

The Case for Civil Antitrust Enforcement*

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To my way of thinking, the substantive law of antitrust and the American business scene have both developed in such a way as to make criminal proceedings, in many situations, an archaic method of antitrust enforcement and a confession of governmental impotence rather than a symbol of governmental power. Many situations of antitrust misbehavior should, of course, continue to be dealt with by criminal sanctions. And the choice of civil remedies for antitrust violation does not imply that antitrust has lost its status as the dominant economic philosophy in this country. It means only that antitrust's primary significance is in the area of public policy, and that its role in condemning private business irregularities is in many cases a matter of secondary significance.

It has been the fashion to put the case for civil, as opposed to criminal, enforcement of the antitrust laws by pleading, on an *ad hominem* basis, the good intentions of the business men involved; that a Sherman Act violation is only a minor strand in the otherwise high-minded, public-spirited, and blameless life of the antitrust offender; that liability is frequently based on largely "archaeological" research into the ancient history of the companies involved,¹ and on uncertain and shifting appraisals of the governing law, etc.² I intend to spend little time on these considerations, because they relate largely to the particular circumstances of individual violations.

Let me state the case for civil antitrust enforcement primarily in terms of the government's and the public's need for effective enforcement of a law which represents, in the word of a *Fortune* article, "a valiant attempt to extend the Anglo-Saxon common code, the source and measure of the liberties of the English-speaking people, into the realm of business." As this same source has said:—"Few acts of idealism have ever turned out so well."³

From a strictly evidentiary and procedural standpoint, the

* Based on a talk given to the annual meeting of the Judicial conference for the Third Circuit, at Atlantic City, New Jersey, on October 7, 1953.

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¹ See, Judge A. N. Hand, *Trial Efficiency*, C.C.H. 1951 Symposium on Business Practices under Federal Antitrust Laws, pp. 31-2. "Doubtless, long-tolerated trade arrangements acquire no vested immunity under the Sherman Act; no prescriptive rights accrue by the prosecutor's delay." *The Times-Picayune Publishing Company v. United States*, U.S. (1953).

² See statement of District Judge Knox on sentencing the defendants in *United States v. General Electric ("Carboloy")*, S. D. N. Y. C. R. 110-412, November 12, 1948, F. 2992-5.

³ FORTUNE, *The New Competition*, June 1952, p. 195.

government faces several severe disadvantages in a criminal anti-trust proceeding that it would not encounter in a civil suit. Should the defendant avail himself of his constitutional right to a jury trial, the government assumes the burden of convincing twelve jurors beyond a reasonable doubt that the Sherman Act has been violated. Considering the unwieldy masses of economic evidence and the elaborate technical arguments that must be fused, in the lay juror's mind, into the simple psychological intuition of guilt beyond a reasonable doubt, a criminal jury proceeding has been well described by an able defense attorney as an "uphill fight for government counsel."⁴

In some criminal cases, the court has not even allowed the jury to weigh the evidence and decide whether it leads to the inference of guilt beyond a reasonable doubt. These courts have applied strictly the rule that limits the use of circumstantial evidence in a criminal case; accordingly, if the evidence does not exclude all reasonable hypotheses except guilt, they have held that there is not sufficient evidence to go to the jury.⁵ There are other cases holding that it is not permissible thus to substitute the judge for the jury;⁶ nevertheless, this is still another obstacle to effective criminal anti-trust prosecutions.

If the case goes to the jury, the government's opportunities to offer evidence which judges will consider competent and admissible are much more restricted than in equity cases. In jury cases, the judge reverts to his time-honored function of protecting susceptible and uninformed jurors from hearing evidence which he would freely admit in a civil equity proceeding involving no jury. A federal judge in an equity case needs no protection in evaluating the relevance and materiality of evidence, since he can be trusted subsequently to dismiss from his mind evidence that turns out to be unconnected or of low probative value. On the other hand, in contrast to the relative disability of the government, defendants in criminal cases, are accorded, it has been asserted, greater opportunity to introduce self-serving evidence.⁷

Moreover, government counsel have no right to insist on tak-

⁴ Duncan, *The "Big Case"—When Tried Criminally*, 4 WESTERN RESERVE L. REV. 99, 116 (1953).

