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National Commission for the Review of Antitrust Laws and Procedures: Reports on Symptoms but Ignores Causes

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COMMENTARY

The National Commission for the Review of Antitrust Laws and Procedures: Reports on Symptoms but Ignores Causes

*Arthur D. Austin**

During the past decade Congress has vigorously supported antitrust with new laws and bigger budgets.[1] The government has pushed enforcement "activism" to the outer limits while the number of private suits is increasing at exponential rates. With optimism, a Nader lieutenant observes that we are witnessing "an outburst of significant antitrust reforms."[2]

Yet despite strong public support and high esteem among politicians, antitrust is a failing institution, collapsing under the weight of self-created chaos and inefficiency.

Inscrutable decisions make it difficult for firms to distinguish "safe" methods of competition from illegal conduct. Litigation is a mess. Defendants skillfully use procedural ploys to delay and obfuscate the issues while frivolous private actions drain company resources and overtax the courts. Class actions seem to benefit no one except counsel. An overburdened and perplexed judiciary succumbs to absurd liability arguments. In short, evidence mounts that the cost of maintaining an antitrust system exceeds the assumed benefits.[3]

I. The Response of the President's Commission to Study Antitrust

In 1977 President Carter created the National Commission for the Review of Antitrust Laws and Procedures with a charge to recommend ways to expedite litigation, improve remedies, and to advise on the credibility of various immunities and exemptions.[4] The Commission heard extensive testimony from the antitrust community, and analyzed various staff reports. It recommended that measures be adopted to improve management of trials, that preference be given

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1 Examples include increasing the fines and criminal liability for Sherman Act violations, requiring "open disclosure" of consent decree negotiations, premerger notice requirements, and the creation of a *parens patriae* right of action for state attorneys general. For a discussion of the new amendments see Fox, *Antitrust Law, reprinted in* 1978 CORPORATE COUNSELS ANNUAL at 527-48; Kintner, Griffin, Goldston, *The Hart-Scott-Rodino Antitrust Improvement Act of 1976: An Analysis,* 46 GEO. WASH. L. REV. 1 (1977).

2 Green, *A Reform Era for Antitrust,* N.Y. Times, March 27, 1977, § 3, at 1, col. 1.

3 Critical commentary is extensive. *See* Erickson, *The Profitability of Violating the Antitrust Laws: Dissolution and Treble Damages in Private Antitrust,* 5 ANTITRUST L. & ECON. REV. 101 (1972); Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review,* 71 COLUM. L. REV. 1, (1971); Kane, *The "Bounty Hunter" Objection to Antitrust Litigation,* 9 DUQ. L. REV. 466 (1971); Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?,* 70 F.R.D. 199 (1976); Parker, *The Deterrent Effect of Private Treble Damage Suits: Fact or Fantasy,* 3 NEW MEX. L. REV. 286 (1973); Wheeler, *Antitrust Treble Damage Actions: Do They Work?* 61 CAL. L. REV. 1319 (1973).

4 Exec. Order No. 12022, § 2(a)(1), (2), 3 C.F.R. 155 (1977), *as amended* by Exec. Order No. 12052, 43 Fed. Reg. 15,333 (1978).

to structural relief, and that there be revision of "attempt to monopolize" substantive requirements. The Report also suggested that more lenient standards for granting injunctive relief be adopted and that Congress conduct hearings to determine the consequences of legislation that would render size illegal without proof of "exclusionary" conduct. (Not reviewed in this Article are the Commission's recommendations on immunities and regulated industries.)[5]

In its concise evaluation of the management problems of "big case" litigation, the Commission identified the major trouble spots and compiled a list of corrective measures. According to the Report, time constraints, discovery controls, more resolute use of summary judgment, and sanctions for dilatory tactics would cut off enough procedural "slack" to render antitrust litigation manageable. These are indeed resourceful improvements and should be adopted.

An inherent defect in the proposals is that their application is discretionary with the individual judge. Given these conditions, there is justification for doubt over the likelihood of radical improvement in handling complex antitrust litigation. The probability is that the past mirrors the future; intelligent and hard working courts conduct efficient trials while the others perform commensurate with their abilities. Moreover, even assuming modest success in control of litigation through management techniques, the Commission proceeds to dissipate its achievements by its treatment of substantive issues.

