operate more swiftly and less expensively than remedies that involve the dismemberment of firms.<sup>91</sup> Also, a cartel's collapse due to new entry, and the consequent fall in the market price, will lead to the exit of the less efficient firms and the return of the market to its pristine state. The stage will now be set for a renewal of the cartel. It makes sense to try to break the cycle. In contrast, once a single-firm monopolist has lost its monopoly it cannot reacquire it by merger because of the merger law. It can reacquire it (again ignoring abuses and government protections of monopoly) only by outperforming all the other sellers, or by changes in cost or demand that make it inefficient to have more than one seller in the market.

D. *The Role of the Antitrust Division in the Regulated Industries—and as a Spokesman for the Competitive Principle Throughout the Government*

The most serious cartelization is found in the regulated industries. Aviation, railroads, trucking, shipping, and stock brokerage, among other regulated industries, appear to be heavily cartelized.<sup>92</sup> What makes cartelization so effective and therefore pernicious<sup>93</sup> in regulated markets is not only that the cartelizing activities of the regulated firms are usually immune from the antitrust laws, but also that the agency frequently assists in enforcing the cartel, as by punishing firms that do not adhere to published tariffs.<sup>94</sup> Although these cartels are of long standing and are vigorously defended by industry spokesmen, the consensus of professional economic opinion I expect is that they are no more justifiable than cartels in unregulated industries.

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<sup>90</sup> See *Oligopoly and Antitrust* at 1594-95.

<sup>91</sup> Compare *Statistical Study* at 377 (Table 7) with *id.* at 406 (Table 29).

<sup>92</sup> See, e.g., R. CAVES, *supra* note 31, at 356-77; J. MEYER, M. PECK, J. STENASON & C. ZWICK, *THE ECONOMICS OF COMPETITION IN THE TRANSPORTATION INDUSTRIES* 208-14 (1959); McGee, *supra* note 47; Baxter, *NYSE Fixed Commission Rates: A Private Cartel Goes Public*, 22 STAN. L. REV. 675 (1970).

<sup>93</sup> Subject to the qualification noted at text accompanying notes 74-76 *supra*.

<sup>94</sup> A case study is P. MACAVOY, *THE ECONOMIC EFFECTS OF REGULATION: THE TRUNK-LINE RAILROAD CARTELS AND THE INTERSTATE COMMERCE COMMISSION BEFORE 1900* (1965).

The power of the Antitrust Division to attack the regulated cartels is circumscribed but by no means negligible. In some cases statutory immunity from antitrust prosecution is absent or defective,<sup>95</sup> but this is not the chief source of the Division's power in this area. It is rather that the agencies are directed by their enabling statutes to decide questions according to the "public interest" (or a comparable standard), and, given the vagueness of the term, it is open to the Division (formally the United States, as represented by the Department of Justice) to intervene in regulatory proceedings and argue that cartel and similar restrictive practices should be forbidden by the agency in the public interest.<sup>96</sup> If the agency rejects the Division's position, the Division can seek judicial review, although there it may run up against an exaggerated deference to the agency's opinions. But one should not conclude that such interventions are ineffectual.

The strategy of intervening in regulatory proceedings to urge the competitive interest is one of the major legacies of Donald Turner's tenure as chief of the Antitrust Division, and one that his successors have used, on the whole, quite effectively.<sup>97</sup> But there is room for improvement. The resources devoted to the program are too few. Only a small fraction of the Division's personnel works on regulatory matters.<sup>98</sup> Yet this would seem to be an area of high potential payoff in comparison to most of the cases on which the Division now spends its time (other than some price-fixing cases); there is every reason to assign more people to it. If they are to have maximum impact on regulatory decision making, the representatives of the Division before the agencies must know much more about particular regulated industries than most of them now do. Regulatory staffs are masters of complication and obfuscation; they make the simplest processes in the industry seem unimaginably complex and arcane. It is a tedious chore to master the

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<sup>95</sup> As in the stock brokers' cartel; see Baxter, *supra* note 92.

