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# Book Review. Massive Industrial Size, Classical Economics, and the Search for Humanistic Value

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## Massive Industrial Size, Classical Economics, and the Search for Humanistic Value\*

Joseph F. Brodley†

IN DEFENSE OF INDUSTRIAL CONCENTRATION. By John S. McGee. New York: Praeger Publishers, 1971. 167 pages. \$10.00.

The Supreme Court has stated that containment of economic power is a national economic policy of prime importance. It is a policy at once "fully consonant with economic theory,"<sup>1</sup> and directly promotive of a system of "fragmented industries and markets."<sup>2</sup> A deliberate policy of economic decentralization, containment is also supported by non-economic values, for in adopting it Congress freely consented that "some price might have to be paid."<sup>3</sup>

*In Defense of Industrial Concentration* directly challenges that economic policy. By asserting that the attempt to contain economic power by any force extraneous to the operation of the free market is an economic mistake and a political intrusion, Professor McGee argues that to accept the prevailing viewpoint—which rests on neither coherent economic theory nor empirical justification—is to retreat from the clear light of classical economics<sup>4</sup> and to immerse the state in the darkness of bad economics and confused morality. Consequently, McGee attempts to reveal the errors of the false economic beliefs about industrial size. His argument rests on both an explicit economic analysis and a largely implicit moral outlook and value system. Accordingly, this review will respond on both levels: the economic-analytical (Sections I–IV) and the moral-humanistic (Section V).

\* I am indebted to Professor Arthur Schweitzer of the Department of Economics of Indiana University for reading my manuscript in an earlier stage and for valuable comments.

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1. *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 363 (1963).

2. *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962).

3. 374 U.S. at 371.

4. The terms "classical" and "classical economics" are used freely, following the precedent of J. M. Keynes, to encompass the fundamental viewpoint contained in the work of Ricardo, Mill, Marshall, and Pigou, but with particular concern here for the micro- rather than the macroeconomic aspects. See J. KEYNES, *THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY* 4 n.1. (Harbinger ed. 1964).

The method of "classical economics" requires the assumption for analytic purposes of (1) perfectly competitive markets and (2) consistently rational pursuit of individual welfare by economic man, whether as producer or consumer. See W. PETERSON, *INCOME, EMPLOYMENT, AND ECONOMIC GROWTH* 86 (1967). Particularly as reflected in the work of Frank H. Knight and many of his followers at Chicago (sometimes called neo-classical), this is a method of analysis based heavily on idealized, logical-philosophical thinking, as contrasted with methods more susceptible to empirical validation or scientific prediction of behavior. See 8 INT'L. ENCY. SOC. SCI. 424–26 (1968); 14 INT'L. ENCY. SOC. SCI. 261 (1968). McGee acknowledges his indebtedness to Knight: "This book borrows freely from Knight." P. 6.

McGee is an economist of the classical "Chicago School." Indeed, the book is notable for its clear statement of the Chicago School's faith in the free economic market and disbelief that industrial concentration itself conveys market advantages. Since the classical model poses the only serious theoretical challenge to the dominant economic view of industrial concentration in the United States and other capitalist countries,<sup>5</sup> the book commands attention on this ground alone. Many readers will also find useful its clear statement of the gist of current theories of oligopoly and its summary of the empirical evidence on oligopoly performance.

Consistent with the classical model, McGee urges that antitrust policy be founded not on conjectural theories of economic concentration, but rather on "a general presumption in favor of the outcomes produced by a property and market system."<sup>6</sup> In pursuing this thesis McGee examines the concept of competition, suggesting the existence of more latitude in the interpretation of that term than is generally supposed. Indeed, McGee challenges us to decide what precisely it is that we mean by "competition"; for before any accurate meaning can be given we must identify some particular goal or function that we wish competition to serve.

For McGee the prime economic goal to be served by competition is the maximization of producer and consumer welfare—the sum total of individual preferences expressed through buyer choice in the market place. Such maximum fulfillment of individual buying choices to the joint benefit of producers and consumers is the end goal of the competitive system and, when aggregated into mass consumer demand, the motive power that makes the system work. And it does work, free of serious distorting influences, in fulfillment of the utilitarian ideal. At any rate, McGee asserts, we can make no better assumption.

The task of government policy in such an economic universe becomes relatively simple. The government should keep hands off! It should let the market function freely, with minimum regulatory intervention. From these premises it is an easy step to McGee's specific policy suggestions: (1) establish a rebuttable presumption that a firm that has grown to monopoly size has done so lawfully; (2) abandon all presumptive rules as to mergers, analyzing each merger on its total economic effect, with special tolerance for those deemed likely to achieve efficiencies; (3) remove legal barriers

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5. This can be seen in the work of conservative antitrust scholars, such as Professors Bork and Bowman of Yale. See Bork & Bowman, *The Crisis in Antitrust*, 65 COLUM. L. REV. 363 (1965). See also Bork, *Antitrust and Monopoly: The Goals of Antitrust Policy*, 57 AM. ECON. REV. 242 (1967).