In recommending that structural relief be the preferred remedy in Sherman § 2[6] and Clayton § 7[7] actions, the Commission oversimplifies the difficulties—and time—involved in determining the ideal state of competition in a particular market and in drafting a feasible plan of dissolution to achieve that goal. The Report offends few by suggesting "workable competition" as the goal for structural engineering. Unfortunately for an already confused judiciary, there are as many versions of "workable competition" as there are practicing economists. In the words of one economist: "Lacking precise and agreed-on criteria, definitions of workability often are tautological; they tend to be redundant, stated in such a way that the definition adds relatively little to the meaning of the term."[8]

Structural relief is obviously an important contribution to competition. The Commission's approach is, however, somewhat casual and seems to assume away the substantial negative trade-offs that must be balanced against less cumbersome but effective conduct remedies. The degree of difficulty in devising a dissolution plan, the chances of successfully rehabilitating the market, and the extent of the drain on time and resources of all involved should be carefully weighed in determining the remedy. Judge Wyzanski, cited by the Commission as an advocate of "workable competition," provides this perspective:

> In the antitrust field the courts have been accorded by common con-

5 For a critique of the Commission's analysis of Antitrust Immunities and Economic Regulation see Baker, *Commission Report Puts Focus On U.S. Regulatory Role,* The National L.J., Feb. 19, 1979, at 23.

6 15 U.S.C. § 2 (1970).

7 15 U.S.C. § 18 (1970).

8 P. ASCH, ECONOMIC THEORY AND THE ANTITRUST DILEMMA 123 (1970). Asch continues: "The notion of workable competition may therefore be useful not so much as a guide . . . but rather for the questions it *raises.*" *Id.*

> sent, an authority they have in no other branch of enacted law . . . . They would not have been given, or allowed to keep, such authority . . . and they would not so freely have altered from time to time the interpretation of its substantive provisions, if courts were in the habit of proceeding with the surgical ruthlessness that might commend itself to those seeking absolute assurance that there will be workable competition, and to those aiming at immediate realization of the social, political, and economic advantages of dispersal of power.[9]

The proposed revision of "attempt to monopolize" would inflate rather than expedite litigation. Under the prevailing test, the plaintiff must prove that the defendant specifically intended to monopolize with a dangerous probability of success.[10] Since most courts have held that only dominant firms can pose a "dangerous probability" of achieving monopoly,[11] a majority of the Commission concludes that this test is too restrictive.

The proposed revision requires proof of "a dangerous risk of monopoly . . . as determined after an evaluation of the defendant's intent, the defendant's present or probable market power, and the anticompetitive potential of the conduct. . . ."[12]

The Commission uses a new set of "buzz" words that will entangle lawyers and judges in extended argument over interpretation. How, for example, does a court ascertain whether, or at what point, a firm possesses "probable market power"? Even hired "experts" will stumble on a vague term like "anticompetitive potential." As Senator Hatch observed in dissent to this recommendation: "Enactment of the proposed statutory amendment would create an entirely new, untested substantive antitrust violation, enforceable by private parties, which will leave the law confused for years to come."[13]

According to the Report, the "dangerous risk of monopoly" test is intended to "avoid the implication that the term refers to a greater than 50 percent chance that monopoly will occur."[14] This language seems to advocate a liability standard similar to, but less onerous, than the "incipiency" or "reasonable probability" of lessening competition or tending to monopoly test used under Sections 2, 3, and 7 of the Clayton Act.[15] If the experience of the decisions under the Clayton

9 United States v. United Shoe Machinery Corp., 110 F. Supp. 295, 348 (D. Mass. 1953). Wyzanski rejected the government's proposal to dissolve United into three separate manufacturing firms as "unrealistic" and instead imposed conduct sanctions. *Id.*

10 L. SULLIVAN, HANDBOOK OF THE LAW ON ANTITRUST 134-40 (1977).

11 P. AREEDA & D. TURNER, 3 ANTITRUST LAW ¶ 831 at 336.

12 *Report to the President and the Attorney General,* ANTITRUST & TRADE REG. REP. (BNA) 50 (Spec. Supp., Jan. 18, 1979) (Hereinafter cited *Report*). The remaining portion of the revision states that "the fact that a defendant's prices were not below either average variable cost or marginal cost shall not be controlling, but may properly be considered, in assessing the defendant's intent and the conduct at issue." For a discussion of the antitrust implications of "predatory" pricing strategy see Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act,* 88 HARV. L. REV. 697 (1975); Areeda, Scherer & Turner, *Predatory Pricing Under Section 2 of the Sherman Act,* 89 HARV. L. REV. 869 (1976); Posner, *Exclusionary Practices and the Antitrust Laws,* 41 U. CHI. L. REV. 506 (1974); Williamson, *Predatory Pricing: A Strategic and Welfare Analysis,* 87 YALE L. J. 284 (1977).