<sup>96</sup> 1968 ATT'Y GEN. ANN. REP. 33-34, 37, and 1969 *id.* at 76, give a glimpse of the Division's activity in this area in recent years. An authoritative discussion of the Division's policy and activity in the regulated industries is Baker, *The Antitrust Division, Department of Justice: The Role of Competition in Regulated Industries*, 11 B.C. IND. & COM. L. REV. 571, 578-93 (1970).

<sup>97</sup> The discussion from this point until the end of Part III relies heavily on the author's personal experience in government service—as an assistant to a Federal Trade Commissioner from 1963 to 1965, as an assistant to the Solicitor General specializing in antitrust matters and working closely with the Antitrust Division from 1965-1967, and from 1967-1968 as General Counsel to President Johnson's Task Force on Communications Policy, on which the Department of Justice was represented by the Antitrust Division. These assignments provided an opportunity to observe the Antitrust Division from several perspectives, always somewhat detached. Others, more intimately involved in the operations of the Division, may of course have different views on the matters discussed in the text.

<sup>98</sup> Ten to fifteen per cent. Letter from Donald I. Baker, *supra* note 2.



details sufficiently to penetrate the maze. But it is necessary, lest the Division's arguments be dismissed out of hand as the work of uninformed outsiders. The problem can be overcome with greater resources.

The Antitrust Division has suffered, in its collisions with regulators, from a reputation, not wholly undeserved, of a sectarian and parochial attitude toward competition: sectarian because the Division habitually espouses only those economic views that are consistent with the broadest possible scope of antitrust activity; parochial because the Division seems often to lose sight of the fact that competition is a means rather than an end. The Division regularly denies, sometimes on the flimsiest of *a priori* grounds, the possible existence of cost savings from operating larger units of production or integrated units, or from selling goods in a package (the dreaded tie-in); and sometimes it implies that cost savings are irrelevant. Often it seems to attach magical significance to numbers of firms and to see barriers to entry everywhere. This is a small point, because these excesses, if I may label them thus, are minor in the total picture of the Division's presentations to regulatory agencies. But they reduce the effectiveness of those presentations.

Participation in regulatory proceedings is only one part of the Antitrust Division's role as the spokesman for competitive principles in the councils of government. By virtue of membership in many important interagency committees, the Department of Justice has a larger role in formulating the economic policies of government than is generally known, and in practice the role is played by the Antitrust Division. Donald Turner is again responsible for having given this role its present importance. My comments with respect to participation in regulatory proceedings apply here also.

### III. INSTITUTIONAL CHANGES

The previous part outlined priorities for antitrust enforcement significantly different from those followed today. Virtually all of the resources of the Division would be allotted to price fixing, patents,<sup>99</sup> and regulatory proceedings, with the last playing a much larger role in the Division's overall activity than at present. Merger enforcement would absorb few resources because few if any mergers vulnerable under my proposed guidelines have occurred for some time. Price fixing would be handled differently from today, with great emphasis placed on economic considerations and evidence quite foreign to the experience of most antitrust lawyers. The guiding principle of the entire operation would be the goal of maximizing the output of the economy.

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<sup>99</sup> See text following note 88 *supra*.

I have summarized the substantive aspects of the program as starkly as possible in order to underscore the importance of institutional change to the success of the program. Such a program could not be implemented without significant reforms in three areas: personnel, supervision, and planning.

#### *A. Personnel*

It goes without saying that the role of economists in the Division would be markedly different from the present. With the occasional exception of the special economic assistant to the chief of the Division (another happy innovation of Donald Turner), the Division's economists today are handmaidens to the lawyers, and rather neglected ones at that. The indifference (and sometimes hostility) of lawyers toward economists in the antitrust enforcement agencies is an old story. The lawyers are in firm command and the better economists are not attracted.

Such a situation would be disastrous if the Division sought to adopt the program proposed here, and not only because the program presupposes a much higher degree of economic competence and larger economic input to the decision-making process than heretofore. Economists are familiar with maximizing strategies, cost-benefit analysis, and the business or enterprise approach. Lawyers are not. The essence of the approach suggested here is that the Antitrust Division transform itself into a kind of business, producing an output that consists of reducing monopolistic misallocations of resources and seeking to maximize that output net of input costs. This approach would bewilder or even horrify the average lawyer in the Antitrust Division, who thinks of his job in terms of enforcing the antitrust laws as Congress wrote them and the courts interpret them. The program can succeed only if economists are well represented among the supervisory personnel of the Division.