⁵ *Pevely Dairy Co. v. United States*, 178 F.2d 363 (8th Cir. 1949), *cert. denied*, 339 U. S. 942 (1950) (antitrust case); *United States v. Maryland & Virginia Milk Producers' Ass'n.*, 90 F. Supp. 681 (D.D.C. 1950) (antitrust case); *U. S. v. Tatcher*, 131 F.2d 1002 (C.C.A. 3, 1942); *Copeland v. U. S.*, 90 F.2d 78 (5th Cir. 1937); *United States v. Gasomiser Corp.*, 7 F.R.D. 712 (D. Del. 1947).

⁶ *United States v. Spagnuolo*, 168 F.2d 768 (2nd Cir. 1948), *cert. denied*, 335 U. S. 824 (1948); *United States v. Feinberg*, 140 F.2d 592 (2nd Cir. 1944), *cert. denied*, 322 U. S. 726 (1944); *United States v. Valenti*, 134 F.2d 362 (2nd Cir. 1943), *cert. denied*, 319 U. S. 761 (1943); *Curley v. United States*, 160 F.2d 229 (D. C. Cir. 1947), *cert. denied*, 331 U. S. 837 (1947).

⁷ See *supra*, footnote 4 at pages 112-114.

ing depositions in criminal cases (as they may in civil cases), because of the defendant's constitutional privilege of confrontation; defense counsel, on the other hand, retain this right. Bearing in mind all of these factors, it is small wonder that the government has obtained guilty verdicts in little more than half the criminal cases that have gone to trial; the government's percentage of victories in civil litigated cases is considerably higher.

In addition to its disadvantages in the trial of criminal antitrust cases, the government is precluded from appealing cases it loses in the trial court. As you know, the court in a criminal proceeding has the power to dismiss a case, or order a directed verdict. Furthermore, jury verdicts of acquittal may be largely based on a lengthy and complicated judge's charge involving a confusing blend of economic and legal considerations. In all such situations, the heavy intellectual and financial investment of the government in investigating, laying the groundwork for, and prosecuting a criminal proceeding — not to speak of the equally strenuous efforts of the defense counsel — dissipates into thin air. There is not even obtained, as in the case of a civil appeal, any clarification of the state and significance of the law.

There is still another procedural matter that can on occasion serve to make a criminal proceeding a cumbersome method of isolating the main issues at stake in an antitrust controversy. The pre-trial conference procedure has been regarded as essential to the streamlining and clarification of otherwise incredibly ponderous antitrust cases. Necessary as it is in cases tried by judges, it becomes even more important when delicate economic issues are confided to the ultimate judgment of a lay jury. While pre-trial conferences are within the control of the judge in civil cases, counsel may block their utilization in criminal proceedings.

Even where a case is tried without a jury, the substantive content of an antitrust violation imposes a difficult burden of proof on government counsel in a criminal proceeding. Let me deal first with the so-called "intent" requisite to a Sherman Act violation, which is about the last vestige of contact that antitrust enforcement has with the psychology of the antitrust defendant. Although still a semantic necessity, this "intent" is now a logically redundant concept. Thus, according to Justice Douglas in the *Griffith* case, "it is not always necessary to find a specific intent to restrain trade or build a monopoly in order to find that the antitrust laws have been violated. It is sufficient that a restraint of trade or monopoly results as the consequence of a defendant's conduct or business arrangements."⁸ Such a standard, stripped of any element of *mens*

⁸ United States v. Griffith, 334 U. S. 100, 108 (1948); United States v. Patten, 226 U. S. 525, 543 (1913).

rea or personal diabolism, is, I think, much too pallid and conceptual to make the ordinary judge or jury easy about finding criminal liability in the first place, or awarding adequate criminal penalties in the second.

In monopoly cases, the standard has become even more conceptual and depersonalized. Judge Learned Hand, in the *Alcoa* case, established that there was no necessity for showing any "specific intent" to violate the Sherman law. The only intent needed is the intention to do the forbidden act, i.e., to monopolize; accordingly, *Alcoa* violated the law by increasing its capacity before others entered the field, and by progressively embracing each new business opportunity as it offered itself.⁹ Mr. Justice Burton, in the *American Tobacco* case,¹⁰ further watered down the criminal nuances of Sherman Act intent by grounding a monopoly conviction on the existence in the defendant of the power to exclude competitors, coupled with the intention and purpose to use that power; the *Schine* case has subsequently reaffirmed this view.¹¹