The Chicago classical approach is also evident in the General Motors memorandum to the Senate subcommittee investigating the automobile industry, a document which reflects many of the views expressed by McGee. See *Hearings on Planning, Regulation, and Competition: Automobile Industry—1968, Before the Subcomms. of the Senate Select Comm. on Small Business*, 90th Cong., 2d Sess. 698-700, 707-15 (1968).

6. P. 136.

to entry into the regulated industries; and (4) reject for all policymaking purposes whatever the myth that there is a relation between competition and high concentration.<sup>7</sup>

These conclusions necessarily lead McGee to reject sharply the recommendations of the Neal White House Task Force Report on Antitrust Policy, which urged deconcentration of industries having four firm concentration ratios of 80 percent or more. Indeed, he rejects even the more conservative Stigler White House Task Force Report's recommendation which called merely for scrutiny of highly concentrated industries and suggested the possibility of divestiture only in connection with aggravated cases of collusion.<sup>8</sup>

To reach such striking conclusions upholding the catholicity of the free market, it is necessary for McGee to destroy the two pillars of the prevailing outlook: economic models and empirical studies. The economic models project a fundamental tendency on the part of highly concentrated oligopoly markets to behave in a manner approaching that of monopoly. The empirical studies purport to show a correlation between high industrial concentration and undesirable economic behavior, namely excessive profits and low technical innovation.

In his dual challenge, McGee charges that the oligopoly models are defective constructs, and the empirical findings fallacious and inadequate. Both overlook the key element of economic welfare—the efficiency with which consumer demands are satisfied.

McGee is indeed a bold spokesman for the classical faith. At every opportunity he confronts the opposing models and the evidence with his own model. While I may disagree with his conclusions, I admire his style. Moreover, the approach he takes gives a correct emphasis to the fact that the use of models as an analytic tool in the social sciences, as in the natural sciences, is indispensable; that when dealing with a complex system, such as the problem of industrial concentration, it is essential to abstract from the system a limited number of characteristics which we identify as crucial and explanatory. Indeed, there is no other way to think about the subject in a systematic way. The meaningful questions then become whether the model is plausible, whether it is supported by available empirical evidence, or whether other theories may be superior.<sup>9</sup> McGee's analysis falls short in its failure to explore fully the ethical and moral values implicit in the model. He fails to recognize that a model as it becomes embedded in the idea structure of society, can come to live a life of its own—tending to perpetuate and cause the very behavior it sought originally to describe.

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7. Pp. 132–37.

8. Pp. 124–32.

9. See generally W. VICKREY, *MICROSTATICS* 5–11 (1964).

In the discussion that follows we will pursue McGee's analysis as far as it takes us, through the worlds of oligopoly models and empirical evidence to the pure theory of large firm superiority; ending with a reconsideration of the policy toward industrial concentration. Thereafter, we must leave McGee in an attempt to approach values not within the ambit of the classical system.

## I. THE OLIGOPOLY MODELS

McGee deems four families of oligopoly theory worthy of discussion: (1) joint profit maximizing, (2) the Cournot theory, (3) cartel instability, and (4) entry theories.

### A. *Joint Profit Maximization*

The theory that has had the greatest influence on the courts is that of joint profit maximization as enunciated by Chamberlain, Fellner and others.<sup>10</sup> It is an appealing theory since it rests on the assumption of the rationality of business decisionmakers. The theory suggests that where a market has few sellers, they will recognize that their fortunes are not independent; that a sharp gain in market share by one seller causes a steep, unacceptable loss in market share by other sellers. Hence, price cutting by one seller will induce uniform price cuts by the others. All sellers find it in their interest to come to a mutual but non-conspiratorial understanding that price competition is harmful to their joint welfare. As a result, their conduct tends to approach that of a single firm monopoly.<sup>11</sup>

### B. *The Cournot Theory*

McGee asserts, however, that it is not the joint profit maximizing model but the Cournot theory, which provides the only solid basis for current anti-trust policy. This is because the Cournot model, unlike the joint profit maximization model, predicts increasing output and decreasing price in a highly concentrated market based on an increase of as little as a single firm. The behavioral assumptions of the model are, however, simplistic. The Cournot model assumes that a firm is free to vary output but not price. Although the firms recognize that changes in output invariably affect price, they never learn to anticipate their rivals' responses. They repeatedly assume that their rivals will produce at the same output during the present financial

10. See E. CHAMBERLIN, *THE THEORY OF MONOPOLISTIC COMPETITION* 46-55 (8th ed. 1962); W. FELLNER, *COMPETITION AMONG THE FEW* 3-50 (1949). See also F. MACHLUP, *THE ECONOMICS OF SELLERS COMPETITION* 414-46 (1952).