13 *Report, supra* note 12, at 99.

14 *Id.* at 44.

15 Section 2 (The Robinson-Patman Act) covers various forms of price discrimination. 15 U.S.C. § 13 (1970). Section 3 is the anti-exclusive dealing and tie-in statute, 15 U.S.C. § 14 (1970), while Section 7 applies to mergers, 15 U.S.C. § 18 (1970). The statutory liability

Act is any sort of guide to the future of the "new" attempt to monopolize violation, we can expect a sharp increase of mental constipation and unpredictability in antitrust. Of the "incipiency" test, Bork says:

> This verbal formula has proved meaningless. The fallacious economic theory employed by the courts makes the problem of forecasting the relevant economic events so intractable that there is no question of being able to estimate degrees of probability or possibility. The result has been that any imaginary threat to competition, no matter how shadowy and insubstantial, is sufficient to satisfy the "reasonable probability test."[16]

By expanding the liability scope of attempt to monopolize the Commission gives private plaintiffs a generous fishing license. According to the Report's interpretation, the revision covers "unambiguously" anticompetitive behavior regardless of the size of the defendant. It likewise embraces "ambiguous" conduct where it constitutes a "dangerous risk" of monopoly, as measured by the defendant's "probable" market power and "potential" anticompetitive effect of its behavior. These are terms of considerable subtlety that would make it extremely difficult to predict with confidence which forms of conduct are legal. An environment of unpredictability would be exploited by aggressive private plaintiffs, using meritless allegations to harass defendants into risk aversion settlements.[17]

The failure to consider the role of the private plaintiff and the consequences of the proposals on private enforcement is a serious defect. Two of the "substantive" proposals will aggravate problems of length and complexity in private enforcement. Because of vagueness and a definite plaintiff bias, attempt to monopolize is subject to abuse by private parties seeking to intimidate rivals. Indeed, a strong proponent of the revision advised that in the hands of private plaintiffs it could be used to "punish hard-nosed competition."[18] Softening the standards for obtaining injunctive relief will increase reliance on Clayton § 7 allegations in resisting unfriendly takeover attempts. Since the "probability" of a lessening of competition standard of Clayton § 7 furnishes a forum for the most tenuous of claims, the market for acquisition of firms would be unnecessarily impeded.

II. The Demise of Antitrust

The Commission acknowledges that it eschewed a broad examination of the substantive rules of antitrust. This was likely due to the six-month time constraint. Unfortunately, the depth of the problems confronting antitrust is such that anything less than a full evaluation of the antitrust system is of marginal

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language is the same for all three laws. Illegality exists where the effect of the conduct "may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

16 R. Bork, The Antitrust Paradox 48 (1978).

17 Concern on this prospect was expressed by John Shenefield, head of the Antitrust Division and Chairman of the Commission, who concluded that if "after Congressional examination, there is concern that the legislation suggested here is susceptible to abuse by private plaintiffs" he favors making the proposed provisions "applicable only to suits brought by the government." *Report*, *supra* note 12, at 44 n.31.

18 *Id.* at 101 (Separate views of Commissioner Hatch).

value. Regardless of time limitations, the Commission should have at least acknowledged those problems whose cumulative effect has subverted antitrust. The remainder of this Article addresses these issues.

A. *Subversion of general principles*

Ironically, the seeds of subversion were sown with what was thought to be the Sherman Act's source of strength—open-ended statutory language setting forth broad principles that could accommodate the evolving twists of the market system. Thus Chief Justice Hughes once praised the Sherman Act for its "generality and adaptability."[19] Subsequent events have made the inaccuracy of the assumption all too evident.

In the 1911 *Standard Oil*[20] decision, Chief Justice White created the now familiar "rule of reason" for evaluating restraints of trade. To White, the "rule of reason" was a flexible guide for distinguishing restraints that harmed consumers by producing higher prices from restraints with neutral or proconsumer effects. Unfortunately, White's creative contribution ultimately became a conduit for conflicting and self-destructive value judgments.