The use of economists knowledgeable in industrial organization in key managerial roles in the Division seems to me preferable to the use of businessmen or management specialists. This is an empirical judgment, based on the notable lack of success that program review officers of the Bureau of the Budget seconded to the Department of Justice have had in introducing efficient planning and management techniques into the various divisions, notably the Antitrust Division. I do not attribute their failure entirely, or even primarily, to the resistance of the lawyers, but more to the Budget officers' unfamiliarity with the highly specialized character of the Division's "output."

### B. *Supervision*

The present organization of the Antitrust Division is highly decentralized. The closest organizational analogy, although a far from perfect one, is to a large litigating law firm. In most periods the Division is dominated by the individual trial lawyers and supervision is minimal. They owe their authority and independence partly to the trial lawyer's distinctive personality and partly to the accumulation of skills and experience that makes them valued by private firms and hard to replace by the Division—but mostly to default. The traditions of supervision and hierarchy are very weak in the Division. For many years section chiefs received no greater compensation than senior trial lawyers and they still conceive of themselves by and large as conduits and office managers rather than as leaders. The total number of officials above the section-chief level in the Division can be counted on one's fingers<sup>100</sup>—this in an organization of several hundred professionals.

Any student of organizations will tell you that a “flat” hierarchy of this sort is all very well if the desire is to encourage maximum autonomy at the bottom level, but that it is ill suited to a more centralized operation.<sup>101</sup> It would be only a slight exaggeration to say that, in the early 1960's, the only real coordination of antitrust policy took place in the Solicitor General's office, where coherent theories were formulated for the antitrust cases bound for the Supreme Court. The Court has expressed its dismay at the liberties taken by the Solicitor General with the theories urged by the Division in the lower court,<sup>102</sup> but the lack of theoretical coherence in the Division's positions made major surgery unavoidable.

Donald Turner took the first step toward correcting the Division's excessive decentralization by creating an “Evaluation Section” whose function was to review all proposals for investigation and for complaint and all important documents filed by the Division during trial.<sup>103</sup> This worthwhile innovation has been retained by his successors. The staff of the Evaluation Section consists of good young lawyers who are free from any trial or investigative responsibilities. The function of the section, however, is essentially negative: to check the excesses of the enthusiastic trial lawyer and to assure a modicum of uniformity and consistency of policy. The initiative remains with the trial sections, which usually means, as noted, with the trial lawyers themselves.

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<sup>100</sup> See 2 TRADE REG. REP. ¶¶ 8541-42, at 14,021-23 (1970).

<sup>101</sup> See, e.g., A. DOWNS, *INSIDE BUREAUCRACY* 56-57 (1966).

<sup>102</sup> *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 371-72 n.4, 374 n.5 (1967).

<sup>103</sup> Nominally the section was created by his predecessor but without staff.

The kind of program proposed in this paper demands a quite different structure. I cannot formulate the details, but a broad outline follows. The Division would be divided into five bureaus—four line bureaus and one staff bureau. The staff bureau would be the Bureau of Planning and Evaluation, discussed in the next subpart. The line bureaus would be the Bureau of Regulated Competition, the Bureau of Investigations, the Bureau of Trials, and the Bureau of Compliance. The first would be responsible for participation in regulatory proceedings, interagency committees, and other proceedings. It would consist of economists and lawyers. The second bureau, also consisting of economists and lawyers, would be responsible for surveying nonregulated markets and developing evidence of anticompetitive effects, mostly price fixing. The third, consisting of lawyers, would try cases prepared by the second. The Bureau of Investigations would furnish expert economic witnesses for the Bureau of Trials. Quite possibly the neat separation of trials and investigations proposed here is infeasible, judging by the FTC's unfortunate experience with such a separation in the 1950's. But however accomplished, it is important so far as practicable to confine trial lawyers to trials in recognition of the specialized character of the trial lawyer's function. The aptitudes required by a good trial lawyer are quite different from those required in the judicious design of policy, appraisal of economic evidence, and selection of cases, and the failure to recognize this has resulted, I believe, in costly underspecialization. Finally, a compliance bureau seems essential in view of the well documented deficiencies of the Division in the administration of equitable remedies;<sup>104</sup> if it is to have greater success than the existing Judgments Section, such a bureau will have to include economists as well as lawyers.