The theory was used explicitly as a basis for decision in *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 363-64 & nn. 38, 39 & 41, and importantly, if somewhat less explicitly, in subsequent decisions. See Brodley, *Oligopoly Power Under the Sherman and Clayton Acts: From Economic Theory to Legal Policy*, 19 STAN. L. REV. 285, 297-313 (1967).

11. Pp. 61-66.

period as they did during the last. Thus, each firm continually makes the mistake of thinking it can unilaterally expand or contract output without competitor response. This assumption becomes correct only under one condition—when the “Cournot equilibrium point” is reached. This occurs when, after numerous trials, a firm finds itself producing at an output which is optimal for both prior and current financial periods. At that point for each firm, the generally false assumption that the future will be like the past becomes true and the Cournot equilibrium is reached.<sup>12</sup> This equilibrium point, which lies between the monopoly and competitive price, approaches a competitive result as the number of firms increases.<sup>13</sup>

### C. Cartel Instability

Professor George Stigler’s cartel instability theory is Machiavellian in its assumptions about business behavior. Whereas under the joint profit maximization model the firms were in a sense forced to collusion by the recognition that price competition was self-defeating, in the cartel instability theory the firms have a positive desire to collude. So relentless is the search for profit, moreover, that even this does not suffice. While taking its allotted share of sales at the collusive monopoly price, each firm desires to capture additional sales at its competitors’ expense. This can be done by secret price cutting (“cheating”), which permits a firm to expand its market share and profit without undermining the general collusive price. Thus, the highest state of welfare for a firm is for its competitors to be rigorously bound to the collusive (or cartel) price while it remains free to deviate at will. But as other firms come to the same conclusion more and more sales are made at a discount. This undercutting of the collusive price increases consumer welfare; thus the object of public policy should be to promote cheating. The way to do this is to induce firms to believe that they can undercut price without high risk of detection. Since the risk of detection will vary inversely with the availability of information on prices, the technique of public policy is to impede the flow of information about prices sufficiently that clandestine cheating will occur. One method of inhibiting information flow is to increase the number of sellers. The

12. This point can be determined mathematically, given the rigid assumptions of the model. See F. MACHLUP, *supra* note 10, at 377 n.9. However, it would violate the behavioral assumptions of the model to conclude that any firm would recognize such an advanced solution.

13. Pp. 54–61. McGee describes several modern variations of the theory: Bertrand makes price rather than output the independent variable and reaches a competitive result even under duopoly conditions. Bowley and Stackelberg introduce the more realistic assumption, contrary to Cournot, that a firm anticipates reactions by its rivals; but McGee finds that such “rival reaction” theories lead only to indeterminacy, in view of the large number of reactions possible. Pp. 59–61. Game theory, also a rival reaction theory, is mentioned by McGee merely in passing—a serious omission in my view. P. 61.

McGee’s explanation of the Cournot model will probably not be clear to those lacking substantial economic background. The best non-mathematical explanation I have seen is F. MACHLUP, *supra* note 10, at 368–77, 411–12.

more sellers there are, the less ripple will be caused in the market by any particular price cut. Thus, the collusive price is undermined by the cumulative effect of the many individually secret price cuts.<sup>14</sup>

#### D. Entry Theory

Each of these three theories neglects the effect of new firms entering the market. The fourth family of theories, however, focuses specifically on this effect. There are two main types of entry theories. The first asserts that oligopolists, looking to long term profits, set prices at levels intended to forestall new entries. To maximize long term profits, these firms seek to establish prices just low enough to discourage entry by additional firms. In a sense this theory is a version of the joint profit maximization theory except that in the entry model the firms take a longer range view of their welfare. Market price moves not toward the high, short run monopoly level, but toward a lower, long run monopoly position.

A second type of entry theory, in sharp contrast to the first, seems to make any policy against industrial concentration unnecessary. According to this theory, entry is an ever present threat whenever the market price exceeds the competitive price. Thus, threat of entry tends to force even a monopolist to charge a competitive price.<sup>15</sup>

#### E. McGee's Criticisms

In McGee's view, all of the oligopoly theories discussed above have serious individual weaknesses. The joint profit maximization model is accurate only if the number of firms is quite small or if the firms have perfect knowledge of each other's prices and products, which is an unrealistic assumption. The Cournot model is even more naïve in its assumptions, unproved by empirical evidence and incomplete in the economic phenom-

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14. Pp. 66-72. McGee points out that Stigler's theory is largely untested empirically; moreover, he urges that even if true, the theory does not inform us that the best variable to manipulate is the number of firms. Other variables that could be controlled are flow of information, price discrimination constraints, and number of buyers.