Perhaps the most influential instance of subversion occurred in the 1945 *Alcoa*[21] decision where Judge Hand held that Alcoa "monopolized" the aluminum industry by maintaining control of ninety percent of the market through "exclusionary conduct." Hand balanced his provocative statement that monopoly power is "always an 'unreasonable restraint of trade' "[22] by exempting the defendant if success is due to "superior skill, foresight and industry."[23] Without pausing to define the terms of this critical qualification, Judge Hand piled on more confusion by condemning Alcoa for engaging in "exclusionary conduct" by facing "every newcomer with new capacity, already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel."[24]

In the most significant challenge since *Standard Oil,* antitrust's response to the issue of size was, at best, enigmatic. Consider Hand's legacy to the executive suite: management is encouraged to use "superior skill, foresight and industry" to get ahead but can be held to have exercised "exclusionary conduct" by utilizing experience, trade connections, and relying on elite management. These two instructions continue to puzzle management, counsel, and courts.

Moreover, confusion was not restricted to the monopolization issue. With a few gratuitous comments, Hand created an ideological discord that has seriously, if not fatally, spifflicated antitrust. While acknowledging the relevance of consumer welfare values, Hand shifted ideological gears to adopt sociopolitical goals by observing that antitrust should be utilized: "to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small

19 Sugar Institute, Inc. v. United States, 297 U.S. 553, 600 (1936).
20 Standard Oil Co. v. United States, 221 U.S. 1 (1911).
21 United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).
22 *Id.* at 428.
23 *Id.* at 430.
24 *Id.* at 431.

units which can effectively compete with each other."[25] With this observation, Hand virtually destroyed the effectiveness of the "rule of reason" as a meaningful legal principle.

The opinions of the Warren Court continued the erosion of traditional principles. Perfunctory references to the free enterprise ethic ("it is competition" the Chief Justice said in *Brown Shoe,* "not competitors, which the Act protects")[26] did not disguise the populist sociology that dominated a string of influential decisions. The Court enforced a civil rights code of conduct for the marketplace that mandated equal opportunity for small firms, however inefficient and regardless of the cost to competition and the consumer.[27]

The reputation of Learned Hand, the influence of the Supreme Court, plus personal predilections, prompted many lower courts to prefer sociopolitical considerations over competition. Small firms are idealized, the preservation of local communities is balanced in along with the rights of employees.[28] One court even thought it necessary to protect an inefficient management from takeover by an "aggressive, fast-moving acquirer of many diverse businesses . . . ."[29]

B. *Exacerbation by the Government*

The situation was further aggravated by the government's anticonglomeration assault in the late 60's. Adroitly exploiting the judiciary's disenchantment with the difficult task of plowing through the usual labyrinth of facts, the Justice Department successfully introduced economic theory into antitrust. Courts quickly perceived the benefits to be derived from using the Government's economic models to justify presumptions of adverse competitive effects.[30] The result was the infusion under the "incipiency" test of exotic *a priori* doctrines capable of proscribing mergers in any context and impossible to rebut.[31]

The *a priori* doctrines were stretched beyond the edge of credibility in the *Marine Bancorporation*[32] case when the Antitrust Division argued that a merger between two banks producing no present adverse effects nonetheless violated Clayton § 7 because the acquiring firm is prevented from enhancing competition sometime in the future by entering the market *de novo.*[33] In a *Catch 22* scenario, a statute prohibiting a lessening of competition really means that a firm must, to

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25 *Id.* at 429.

26 Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962). In the next breath the Court said: "But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization." *Id.*

27 *See* Kauper, *The "Warren Court" and the Antitrust Laws: Of Economics, Populism, and Cynicism,* 67 MICH. L. REV. 325 (1968).

28 *See* Bork, *Antitrust in Dubious Battle,* FORTUNE, Sept. 1969, at 103.

29 Allis Chalmers Mfg. Co. v. White Consolidated Indus., Inc., 414 F.2d 506, 525 (3d Cir. 1969), *cert. denied,* 396 U.S. 1009 (1970).

30 *See* Austin, *A Priori Mechanical Jurisprudence in Antitrust,* 53 MINN. L. REV. 739 (1969).

31 *See* R. Bork, *supra* note 16.

32 United States v. Marine Bancorporation, Inc., 418 U.S. 602 (1974).

33 After attaching several qualifications to the government's theory, the Supreme Court held the facts failed to support the allegations.

avoid liability, merge to *increase* competition.[34]

Under the leadership of a new Chairman supercharged with the populist vision, the Federal Trade Commission fuels (or exploits) the ideological confusion by advocating something called "humanistic competition." Efficiencies and lower prices are secondary to a compassionate brand of "competition" that gives priority to "ventures of small, human scale entities."[35] Chairman Pertschuk vows to sort out "vulnerable groups" such as children, minorities, the elderly, and use the Commission's considerable powers to "protect" them from the evil blandishments of the market system.