Each bureau would be headed by a bureau chief, and would be divided into several small sections, each headed by a section head. The bureau chiefs would be supervised by the Director of Operations in administrative and operational matters, and by the Director of the Bureau of Planning and Evaluation in policy matters, including the selection of cases.

The foregoing description is incomplete and simplified, but it conveys the essential purpose of the reorganization: to reduce the dominant role of trial lawyers in the direction of the Division's affairs and to create a more vertical system of hierarchical control.

### C. *Planning*

A position of Director of Policy Planning was created by then Assistant Attorney General Orrick in 1963 and continued by his successors.

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<sup>104</sup> See Adams, *Dissolution, Divorcement, Divestiture: The Pyrrhic Victories of Antitrust*, 27 IND. L.J. 1 (1951); Elzinga, *The Antimerger Law: Pyrrhic Victories*, 12 J. LAW & ECON. 43 (1969); *Statistical Study* at 386-88.

Not one of the extremely able men who have filled the post has done any planning worthy of the name. Initially little more than a speech-writing job, it later became a supervisory position. The principal unit supervised was the Evaluation Section. A superficial reason why the Directors of Policy Planning have never done any planning is that they have never been given a staff whose function was planning, rather than riding herd on trial lawyers or something else equally removed. The more basic reason is that the Antitrust Division has never conceived for itself a role in which planning would be something more than homiletics. Planning is meaningful only in the context of a programmatic approach to antitrust enforcement, heretofore lacking.

The first job of the Bureau of Planning and Evaluation would be to design a substantive program—to determine priorities in the use of the Division's resources—of which the proposals in Part II of this paper may be viewed as a very rough cut, and also to coordinate the activities of the line units of the Division in carrying out the program. The second job would be to evaluate the program, using statistical measures discussed at length elsewhere,<sup>105</sup> and to revise it from time to time in accordance with the results of the evaluation. The third job would be to formulate a legislative program for submission to Congress, specifying any changes in legal authority or the level of appropriations that appeared appropriate in view of the Division's program. The Bureau would be advised by an advisory board consisting of distinguished private economists.

### CONCLUSION

The program presented here, entailing as it would a rather drastic overhauling of antitrust enforcement, is not—I predict—about to be adopted by the Antitrust Division and is in that sense an academic exercise. But perhaps not completely. After all, such a program would be the culmination of perceptible trends in the Division's recent history. Moreover, to return to an earlier point, the trend of antitrust decisions in the Supreme Court has given new importance to the devising of a program for the Division. The Court's often remarked tendency in the antitrust area to declare principles so sweeping as to be incapable of practical and consistent application had by 1967 reached such a point with regard to mergers that the Division either had to declare its own rules to channel the discretion of its trial staff or permit antimerger enforcement to become virtually random. The response was the Merger Guidelines.<sup>106</sup> One may fault these guidelines in many

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<sup>105</sup> *Statistical Study* at 414-19.

<sup>106</sup> *Department of Justice Merger Guidelines*, 1 *TRADE REG. REP.* ¶ 4430, at 6,681 (1968).

places but what is significant for the present discussion is that the Division felt obliged to articulate a set of goals based not upon statutory or judicial language but upon the policy grounds assumed to underlie such language<sup>107</sup> and that it attempted to fashion a set of priorities under which, grudgingly to be sure, the Division indicated that it was prepared to condone some apparent violations of the merger law as it had been interpreted by the Court. What is this but an embryonic form of the program suggested here?

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<sup>107</sup> See *id.* at 6,681-82.