The Stigler and other similar cartel-theory models provide the theoretical base for Professor Posner's recent proposal that uniform pricing action in oligopoly markets may, when accompanied by certain other economic indicia, justify a finding of collusion without proof of direct agreement or even communication between firms. The Stigler cartel-theory model is crucial to Posner's analysis because it projects a breaking down of collusive prices under the pressure of cheating unless unusual economic forces provide a kind of coordination or enforcement mechanism; in Posner's view the existence of such economic forces, although difficult to ascertain provides the basis for drawing the line between a price uniformity that is collusive and unlawful (cheating effectively prevented) and one that remains competitive and lawful (cheating remains possible). See Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 STAN. L. REV. 1562, 1569 n.24, 1572 n.31, 1569-75 (1969). Whatever its theoretical merit, in application the proposal raises extreme problems of proof. *Id.* at 1578-83, 1593. See also note 40 *infra*.

15. Pp. 72-75. Some recognition of the first entry theory (the Bain-Sylos-Modigliani view), can be seen in recent Supreme Court decisions that have emphasized the importance of preserving the possibilities of potential competition—*i.e.*, threat of new entry. See *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 575 (1967); *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158, 174 (1964). The second view (the Demsetz and Day models), so far as I know, has not received judicial recognition.

ena it describes. The cartel instability model is likewise unproven empirically and fails to indicate which of several potential variables should be manipulated to stimulate price competition. Entry theories simply cut in too many directions.

Moreover, McGee finds it a grievous weakness that all of these theories are unable to identify the difference between a competitive and a non-competitive market structure. At best, the theories tell us that as the number of firms in a market shrinks, some point is reached at which the number becomes too small to sustain price competition. This provides no adequate basis for public policy.

Without detracting from McGee's analysis, I draw quite opposite policy conclusions. I find it striking that almost all of the theories converge on the structuralist conclusion that highly concentrated markets are likely to behave non-competitively in the classic economic sense. That is to say price will be substantially above and output substantially below the competitive level, leading to economic profit and misallocation of resources. Moreover, the additional theoretical approaches of game theory and conflict analysis, not considered by McGee, also point in this direction.<sup>16</sup> The inability of oligopoly theories precisely to distinguish competitive and non-competitive market structures is not a deterrent to effective policymaking; for we still know the direction of desirable policy change, and this is frequently enough for effective action. Similarly, the failure to know the limit beyond which policy change effects no improvement is not a barrier to effective policymaking, unless (1) there are costs associated with exceeding such limit, and (2) such costs exceed the costs of remaining at the status quo. At the core of McGee's case in defense of industrial concentration is the contention that there are such costs and that they are substantial, as discussed below.<sup>17</sup>

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16. See T. SCHELLING, *THE STRATEGY OF CONFLICT* 53-80 (Oxford paperback ed. 1960); 11 INT'L ENCY. SOC. SCI. 287 (1968); Scherer, *Focal Point Pricing and Conscious Parallelism*, 12 ANTITRUST BULL. 495 (1967); Shubik, *A Game Theorist Looks at the Antitrust Laws and the Automobile Industry*, 8 STAN. L. REV. 594 (1956). See also Marris, *The Modern Corporation and Economic Theory*, in *THE CORPORATE ECONOMY*, 270, 283-304 (R. Marris & A. Wood eds. 1971).

17. McGee alludes briefly to "the general theory of the second best" as an additional theoretical barrier to the formulation of a vigorous antitrust policy. Pp. 17, 79. In general terms, the theory states that the conditions of competition are not "additive" but instead are "interrelated" such that "if one condition of a state of workable competition is absent, even the presence of all the other essential conditions might not make competition workable." 2 INT'L ENCY. SOC. SCI. 510 (1968). Applying this, McGee states that a change designed to improve competition in one industry may actually make things much worse in other industries involved in economic relationships with the changed industry. P. 17. However, the point is not developed, and McGee seems to place little emphasis on it.

This is perhaps wise in view of McGee's primary reliance on economic efficiency as the justification of economic size. A theory which holds that there is no basis for predicting that policy changes made in one sector will not injure allocative efficiency in other sectors really says too much. For ultimately what this means in complex, real world situations is that the allocative effects of change are indeterminate. See F. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 25-26 (1971). Thus the theory provides no argument for either change or the status quo in terms of economic efficiency. Indeed, the logic of this analysis is to turn from allocative efficiency as a goal for



## II. THE EMPIRICAL STUDIES: PROFITS AND INNOVATION

Critics of industrial concentration have been able to buttress their viewpoint with the findings of several empirical studies showing a strong correlation between high concentration ratios and undesirable economic behavior. Moreover, unlike the economic theories the empirical studies *do* provide a basis for drawing a line between concentration levels that are undesirably high and those that are tolerable.<sup>18</sup> In fact, McGee traces the 1968 Neal White House Task Force recommendation for deconcentration of industries having a four-firm concentration ratio of 70 percent or more directly to the Bain study.<sup>19</sup> Although McGee's advocacy of industrial concentration would scarcely falter even should it be established that such studies were irrefutable (see Section III *infra*), the doctrine against concentration has relied importantly on them. Accordingly, opponents of that doctrine have a natural interest in attacking the studies.