District Judge Wyzanski, in the *United Shoe* case, has crystallized this trend by pointing out that normal, natural, and "honestly industrial" activities, of the sort engaged in by honorable firms, conforming to long-established traditions of the business and not involving predatory practices, may nevertheless bring about an illegal monopoly; for "market control is inherently evil and constitutes a violation of section 2 unless economically inevitable, or specifically authorized or regulated by law." The violation "depends not on moral considerations, but solely on economic considerations."¹²

Criminal sanctions, as a matter of popular taste, call, I think, for a greater showing of the social cloven hoof or of economic brimstone than the foregoing judicial statements would indicate. It is only when a mere attempt to monopolize is charged, that specific intent to destroy competition or build monopoly becomes essential to guilt.¹³ Since, however, the government rarely, if ever, brings antitrust cases based exclusively on charges of attempts to monopolize, this is a relatively unimportant consideration.

If judges are reluctant to impose criminal sanctions without more robust manifestations of devilry than many current antitrust

⁹ *United States v. Aluminum Company of America*, 148 F.2d 416, 432 (2d Cir. 1945).

¹⁰ *American Tobacco Co. v. United States*, 328 U. S. 781, 814 (1946); cf. *Swift and Co. v. United States*, 196 U. S. 375, 396 (1905).

¹¹ *Schine Chain Theatres v. United States*, 334 U. S. 110 (1948).

¹² *United States v. United Shoe Machinery Corp.*, 110 F.Supp. 295 (D. Mass. 1953).

¹³ See *The Times Picayune Publishing Co. v. United States*, *supra*, footnote 1 at page 839.

cases involve, juries are even more reluctant. This is particularly true where proof of violation is dependent on a technical evaluation of an elaborate mass of facts and on legal theories that tax even a federal judge's time, patience, and mental energies. The complexity of antitrust violations, and their occasional dependence on conflicting theories of the relation of law to business society,¹⁴ result in blurring that intuition of personal, conscious, and deliberate guilt that is at the root of effective criminal law enforcement.

Having shown the decreasing basis for imputing a criminal intent or *mens rea* to most antitrust defendants, is there any psychological impressiveness in the concept of antitrust "conspiracy"? Here, let us first note that a Sherman Act violation does not have to involve a conspiracy; it suffices under the statutory language to establish either a contract or a combination to restrain trade. Thus liability in the *Standard Oil of California*,¹⁵ *Richfield*¹⁶ and *American Can*¹⁷ cases was pretty much based on the consistent use, by a single concern controlling a substantial portion of the market, of certain standard sales or lease contracts. The government's complaint in the *Western Electric-A.T.&T.* monopoly case could be viewed as an annotated gloss on four basic contracts or contract forms, which symbolize the structural pattern of the organization of the entire Bell System.¹⁸ Contracts have been held to be illegal restraints merely on the basis that, as in the case of movie exhibitor partnerships, they eliminate the competition of the partners.¹⁹

Likewise, combinations which illegally restrain trade may take forms from which conventional "cloak-and-dagger" conspiratorial elements are lacking. Thus, the gravamen of the government's complaint in the *du Pont* proceeding currently being tried in Chicago is mainly that members of the du Pont family hold large and allegedly controlling percentages of stock in General Motors and United States Rubber.²⁰ In this case, as well as where antitrust liability is predicated on adherence by defendants to a common plan (as in the *Interstate Circuit*²¹ and *National Lead*²² cases) or on so-called concerted action (as in the *Cement Institute*²³ and

¹⁴ See *supra*, footnote 2.

¹⁵ *United States v. Standard Oil of California*, 337 U. S. 293 (1949).

¹⁶ *United States v. Richfield Oil Corp.*, 99 F. Supp. 280 (S. D. Calif. 1951), *aff'd* 343 U. S. 922 (1952)

¹⁷ *United States v. American Can Co.*, 87 F.Supp. 18 (N. D. Cal. 1949).

¹⁸ D. N. J., Civil Action No. 17-49, filed January 14, 1949.

¹⁹ *United States v. Paramount Pictures, Inc.*, 334 U. S. 131 (1948).

²⁰ N. D. Ill. E. D., Civil Action No. 49-C-1071, filed June 30, 1949.

²¹ *Interstate Circuit v. United States*, 306 U. S. 208 (1939).

²² *United States v. National Lead*, 332 U. S. 319 (1947).