These factors have created an environment where enforcement by the government tends—or is perceived—to be arbitrary, result oriented, or outright political. Enforcers seem to make negative value judgments on the merits of conduct, then concoct liability theories. The potential competition assumptions developed by the Justice Department fall into this category. The FTC's demand for "humanistic competition" reflects the sociopolitical views of its Chairman and a reformist constituency. Recently, the FTC revealed that it is looking for candidates on which to test an "aggregate concentration" theory. A doctrine that "involves not only the economic but also the social underpinnings of the antitrust laws," aggregate concentration "looks to the effect of a merger not on a particular market but upon the further concentration of assets and economic and political power in the hands of the major firms in this country."[36] Whether the FTC has been charged with the responsibility to render judgments on the appropriate sources and legal limits of "political power" is, to be generous, highly debatable.

More important are the adverse effects of antitrust subjectivism on litigation. The existence of conflicting ideologies makes it impossible to efficiently conduct a case. Without the discipline of a lucid set of liability standards derived from a single theory, almost any offer of evidence is admissible as "relevant." Inevitably trials deteriorate into lengthy exercises in convoluted and somnific debate that produce rooms of turgid testimony by "hired gun" expert witnesses. So long as courts are confronted with a wide choice of ideologies, recommendations to improve trial management will have trivial effect.

C. *Adverse effects of private treble damage suits*

The Commission's failure to examine the ramifications of the private action cannot be justified. If for nothing else the sheer volume of private actions which

34 In 1958 Professor Rahl said: "Once again, we need to remind ourselves that the Clayton Act does not deal with all kinds of possibilities, nor does it protect mere 'chance.' Further, it does not prescribe a program for increasing competition. Its prohibition runs to conduct which actually or probably *lessens* competition. To treat an election not to augment competition as a lessening of competition is a neat trick, perhaps facilitated by the enveloping propensities of the phrase, 'potential competition.' It is, however, plainly not authorized by the language of the statute, nor by the philosophy of antitrust, which does not affirmatively seek to compel competition." Rahl, *Applicability of the Clayton Act to Potential Competition*, 12 ANTITRUST L.J. 128, 143 (1958).

35 *Questions and Answers Composed by FTC Chairman Michael Pertschuk as Part of Personal Appraisal of Antitrust Enforcement by FTC*, ANTITRUST & TRADE REG. REP. (BNA) No. 832, F-1 (Sept. 29, 1977).

36 ANTITRUST & TRADE REG. REP. (BNA) No. 891, A-17 (Nov. 30, 1978).

far surpass the number of government complaints[37] demands attention. The fact that private actions are a major contributor to litigation confusion and delay makes investigation mandatory.

Sophisticated firms use the treble damage threat as a tactical weapon to inhibit the competitive vigor of rivals.[38] While conducting business under the vague principles of Judge Hand's *Alcoa* decision, large firms know that almost every form of conduct involves a risk of being held to constitute "exclusionary conduct." Exploiting the risk aversion that these firms have to the possibility of paying treble damages,[39] small firms are often successful in intimidating defendants into modifying competitive behavior. For example, private plaintiffs have sought to impose liability on dominant firms for the "surprise" introduction of new products.

That risk aversion by management of large firms to the private action is a rational judgment on the vicissitudes of antitrust gets support from the controversial *Berkey Photo, Inc. v. Eastman Kodak Co.*[40] case. A small manufacturer of photographic products, Berkey charged that Eastman, "without adequate notice to the industry" introduced a new "110 camera" system with the intention of displacing Berkey and others from the market.

Eastman is the nation's largest producer of conventional film. In 1972 it introduced the "110 system," which included a new camera and film. Since Berkey's processing facilities and cameras were not compatible with the "110 system," it necessarily lost business until it could make the appropriate technological adjustments. Berkey alleged that under these conditions the failure of the defendant to "predisclose" pertinent information on the "110 system" constituted monopolization. On this point, Judge Frankel approved a jury verdict for Berkey by saying:

> Treating this aspect of the claim, the court cautioned the jury that a company normally has a perfect right to keep its secrets, winning competitive advantages by launching new and better products in its own way and in its own time. Undertaking, however, to apply the teachings of the authorities on Section 2 of the Sherman Act, the court went on to instruct that Kodak's monopoly power in film, if it was found to disable competitors who could not offer cameras comparable to Kodak's, might lead the judges of the facts to decide that the failure to give camera makers the necessary predisclosure concerning film should in all the circumstances be deemed anticompetitive. These instructions applied to a record on which the jury could readily have found among other things: [(1) the 110 system was used to cope with competition, rather than the result of the pace of design revolution, (2) there was no genuine improvement of benefits to consumers, (3) the new products were inferior in important respects, (4) the new Kodacolor

37 *See* Posner, A *Statistical Study of Antitrust Enforcement*, 13 J. OF LAW & ECON. 365 (1970).