McGee charges that the profit studies, showing a correlation between high profits and high concentration, are spurious in the light of other studies which show the correlation to become weaker or disappear if one of several plausible adjustments are made: for example, (1) adjusting upward the profits of smaller corporations to take account of the bias due to tax factors which induce such corporations to pay relatively high salaries to officer-shareholders; (2) narrowing the profit measure to particular product lines rather than whole industries; (3) computing profits over longer spans of time.<sup>20</sup> The strength of the correlation between profits and concentration remains a disputed point. McGee fairly calls to our attention the counter evidence, which is significant and, while a minority economic view, tends

economic policy and to embrace other goals of a social and political nature, such as economic decentralization and distributive justice, which I judge would have little appeal to McGee.

Professor Calabresi believes that whatever its theoretical merit the theory can be largely disregarded for policy-making purposes under a condition which would normally be satisfied. This condition is that the policy change be made within a reasonably confined category (Calabresi uses the example of a \$100 automobile cost increase for brakes). Thus, if the direct allocative effects in the industry or economic area under scrutiny are favorable and limited, the more remote effects, whether for good or ill, can be ignored on the basis that in whatever direction they cut, they will do no great damage to the economy. See G. CALABRESI, *THE COST OF ACCIDENTS* 86-88 (1970). Curiously, McGee seems to agree that antitrust meets that condition, for he says at one point that even a misdirected antitrust policy would be unlikely to do any critical injury to the economy as a whole. Pp. 132-33.

All of this leads some economists toward a "third best" solution, which would attack specific concentrations of monopoly power and misallocations so as to move the economy generally toward a more competitive stance. Such a "third best" solution would support existing antitrust policy. See F. SCHERER, *supra*.

I am indebted to my colleague, Professor Jon Hirschhoff, for comments on this footnote.

18. Thus, Professor Joe Bain's study, showing a substantially higher profit rate in industries where the eight-firm concentration ratios exceed 70 percent has been highly suggestive for public policy. I made use of the Bain findings in my 1967 article on oligopoly power as a convenient point at which to define "proscribed oligopoly market," as to which special rules of law might be made applicable. Brodley, *supra* note 10, at 347.

19. P. 127.

20. Pp. 94, 127-28. See also Brozen, *The Antitrust Task Force Deconcentration Recommendation*, 13 J. LAW & ECON. 279 (1970).

to unsettle somewhat a correlation many thought well established.<sup>21</sup> More fundamental to McGee's viewpoint, however, than where the weight of the evidence lies on this issue is his assertion that the profit studies are simply irrelevant because the level of profits in and of themselves provides no measure of desirable industry performance in the consumer interest. To ascertain this we must look also to consumer welfare, and as to this, as discussed in Section III, McGee's view is that profits by themselves cannot enlighten us in view of the gains consumers may realize through industrial efficiencies.

Turning to innovation and invention, defenders of industrial concentration can draw support from the work of Joseph Schumpeter, who urged that only massive industrial size can make rapid innovation possible under modern technology.<sup>22</sup> Similar views are expressed by Galbraith, who has urged the necessity of the planned market to draw forth the massive capital investment required by modern large scale technology.<sup>23</sup> Thus, when it comes to a discussion of innovation—in contrast to an emphasis on profits—there is existing economic theory, apart from the Chicago School, in support of large size. But, is the evidence contained in several recent empirical studies of innovation consistent with the theory? In other words, are the largest firms the most innovative? The question is important, but, as McGee points out, poses difficulties. How is innovation to be measured exactly? Since it clearly cannot be measured directly, proxies for this elusive quality must be found. Researchers have variously attempted to measure this dimension by examining research and development expenditures or alternatively, research and development employment, number of patents issued, and number of "important" patents issued.<sup>24</sup>

It is striking that all studies fail to establish a correlation between largest firm size and maximum innovation, however measured. McGee dismisses most of the studies as measuring mere inputs into research (*i.e.*, research expenditures) as distinct from research outputs (*i.e.*, inventions).<sup>25</sup> Turning to the studies that are directed at the outputs of research laboratories, McGee finds the work of economist Edwin Mansfield to be truly impressive. Having survived the meticulous scrutiny of McGee's analysis, Mansfield's work invites our careful attention.<sup>26</sup>

21. See also F. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 184-86 (1971). Reviewing the evidence, Professor Scherer, while admitting that doubts remain, concludes that "the bulk of the evidence supports the hypothesis that profits increase with the degree to which market power is concentrated in the hands of a few sellers." *Id.* at 186.

22. See J. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* (1942), quoted in P. SAMUELSON, *ECONOMICS: AN INTRODUCTORY ANALYSIS* 92-93 (7th ed. 1967).