²³ *Fed. Trade Commission v. Cement Institute*, 333 U. S. 683 (1948).

other basing point and uniform delivered price cases²⁴), the ugly (and logically ineffective) word "conspiracy" could well have been replaced by the less irritating concept of "combination". Such a moderate verbal de-emphasis might well have taken the emotional overtones out of some of the current denunciations by the private bar of the so-called doctrine of "conscious parallelism," and at the same time would, from a legal standpoint, have been equally serviceable to the government.²⁵

In short, in antitrust cases the legal concept of conspiracy has lost its morally reprobate character. It does not have the personalized criminal innuendoes of the other kinds of conspiracies involved in Justice Jackson's memorable concurring opinion in the *Krulwich* case.²⁶ Because it lacks this feature of moral reprehensibility, the modern version of antitrust conspiracy strikes me as a poor semantic base for criminal proceedings.

Let us now pass from the definition of antitrust crime to the problem of fixing responsibility for it by taking up the issue of agency. There is little point in convicting a corporation of a crime, unless the guilt therein is chargeable to human actors. Of course, there are situations where individuals are so completely masters of their corporation's fate that they can, and should, be held criminally responsible for the criminal aberrations of their corporation. But, particularly for large corporations, business decisions and acts are a collective responsibility. A top executive who signs an incriminating patent licensing agreement is probably acting on the specific recommendations of several subordinates, who may in turn be basing themselves on a general policy laid down by an interdepartmental committee, perhaps even in part on an opinion of patent counsel. Or the salesman who has negotiated an offensive "tie-in" transaction may have been following a company policy that was more or less anonymously and collectively evolved. Unless a prosecutor is in a position to bring guilt home directly and unequivocally to specific individuals, he is in a poor position to press criminal charges.

²⁴ *Triangle Conduit and Cable Co. v. Fed. Trade Commission*, 168 F.2d 175 (C.C.A. 7, 1948), *aff'd* (by equally divided court), 336 U. S. 956 (1949); *Milk and Ice Cream Can Inst. v. Fed. Trade Commission*, 152 F.2d 478 (7th Cir. 1946); *Fort Howard Paper Co. v. Fed. Trade Commission*, 156 F.2d 899 (7th Cir. 1946), *cert. denied*, 329 U. S. 795 (1946); *Allied Paper Mills v. Fed. Trade Commission*, 168 F.2d 600 (7th Cir. 1948), *cert. denied*, 336 U. S. 918 (1949).

²⁵ A perceptive note writer points out that many of the difficulties found with the doctrine of "conscious parallelism" flow from the failure to recognize it as related to concentration of economic power, rather than to the actions of businessmen. Note, — *STAN. L. REV.* 679 (1951).

²⁶ *Krulwich v. United States*, 336 U. S. 440, 445 et seq. (1949).

This point can be illustrated I think by two cases. A careful reading of District Judge Lindley's opinion in the *A & P* case²⁷ gives one the impression that the enormous record developed in that case, covering a great number of discriminatory practices similar to those prohibited by the Robinson-Patman Act, did not on the whole strike the judge as meriting criminal condemnation. The government criminal case was ultimately saved by what Judge Lindley called the "rotten thread" that permeated the entire course of *A & P's* business dealings, to wit: *A & P's* concurrent use of its fruit and vegetable produce subsidiary as an agent for the *A & P* as buyer, and as a broker for the sellers of the fruit and vegetables. If not for the outburst of moral indignation engendered by this abuse of fiduciary position, it seems to me a matter of speculation whether the government would have won its criminal case.²⁸

In the *Lumber Products* case,²⁹ the majority of the Supreme Court held that no labor union could be found guilty of acts involving an illegal restraint of trade, unless there was clear proof that such labor union actually participated in, authorized, or, after actual knowledge thereof, ratified the unlawful act. This holding was largely based on the language of the Senate report accompanying Section 6 of the Norris-LaGuardia Act, which had said that "the courts should be required to uphold the long-established law that guilt is personal" and that "criminal guilt and criminal responsibility should not be imputed but be proven beyond reasonable doubt in order to impose liability." In vain did Mr. Justice Frankfurter, with the concurrence of the Chief Justice and Mr. Justice Burton, protest that this rule was "unmindful of the anatomy and physiology of trade union life" and that it enabled powerful international unions to "be insulated from responsibility for the acts of their leading officers, although such action be taken in furtherance of the vital concerns of the union and in every other aspect of legal responsibility be deemed within the direct authority of these officers and binding on the union." It is highly doubtful that this issue would have been handled by the Court in the same way or would have had the same significance if the case had not been a criminal one, but had rather been brought on the civil side.