38 I have discussed this problem in depth in *Negative Effects from Treble Damage Actions: The New Antitrust Strategy*, to appear in a forthcoming edition of the *Duke Law Journal*.

39 *See* Breit & Elzinga, *Antitrust Penalties and Attitudes Toward Risk: An Economic Analysis*, 86 HARV. L. REV. 693 (1973); Mussman, *Antitrust Risk Taking by the Executives*, 44 ANTITRUST L.J. 394 (1975).

40 457 F. Supp. 404 (S.D.N.Y. 1978).

> II was restricted to the 110 format, "for that anticompetitive purpose alone. . . ."][41]

Vibrations from Berkey resound loudly in the executive suite. Stunned by a jury verdict trebled to over $80 million, many interpret the case as judicial approval of Kodak's superior technology being forced to give in to a nebulous duty of "predisclosure."[42] It is felt that enforcement of predisclosure will stifle competition. Confronted with an unpredictable jury evaluation on the legality of marketing new products, firms will, so it is argued, subdue innovation and adopt conservative policies on the introduction of new technology. Moreover, if a firm has the responsibility to share information, there will be less incentive to invest in risky research.[43]

Judge Frankel disagrees, saying that it is "neither accurate nor useful to insist that the case stands for some vague, general requirement of predisclosure."[44] To antitrust scholar Louis Schwartz the case requires no more than drawing a line "between competing hard and resolving to throw a roadblock in the path of your competitor. . . ."[45]

This sanguine interpretation misses the practical ramifications of a case like *Berkey*. "Predisclosure," like possession of "the advantage of experience, trade connections, and the elite of personnel" from *Alcoa*, is now *perceived* as a situation involving serious danger of antitrust liability. Conditioned to the uncertainties of antitrust, large firms will err on the side of risk aversion by predisclosing. Therefore, as a practical matter, firms will indeed become more cautious in introducing new technology. There is another point, subtle but important. Unlike the requirement of refraining from "exclusionary conduct" imposed by prior monopolization decisions, *Berkey* suggests that large firms have a responsibility to "affirmatively" aid smaller rivals.

The long run effect of "affirmative protectionism" is that critical conduct such as pricing and product innovation will be pacified. Moreover, when firms are intimidated from normal expressions of competition, they are likely to go "underground" by engaging in less beneficial forms of competition such as product differentiation.[46]

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41 *Id.* at 414.

42 A *Forbes* commentator says: "This antitrust decision implies that any company in a seemingly monopolistic position must give advance disclosure of any innovations or new products to competition." FORBES, April 17, 1978, at 27.

43 "But some legal observers—including a few who have no particular affection for Kodak . . . see Berkey as a poorly managed company knocked out of the box by Kodak's superior technology and marketing skill. Kodak is being punished, they contend, for introducing inexpensive pocket cameras and handy new flashbulbs without worrying much about how these innovations would affect the profits of rivals. If every company with a dominant market position had to consider how each new product might be interpreted by a judge or jury, the argument goes, the incentive to innovate would be severely crippled." Passell, *Antitrust Out of Focus,* N.Y. Times, April 27, 1978, at 36. *See also* Clearwaters, *Better Mousetrap Builder Beware,* N.Y. Times, Feb. 26, 1978, § F, at 14.

44 457 F. Supp. at 440.

45 Schwartz, *Berkey-Kodak Verdict No Cause for Panic,* N.Y. Law J., May 1, 1978, at 1, 2.

46 *See* Elzinga, *Panel Discussion: Private Action—The Purposes Sought and the Results Achieved,* 43 ANTITRUST L. J. 73, 99 (1973).

III. Conclusion

A. *The gaps in the Commission's Report*

Either by design or because of time limitations, the Commission failed to evaluate a group of factors that inhibit the efficiency and effectiveness of the antitrust system. Ideological confusion which fosters indiscriminate use of *a priori* economic theories and encourages efforts to bend the statutes to fit preconceived judgments on conduct is the primary cause of waste and delay in administering antitrust. Until these conflicts are confronted and satisfactorily resolved, improvements in trial management will have peripheral effect.