23. J. GALBRAITH, *THE NEW INDUSTRIAL STATE* 35-45, 189-218 (1967).

24. Pp. 98, 102-19 (discussing empirical studies by Worley, Hamberg, Comanor, Williamson, Scherer, and Mansfield).

25. Pp. 98-99.

26. E. MANSFIELD, *THE ECONOMICS OF TECHNOLOGICAL CHANGE* (1968); E. MANSFIELD, *INDUSTRIAL RESEARCH AND TECHNOLOGICAL INNOVATION* (1968).

Mansfield's findings, consistent with those of other economists who have sought to measure innovation, reveal an absence of correlation between maximum industrial concentration and highest levels of invention and innovation. In a study of thirty large firms in five industries, Mansfield found that inventive output (measured by the number and importance of patents issued) was lower for the largest firms in an industry than for second level firms. Separating the concept of innovation (first application of invention) from invention, the situation was mixed in the four industries studied. Although the four largest firms ranked high in innovation, in two of the three industries where this proved to be true the absolute peak rate was achieved not by one of the four largest firms, but by the sixth largest firm in the market.<sup>27</sup>

The strongest policy argument against attacking industrial concentration which McGee draws from the studies on innovation and invention rests on Mansfield's finding that the large firm of today is apt to be the successful innovator of yesterday. Following successful innovation, a firm tended to grow faster than its competitors. Thus, urges McGee, a public policy which would forcibly break up large firms imposes a penalty on successful past innovation and a negative incentive to future innovation.<sup>28</sup> Even accepting McGee's factual premise, the conclusion seems extreme.

There is simply no data to support the conclusion that growth to massive size alone provides the necessary and sufficient incentive for innovation. Nor is a theory offered to explain why this should be so, particularly considering that McGee labors mightily to deny a correlation between largest size and highest profit. Indeed, it seems inherently implausible that the rewards and incentives should be so neatly balanced. As Professor Williamson has pointed out, growth to market dominating size, whether the result of innovative achievement or other causes, may as readily be the consequence of inferior performance by competitive firms as superior performance by the dominant firm.<sup>29</sup> Moreover, the issue is not so much whether growth to market dominance is to be prohibited, but whether there should be a limit on how long it is to be tolerated.<sup>30</sup>

Thus, even were it true that such a growth-based incentive existed, the appropriate policy response would not necessarily be continued tolerance of dominating size. An equally effective alternative might be to increase the innovative reward of the limited term patent system. The very existence of the patent reward is a clear recognition that the incentives of the private

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27. Pp. 106-15.

28. Pp. 111-12.

29. Williamson, *Dominant Firms and the Monopoly Problem: Market Failure Considerations*, 85 HARV. L. REV. 1512, 1517 (1972).

30. *Id.* at 1523-24, citing Turner, *The Scope of Antitrust and Other Regulatory Policies*, 82 HARV. L. REV. 1207, 1216, 1220-21 (1969).

enterprise system are considered insufficient to induce desired levels of innovation. The most obvious response if such incentives are inadequate is to increase them directly, by open subsidy.<sup>31</sup> This avoids the dangerous side consequence of more permanent single firm dominance or concentrated oligopoly, an avoidance all the more vital in light of Mansfield's basic finding, that whatever innovative spur the lure of growth may bring, the evidence is solid that once having achieved dominance, a firm can make no showing of superior innovative achievement.

### III. THE THEORY OF BIG FIRM SUPERIORITY

What remains is to confront McGee's major thesis: that big firms *are* superior by the only criterion that counts. That criterion is economic welfare—the sum total of consumer welfare and aggregate business profit.<sup>32</sup> Economic welfare rests on firm efficiency: present productive efficiency and future innovative advance. By the standard of these efficiencies, which can also be described in terms of superior foresight, productive capacity, know-how and innovative response, large firms in concentrated markets are simply better than other firms. How do we know this? Despite its seeming redundancy, what McGee asserts is that we know big firms are superior simply because they are big! Markets are “biased toward efficiency . . .” and “market results *are* evidence of efficiency.”<sup>33</sup>

The firm that has grown big has proven its superior efficiency or innovative capacity. If this were not so, new capital would flow into the market and new enterprises would enter. McGee challenges economists and schol-

31. Indeed, one recent review suggests that the single most effective means of stimulating innovation may be to provide government funds for research to *smaller firms*, for they have shown themselves to be the best innovators. See Utterback, *The Process of Innovation: A Review of Some Recent Findings*, in *TECHNOLOGICAL DEVELOPMENT AND ECONOMIC GROWTH* 139, 157 (G. Wilson ed. 1971) (this study also adds additional support to the lack of correlation between firm size and innovation, citing studies even more recent than Mansfield's).

32. Pp. 13, 75–79, 100–01. Economic welfare, as so defined, is equivalent for McGee to maximizing output. *Id.* Output consists of the total value of goods produced, including profits realized to producers and consumer surplus. Following Stigler, McGee defines consumer surplus as “the dollar value by which the consumer is better off with a given price and consumption than he would be with none of the good at all.” P. 140 n.1. As Stigler puts it, this is the amount in excess of price that a consumer would pay rather than go without the good altogether. See G. STIGLER, *THE THEORY OF PRICE*, 78 (1966). As so defined, consumer surplus, under simplifying assumptions, is the area under the demand curve and above the current price. P. 149 n.45. See also P. SAMUELSON, *ECONOMICS* 418 n.11 (8th ed. 1970).