Assuming, however, that the government has overcome the foregoing legal and psychological difficulties and has established criminal liability, what does the public obtain by way of relief?

²⁷ *United States v. The New York Great A. & P. Tea Co.*, 67 F.Supp. 626 (E. D. Ill. 1946).

²⁸ This does not seem to be true of the opinion on appeal in the Circuit Court, which based the defendant's liability on a broader theory of abuse of vertical integration, 173 F.2d 79 (7th Cir. 1949).

²⁹ *United Brotherhood of Carpenters and Joiners of America v. United States*, 330 U. S. 395 (1946).

Merely a maximum fine of \$5,000 for each count laboriously brought home to each defendant. And I don't think the argument would change much if the current bill providing for fines of up to \$50,000, in the discretion of the court, were to pass.

Assuming that there are enough defendants and counts to net the public fisc the \$250,000 obtained in fines in the *American Tobacco* case, is that much of a recompense to the government for, let us say, a 90 volume transcript, many years of prior investigation by a large staff, and a delay of six years between the filing of the indictment and final decision by the Supreme Court? On the other side, are the defendants really much more inconvenienced in fact than if they had to defend a civil proceeding, considering the heavy financial impact of counsel fees, printing records, court costs, loss of executives' time, etc? Thus, a single compilation needed in the *Investment Banking* case is said to have cost the defendants \$350,000.³⁰ An executive of another antitrust defendant has stated that defending his case in court cost his firm more than \$100,000 in fees and other expenses; seven other companies involved in the same lawsuit, who had pleaded *nolo contendere*, each paid \$5,000 fines.³¹ Over and above the high cost of defending government proceedings is the very potent financial sanction of the private treble damage suit; a single motion picture company has in a thirty-year period been in more than five hundred such proceedings, and paid out (or had judgments entered against it for) more than ten million dollars.³²

There are two other considerations that in my mind serve further to underscore the futility of many criminal antitrust proceedings. It has been urged that criminal convictions are effective deterrents to antitrust violation because of the social stigma they involve. I question this. It seems to me that a collectively managed business, confronted with a criminal charge deodorized of moral obloquy and hence not subject to strong public condemnation, may cynically regard an antitrust fine as a mere cost of doing business — as an occupational license fee. This is a particular danger since a criminal proceeding inflicts a purely negative chastisement — frequently more on the basis of an economic condition or state of affairs than on specific acts of the defendants — without advancing any positive suggestion as to how to change the status quo.

The cardinal point at issue is whether, in the language of Section 4 of the Sherman Act, we mean to "prevent and restrain"

³⁰ McAllister, *The Big Case: Procedural Problems of Antitrust Litigation*, 64 HARV. L. REV. 27, 50 (1950).

³¹ COLLIER'S, March 15, 1952, p. 98.

³² "Antitrust Cases Beginning in 1920 and Ending December 27, 1951 in which 'Paramount' was Involved," F. C. C. Docket No. 10031 et. al., Paramount Exh. Nos. 9 and 9A.

violations of the act. Section 4 itself points out that the way to do so is to institute equity proceedings. There are, of course, situations where the criminal proceedings contemplated under Sections 1, 2, and 3 of the Sherman Act would have a deterrent effect and, by indicating that the policeman is still on the beat, prevent some of the simpler and more obvious forms of antitrust violation. Also, there doubtless will still occur flagrant and clear-cut antitrust violations where an equity injunction would be meaningless, because it could do little more than prohibit obvious forms of antitrust misbehavior — primary boycotts, strong-arm tactics, etc.

But the center of enforcement gravity is moving away from these simple situations and their simple solutions. Antitrust liability has become more and more a matter of statistical percentages and the economics of market control. Results, not intentions, count. The analysis that has become pertinent is sociological, not theological.³³ And the business community, having a pro-competitive outlook, genuinely regards competition as a valid public policy, and looks to bench and bar for guidance as to how it may comply with general antitrust directives, the application of which is sometimes not clear in specific cases. Similarly, government is, or should be, concerned with the rational projection into the future of the sort of free industrial society to which we all subscribe, rather than securing personal retribution for past illegal restraints.