The failure to evaluate the Robinson-Patman Act[47] sidesteps the Commission's responsibility to recommend substantive revisions that would expedite complex litigation. Arguments over the effectiveness of this statute have raged for years.[48] A growing group of observers agrees with Professor Levi's view that the Act "tends to be a price-fixing statute hiding in the clothes of anti-monopoly and pro-competition symbols."[49] More germane to the Commission's work is the Act's substantial contribution to delay and waste of judicial resources. As "one of the most tortuous legislative pronouncements ever to go on the statute books"[50] it mystifies courts and counsel, thereby prolonging litigation with its unfathomable twists. In addition, its unpredictability is easily exploited to harass defendants with meritless claims.[51]

The Commission's revised attempt to monopolize test has a plaintiff bias that will encourage nuisance and anticompetitive suits. Introduction of a vague "incipiency" liability standard will force confusion among the judiciary. The threat of liability for "potential" anticompetitive behavior will increase management's risk aversion to private actions and encourage medium-sized and dominant firms to adopt "soft" methods of competing.

The most serious defect in the Report is its silence on the effects of private enforcement. The Commission should have heard evidence on the use of private actions to inhibit risk-averse rivals from engaging in aggressive competition. An effort should have been made to ascertain the extent to which the judicial system is burdened with frivolous private claims. Finally, the record would have been enhanced by addressing the arguments of those who suggest that the diseconomies in private litigation are substantial enough to justify repeal of Clayton § 4.[52]

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47 15 U.S.C. § 13 (1970).

48 *See* R. Posner, The Robinson-Patman Act: Federal Regulation of Price Differences (1976); Elias, *Robinson-Patman: Time for Rechiseling,* 26 Mercer L. Rev. 689 (1975).

49 Levi, *The Robinson-Patman Act—Is It in the Public Interest?,* 1 Antitrust L.J. 61 (1952).

50 J. Dirlam & A. Kahn, Fair Competition: The Law and Economics of Antitrust Policy 119 (1954).

51 In recommending that trial judges be given discretion to double or triple damage awards, the 1955 Attorney General's Report expressed concern over "unwitting violators" being trapped by antitrust. "This is especially so in the Robinson-Patman Act area where, in some instances, violations can hardly be predicted." Report of the Attorney General's Nat'l Comm. to Study the Antitrust Laws 378 (1955).

52 On the basis that fines rather than private reparations would be more efficient in deterring violations, Breit and Elzinga advocate exclusive reliance on government enforcement. Breit & Elzinga, *supra* note 39, at 693-96.

B. *The rehabilitation of Antitrust*

Can antitrust be rehabilitated? Maybe, but drastic surgery is necessary. The first step is to repeal the right of private parties to assert antitrust claims. This eliminates the opportunity to use the treble damage action for anticompetitive purposes and removes countless meritless and time-consuming complaints from the court docket. It also erases the origin of much of the intellectually irrational case law. In addition, use of the government as the exclusive antitrust advocate would provide an advocate to present the courts with a coherent policy.

Congress could prevent the government from indulging in exotic *a priori* theorizing by eliminating the existing ideological confusion. Consistent with the congressional intention standing behind the Sherman Act,[53] the statutes should be interpreted to prohibit only those restraints that inhibit price competition and impede efficiencies. Reliance on sociopolitical value judgments should be expressly rejected. A succinct amendment reaffirming the competition ethic would stabilize judicial inquiry by providing a guide to the admissibility of evidence. A cluster of rational and unambiguous precedent would soon emerge. It would also put a stop to the FTC's efforts to subvert antitrust with its marketplace egalitarianism.

Section 2 of the Sherman Act should be repealed. Seldom invoked, section 2 is the source of tension, controversy, and diseconomies. It produced the *Alcoa* decision and its fuzzy sociology. Most importantly, Sherman § 2 brings disrepute to antitrust in its inability to handle the monopoly problem.