McGee's concept of economic welfare, as stated, includes both consumer surplus *and* firm profit (or producer surplus). They are treated as equivalents in social value in that \$1 of consumer surplus is no better or worse than \$1 of business profit. Thus, large dollar increases in business profit accompanied by relatively smaller dollar losses of consumer welfare would promote overall economic welfare in McGee's terms. Moreover, it is possible, as McGee takes pains to demonstrate, for *both* business profits and consumer surplus to increase at the same time, and for firms in an oligopoly market to contribute more to consumer surplus than would firms in a competitive market. This will occur where the oligopoly firm enjoys large cost advantages, due for example to scale efficiencies, over the necessarily smaller firms that would exist if the market were more competitive. The gain from the oligopoly efficiencies can result in both higher profits and lower prices, and hence a larger consumer surplus.

33. P. 130.

ars who disagree with this view to "pool their resources," enter the market and "with their superior information and intellect, make personal fortunes."<sup>34</sup> The failure of new capital to enter concentrated markets is no indication of flaws in the capital markets, but simply further evidence that "some activities are complex, demanding, and risky, and that experience and competence count."<sup>35</sup>

Indeed, McGee asserts that "[m]ost are not shocked to learn that genius is rare; that an auto firm with a prime Henry Ford was richly endowed; that a small proportion of sport fishermen catch most of the fish; and that relatively few economists do almost all the publishing."<sup>36</sup>

If this analysis is accepted it becomes clear why oligopoly models and empirical studies are irrelevant for McGee. The oligopoly models skipped the question of efficiencies altogether by assuming that all size distributions of firms were equally efficient. The empirical data on profits simply measured the wrong factor. In themselves profits tell us nothing about productive efficiency or consumer benefits. A high profit, efficient firm can quite possibly sell at lower prices than can a zero profit inefficient firm. Only the empirical studies of innovation approached a meaningful inquiry for they attempted to measure innovative performance. Although McGee discounts the results of such studies on statistical and measurement grounds, he ultimately rejects them on the analytical basis already stated. Large firms are superior as innovators because they remain large. If they were not, smaller more innovative firms would grow at their expense and rapidly deconcentrate the market.<sup>37</sup>

And so we penetrate to the core of the McGee analysis—an unshakable belief in the operation of the free market. Here, indeed, is McGee's leap of faith, which is in the face of the joint concern expressed by both the Neal and Stigler White House Task Force Reports on the existence in concentrated industries of price leadership.<sup>38</sup> One of the rare points of agreement between the two reports is the recognition that stubborn persistence of price leadership is simply inconsistent with the existence of a workably competitive market. Where large firms in concentrated markets can price their goods non-competitively over prolonged periods without new entry or other challenge, the classical free market does not exist. Others of the classical viewpoint have been quick to grasp the philosophical threat that this fact poses. (It would strain credulity to the breaking point to maintain that all such firms in all such markets had achieved unmatched efficien-

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34. P. 51.

35. Pp. 51-52.

36. P. 41.

37. Pp. 121-22.

38. *Report of the White House Task Force on Antitrust Policy* [The Neal Report], REPRINTS FOR ANTITRUST LAW & ECON. 658 (1969); *Report of the Task Force on Productivity and Competition* [The Stigler Report], *id.* at 843-46.

cies.) Accordingly, the Stigler Report vigorously attacks collusion and declines to rule out the extreme remedy of forced deconcentration.<sup>39</sup> In a similar vein is Professor Posner's recent proposal to expand antitrust conspiracy doctrine to encompass persistent price leadership; and by this means avoid applying a structural solution to the problems of concentrated markets.<sup>40</sup>

In addition to the above, McGee provides inadequate treatment of several other factors that have been urged as distortions of the free market: the possibility that capital barriers impede new entry, both because of scarcity of funds for new entrants and the freedom and proclivity of existing firms to generate funds internally; the existence of inertia in all human relations, including business relations which new market entrants must break down by more than price shading; high start-up costs due to less experience, know-how, and reputation, and differential costs in attracting management talent;<sup>41</sup> the identification of specific barriers to entry in many concentrated industries;<sup>42</sup> and the ability under the patent system (as it has developed in the United States, but not generally in other advanced capitalist countries) to suppress as well as disseminate new discoveries.<sup>43</sup>

In a later, more speculative portion of this Review (Section V) I shall advance the idea that the classical model is vitally dependent on two additional assumptions that seem highly questionable: the free and effective flow of consumer information and the efficacy and value of competition as the driving power within the economic system. But I do not draw on such concepts for immediate policy recommendations, and it is to these recommendations which I now turn.