At this point, let me deal briefly with the second main part of the case for civil antitrust proceedings — the way in which industrial practices and business conditions have changed since the early days of the Sherman Act.

When the Sherman Act was first passed and for some decades thereafter, public opinion about it was largely molded by antipathy to industrial maneuvers of an imaginative but nevertheless somewhat buccaneering nature. There was something brutal about the tactics whereby dissident competitors were forced to sell out or join the early trusts — railroad rebates, physical tampering with competitors' machines, financial pressures, large scale trade disparagement, "fighting ships" and "fighting brands," sustained price cutting, and the other predatory practices that the early muckrakers (with great justification) exploited. Farmers were afraid of the

³³ In his Annual Report for 1937, Attorney General Cummings deprecated, and attributed to "the search for that fictitious thing known as 'corporate intent,' . . . an attitude commonly taken by courts, emphasizing moral culpability and subordinating practical effects of business activities which tend toward monopoly or restraint of trade. . . . In other words, actual results are ignored in an effort to determine whether a fictitious personality is acting in an evil state of mind. The antitrust laws have become theological tracts on corporate morality." Except in some criminal antitrust cases, the courts seem to have gotten away from this approach.

high prices they would be charged, by the farm machinery, fertilizer, and other trusts, for the machinery and supplies needed by them in their agricultural operations, and the low prices they would be getting for their own products because of trade manipulations and restraints engaged in by other organized groups — the packers, the wheat and grain speculators, the corn products combine. Consumers were afraid of exorbitant prices and unavailability of supplies — the odious abuses that had for centuries made common law crimes of engrossing, regrating and forestalling.

This picture has I think on the whole changed. Human nature has not become so spiritualized that there do not exist good current examples of practices engaged in by antitrust violators at which the ethically minded might well lift up their eyebrows — attempts at commercial bribery (in the *American Can* case this was euphemistically called "commercial massage");³⁴ the assumption by a company of conflicting interests involving betrayal of a fiduciary relationship (as in the operations of the fruit and produce subsidiary of the A&P);³⁵ undue coziness with municipal officials (as in the *Gamewell* case).³⁶ But on the whole the heyday of business rapacity and predatory industrial practices has passed.

Modern industrial management is not interested in momentary business coups or in fleecing consumers; it is interested in the continuity of successful business operations and the retention of public favor. The decisions against *Alcoa*³⁷ and *United Shoe*³⁸ indicate that these adjudicated monopolists were satisfied with reasonable profits. Du Pont (which has nonetheless had to defend itself in an antitrust court) points to twenty reductions in the price of cellophane, from \$2.65 to \$.50 a pound.³⁹ The farmer and the worker have, with government permission and support, become progressively better organized into cooperatives, unions, and other associations, so that most of them can no longer be described as the easy victims of efforts by antitrust violators to gouge or oppress them or to deprive them of a fair return for their farm products or of a fair wage.

In fact, although the protagonists of the antitrust laws still point to the benefits that competition among producers confers on the consumer, increased emphasis is being placed on the advantages that competition has for the producer himself. Thus, large-scale

³⁴ See *supra*, footnote 17 at page 28.

³⁵ See *supra*, footnote 26.

³⁶ *United States v. Gamewell*, CCH TRADE REG. REP. SUPP. 1948-51, § 62,236.

³⁷ See *supra*, footnote 9 at page 427.

³⁸ See *supra*, footnote 12 at page 325.

³⁹ Address by Mr. Livingston, Public Relations Department, du Pont de Nemours and Company, June 1950.

American industry is beginning to follow the principle symbolized by a *bon mot* credited to a General Electric executive — “If there weren’t a Westinghouse, we would have to create one.” Of the eight single-unit monopolies that dominated their respective industries and were sued by the government in the first two decades of the twentieth century, only the smallest (shoe machinery) now survives.⁴⁰ One of these monopolies — the oil trust — has evolved into an industry with twenty-one major competitors and countless smaller ones. Mergers of a horizontal or vertical type are not, I think, significantly on the increase.⁴¹ Public policy may still have great difficulties with respect to the so-called “conglomerate merger” of the last twenty years — the business enterprise producing a host of diversified products — but they are of an entirely different economic and legal order than those posed by the traditional horizontal or vertical trusts or mergers of older times.⁴²