The chief response to Sherman § 2's impotence is "no-fault" liability. Conduct is irrelevant; size is the violation and illegality is presumed once the government proves that the defendant controls a designated share of the market. Some proposals allow defenses, such as economies and possession of patent monopoly.[54]

Debate over "no-fault" generally centers on two points: (1) will elimination of the necessity to prove "exclusionary conduct" reduce the length of litigation, and, (2) is there sufficient empirical evidence to support the assumption that large firms are invariably poor performers? Unable to reach a consensus judgment on "no-fault," the Commission asked Congress to examine the issue.[55]

A "no-fault" statute is not a convincing solution. Opponents persuasively argue that since evidence of conduct would be necessary to determine the relevant market and establish the economies defense, litigation time would not be reduced. Professor Bork argues that a "no-fault" statute would operate to the detriment of consumer welfare since size in most cases is achieved through efficiencies and superior performance.[56] Another negative trade-off is that the threat of automatic liability for size would inhibit the entrepreneurial spirit.[57]

The implicit asumption by many "no-fault" supporters is the populist myth that "bigness" is inherently "evil," regardless of performance. The "devil theory" of corporate take-over of the political system is refuted daily by the

53 R. Bork, *supra* note 16, at 50-71.
54 For the most thoughtful "no-fault" recommendation see C. Kaysen & D. Turner, Antitrust Policy: An Economic and Legal Analysis 44-99 (1959).
55 *Report, supra* note 12, at 45-49.
56 R. Bork, *supra* note 16, at 175-97.
57 *Report, supra* note 12, at 102-04 (Separate views of Commissioner Hatch).

countervailing power of government interference, labor, and an army of reform groups. As Bain observes: "Reversion to a more primitive sort of democracy would require much more than just a reduction in business concentration."[58]

Finally, the concept of "no-fault" is simplistic in that it ignores the reality of the large enterprise competing in an economy that is more international than domestic. Defendants in government monopolization suits will always be substantial participants in the national and world economies. At this level, the issues are more macro- than microeconomic. Inflation, the balance of payments, international trade, and national security, rather than effects on competition in particular markets will determine the appropriateness of dissolution.[59]

The government's monopolization case against IBM[60] is a classic example of antitrust struggling with national interests and the priorities of an international economy. Dissolving IBM raises a serious risk of adversely affecting the world's leading producer of the computer—the most important product of the post-World War II society. Leonard Silk states the problem: "Should the United States, for the sake of preventing monopoly, break up a company that helps to sustain America's role in the world economy?"[61] *Fortune* worries that dissolution would "run counter to broader public interests" because it would weaken the U.S.'s "technological leadership."[62]

Use of the anti-monopolization statute is impractical and counterproductive. Allocating maximum enforcement resources to ferreting out "conduct" violations such as price-fixing would produce a "cleaner" market than presently exists and thereby encourage firms to compete on the merits. If government enforcement is effective, and a firm does achieve size, it would likely be the result of efficient operation or due to the myriad forms of government interference.

Attorney General Griffin Bell's suggestion that Congress assume responsibility for dissolution of large firms deserves serious consideration.[63] One possible arrangement is to charge the Senate Judiciary Committee with the responsibility to identify any firm whose size might be detrimental to national interests. "National interests" would include both micro- and macroeconomic factors, and could include political judgments on the appropriate role of size in a democracy. Hearings would develop the credibility of a proposed sanction and expose the possible consequences of dissolution. The testimony of interested third parties, such as labor and rivals, would provide an added dimension.

If the Committee found compelling reasons for dissolution, a bill of particulars would be drafted for presentation to the Senate. The bill would describe the reasons for the Committee's recommendations, along with an impact statement. The impact statement would summarize the potential consequences of

58 J. BAIN, INDUSTRIAL ORGANIZATION 92 (2d ed. 1968).

59 Senator Javits, a member of the Commission, complained that the Report failed to study the interaction between antitrust and international competition. *Report, supra* note 12, at 110 (Separate views of Commissioner Javits).

60 United States v. I.B.M., 69 Civ. 200 - Div. No. 72-344 (D.N.E.).

61 Silk, *Break Up I.B.M.?* N.Y. Times, Oct. 23, 1972, at 31.

62 Beman, *I.B.M.'s Travails in Lilliput*, FORTUNE, Nov. 1973, at 148, 162. A *Barron's* commentator complains: "Like the statutes which spawned it, the antitrust case against IBM has lost all touch with reality." Barron's, Aug. 21, 1978, at 7.

63 Wall St. J., Aug. 29, 1977, at 3, col. 4.

the proposed remedy. It would then be up to the Senate to pass judgment on the Committee's recommendations. The Justice Department would be charged with the responsibility for implementing the dissolution decree.

This proposal anticipates a substantial commitment of time and resources. Given the stakes involved, thorough evaluation is justified. Moreover, the entire process would not exceed the amount of time the Justice Department has already expended in prosecuting the *IBM* and *ATT* extravaganzas and the FTC on the *Exxon* and *Cereal* complaints.