Rather than take pride in the number of competitors that have been eliminated or merged, du Pont and similarly placed firms rejoice in the number of small fabricators that they keep in business by supplying them with rayon, plastics, and other basic materials, and the number of suppliers from whom they in turn draw their basic raw materials.⁴³ A prominent American corporation until recently kept fragrant the recollection of a bygone day when a nickel was a unit of exchange, while resolutely sticking to a one-product policy and proudly pointing to the number of independent bottlers it has established throughout the world.⁴⁴ Other large-scale enterprises emphasize the liberality with which they license patents

⁴⁰ *United States versus Economic Concentration and Monopoly*, A Staff Report to the Monopoly Sub-Committee of the House Small Business Committee Pursuant to H. R. 64, 79th Congress.

⁴¹ This statement is, of course, a debatable and somewhat meaningless one until measures of horizontal and vertical concentration become more refined. It seems to the writer, however, to reflect the viewpoint of the majority of the economists who have written about the problem. This is not the occasion to discuss the many economic and statistical problems involved.

⁴² Cf., e.g., Andrews, *Product Diversification and the Public Interest*, 29 HARV. BUS. REV. 91 (1951).

⁴³ President Greenewalt of du Pont has pointed out, for example, that \$1.92 of nylon staple, in producing a \$49.95 dress, keeps countless spinners, throwsters, weavers, finishers, designers, cutters and retail stores in business. Statement before House Judiciary Committee on Study of Monopoly Power, November 15, 1949. He also stated that cellophane has over 6,000 customers, of which only a hundred are in the category of big companies like the bakers, tobacco people, and meat packers, and that over 300 firms converted 40 per cent of du Pont cellophane into tape, bags, envelopes, tubes, etc.

⁴⁴ Arnold, “*Depression: Not in your Lifetime*,” 131 COLLIER’S 24, 26 (25 Apr. 1953).

to competitors,⁴⁵ or their relatively small percentage occupation of an industrial field, or the extent to which they foster the competitive instinct among even unincorporated subdivisions within their own enterprises.⁴⁶ Some analysts have been emphasizing the need for large firms sloughing off certain kinds of business operations, and this has taken place in the automobile, meat packing, and asbestos industries.⁴⁷

The current attitude of the enlightened American producer to the American antitrust laws is typified by Paul Hoffman when he points out that:

...the antitrust laws have played a major part in the development of America, and for a rather basic reason. I said this morning that I believed one of the reasons for the existence of a dynamic society and one of its objectives should be the promotion of challenge, and promotion of pressures that would make individuals realize all their capacities.

To my mind that is the great contribution of competition. I perhaps take a rather dim view of the willingness of most of us — and I include myself, certainly — to work, and particularly to think, unless there is some pressure that drives us to it! I really feel that almost no thinking is done when you get to the place where, if you do not start thinking, you will either go broke or lose your competitive position. When that happens you really will think. Competition has probably resulted, over the last 50 years, in a great outburst of mental activity which would never have taken place without it; and that is in no small way responsible for what we have accomplished in the way of material development.⁴⁸

Similarly, thoughtful business men have been condemning trade restraints and restrictions because they retard productivity and technological advance. While the conventional criteria of abuse of economic power and trade restraint must still be kept in mind, the

⁴⁵ See address by Charles E. Wilson, President, General Electric Company, before the Rotary Club of New York City, November 3, 1949 with respect to licensing of Disposall patents to competitors. In the cellophane field du Pont has built a \$20,000,000 plant for Olin Industries Inc., see *New York Times*, November 7, 1949; *New York Herald Tribune*, August 28, 1951.

⁴⁶ Thus, Mr. Greenewalt has stated that du Pont has roughly eight per cent of the trade in the "chemicals and allied products" field and has larger rivals in the paint, rayon, plastics, nitrogen products, photographic films, chlorine products and insecticide fields.

⁴⁷ See Drucker, *The Concept of the Corporation* (1946); *Why Not Compete With Yourself?*, *THE MANAGEMENT REVIEW*, October 1949, pages 551-3. *The Cleanup Man*, 62 *Time*, No. 14, pages 92 et seq. This viewpoint is not shared by Bowman, *Towards Less Monopoly*, 101 *U. OF PA. L. REV.* 577, at 604-5 (1953).

⁴⁸ See Kaplan and Kahn, *Big Business in a Competitive Society*, *FORTUNE*, section 2, February 1953, page 13; Powlison, *Obstacles to Business Growth*, 31 *HARV. BUS. REV.* 48, 50 (1953).

basic objective of current antitrust policy, borne out, I think, by the nature of some of the important new cases in the field, has come to be, to borrow the language of a relatively recent United Kingdom statute on the point, the production, treatment, and distribution of goods by the most efficient and economical means and the fullest use and best distribution of men, materials, and capacity.⁴⁹ As antitrust in legal terms thus becomes a matter of desirable public policy rather than of personal guilt, it moves, in philosophic terms, in the direction of what Aristotle has called "distributive justice," as contrasted with "punitive justice." And, if I am correct in describing this trend, government can no longer be content with the merely negative and retrospective attitude that is implicit in criminal condemnation. It must assume the affirmative role of suggesting to antitrust violators, albeit in broad outlines and with the utmost latitude for independent business discretion, the general future course of business conduct as it affects the competitive process.

This latter is what the modern equity antitrust decree does. Nobody desires or expects of an equity court a blueprint for the future conduct of any industrial segment of our dynamic American society. But we expect our government to insist on maintaining the flexibility and opportunities for healthy business growth that are only possible if one safeguards the freedom of economic choice. The preservation of competition calls for the art of stimulating creative business endeavor as an alternative to regimenting it.

No amount of nominal criminal penalties could, I think, accomplish anything near the public good which is done when a large national company, obligated by court decree to increase the number of its distributors by 10% in a five year period, ends up with a 29% increase;⁵⁰ or an equipment manufacturer who had coerced purchasers of its equipment to take trade mark franchises from it finds the frequency of such trade mark franchises dwindling from 70% to 1% of its total sales in the three-year period since antitrust

⁴⁹ Hoffman—HARV. BUS. REV. (1952). Professor Wright puts the case more forcefully. He refers to "the law of decay of self-perpetuating non-competitive groups," as stated by a famous English biologist—" . . . where you have a very comfortable ruling group all cooperating very nicely, promotion will tend to go to the 'nice boys' rather than the able boys; [that] scientific innovation is discouraged as much as technical change." And he ends by saying, "We need a ministry of Disturbance, a regulated source of annoyance, a destroyer of routine, an underminer of complacency, an enfant terrible." *Competition—More or Less?* CURRENT BUSINESS STUDIES, Oct. 1952, pp. 27, 29.

⁵⁰ See section 14 (a) of United Kingdom Monopolies and Restrictive Practices Inquiry and Control Act, 1948, 11 & 12 Geo. 6 Ch. 66.

judgment was entered against it.⁵¹ A fine levied against an anti-trust defendant does less for the public interest than, let us say, a 50% increase in the sales of a competitor in the year following entry of a civil judgment,⁵² or a tenfold increase in imports into this country by a single British company within a similar one year span,⁵³ or the entry of an American firm into foreign markets that had been previously believed impregnable.⁵⁴

On the whole, therefore, an informed, imaginative, and forward-looking application of antitrust equity jurisprudence will do more to reconcile the current situation, needs and temperament of the enlightened business community with the basic spirit and purpose of the antitrust laws, than the assessment of criminal sanctions against antitrust violators, stripped as so many present day anti-trust violations are of the psychological malice and moral obtuseness that people still expect as a basis for a criminal proceeding.⁵⁵

⁵¹ Under the Consent Final Judgment in *United States v. Libbey-Owens-Ford* (N.D. Ohio), CCH TRADE REG. SUPP. 1948-1951, 62,323 (1948).

⁵² Under the Consent Final Judgment in *United States v. Bendix Home Appliances*, CCH 1948-1949 TRADE CASES 62,346 (S.D.N.Y. 1948).

⁵³ Under the Final Judgment in *United States v. American Can Co.*, 87 F.Supp. 18, (N.D. Cal. 1949). See *Wall Street Journal*, Oct. 15, 1951.

⁵⁴ See *United States v. Imperial Chemical Industries Inc.*, 105 F.Supp. 215, 229 (S.D. N. Y. 1952).

⁵⁵ See Timberg, *Competition—A Philosophy for Export and for Defense Production*, 21 GEO. WASH. L. REV. 677, 692-3 (1953).