#### IV. ANTITRUST POLICY AND INDUSTRIAL CONCENTRATION

The dominant issue of modern antitrust centers around the policy to be followed toward industrial concentration. The Neal Task Force Report recommended forced deconcentration of highly concentrated industries. Existing antitrust policy stops short of this, but it moves vigorously to prevent additional concentration. Numerous other proposals have been made to effect this policy. At one extreme are proposals to move toward atomistic markets. A recent one suggested a divestiture against the Big Three auto-

39. *Id.* at 846.

40. Posner, *supra* note 14, at 1562. Although an interesting approach, it has its own built-in limitations, such as the high costs of enforcement in a world of limited antitrust resources. The issue in such cases would be far from simple—whether price or other uniformity by firms, absent any overt understanding or conspiracy, was legitimate competitive parallelism or unlawful and deliberate uniformity of action. See note 14 *supra*. The approach is also heavily dependent on a single theory of oligopoly behavior (Stigler's cartel theory) as to which there is no theoretical consensus and as yet little empirical support. See text accompanying note 14 *supra*. See also Posner, *supra* note 14, at 1569 n.24, 1572 n.31; Stigler, *A Theory of Oligopoly*, 72 J. POL. ECON. 44, 59 (1968).

41. Williamson, *supra* note 29, at 1520-21.

42. See J. BAIN, *BARRIERS TO NEW COMPETITION* (1956).

43. Special Equipment Co. v. Coe, 324 U.S. 370, 378-79 (1945). See Kahn, *The Role of Patents*, in *COMPETITION, CARTELS AND THEIR REGULATION* 332 (J. Miller ed. 1962).

mobile producers and the creation of 42 new producers.<sup>44</sup> At the other extreme is McGee's opposition to any general policy against concentration as an obstacle to industrial efficiency.

Despite its imperfections, the American economy is impressively strong. While speculations can be bold (see Section V), when it comes to policy decision, political realism and the absence of well-developed alternatives constrain a more cautious approach, especially in changing structural factors. Thus it becomes crucial to find out how far we can move without losing any efficiency. Here the oligopoly theories and the empirical studies dealing with innovation and invention are particularly relevant. Despite McGee's vigorous arguments, I cannot find that he produces anything of substance to show that there is a serious risk that deconcentration of the most concentrated markets would cause appreciable efficiency losses. On the key question of invention and innovation, the evidence seems to point strongly in the direction of the superiority of middle sized firms: for example, the sixth largest firm in petroleum and coal.<sup>45</sup> Indeed, these findings sufficiently impress McGee to induce him to question whether mergers ought to be permitted to allow firms to grow to such size.

Thus, I find that the totality of considerations coalesce in a policy of moderate deconcentration of tight oligopoly markets and of vigilant resistance against increased oligopoly concentration.<sup>46</sup> Consistent with prevailing theories of oligopoly and the empirical evidence reviewed above, such a policy also offers the additional benefit of increasing the number of leadership positions in industry and the number of decision-making centers, the desirability of which seems clear. It diffuses economic and corporate power, consistent with our general political bias toward fragmentation of political power. It promotes greater experimentation in business since each separate management is apt to make its own assessment of the problems confronting it and to devise a differing approach to their solution. Moreover, as the number of firms in an industry increases, more opportunities are available to rise to a leadership position within a firm. And increased numbers of firms in an industry make for greater job mobility alternatives for employees, as they can more readily change positions without loss of job utility.<sup>47</sup>

Moreover, these benefits can be achieved without running any ascertain-

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44. See Note, *Annual Style Changes in the Automobile Industry as an Unfair Method of Competition*, 80 YALE L. J. 567, 608-10 (1971).

45. P. 110.

46. See Williamson, *supra* note 29, for a particularly cogent and restrained proposal to deconcentrate industries dominated by single firms.

47. See Brewster, *The Corporation and Economic Federalism*, in *THE CORPORATION IN MODERN SOCIETY* 75-76 (E. Mason ed. 1960); cf. *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 347, *aff'd per curiam*, 347 U.S. 521 (1954) ("... creativity in business as in other areas, is best nourished by multiple centers of activity, each following its unique pattern and developing its own esprit de corps").

able risk to our productive capabilities or efficiencies. Such risk would be encountered only in the event of irreducible scale economies or unique, management superiority, both of which are apt to be extremely rare occurrences in the mature industries that would be the likely candidates for divestiture.<sup>48</sup> While a divestiture program free of all risk is scarcely possible, in the words of the Neal Report, “. . . public policy must often be made on the basis of imperfect knowledge, and the failure to adopt remedial measures is in itself the acceptance of a policy.”<sup>49</sup>

To this McGee would no doubt reply, amplifying the argument made in relation to innovation and size, that a public policy directed against dominant firms is an unfair penalty on past industrial efficiency, and a negative incentive to future efficiency even if no present damage is done. In response I would urge: First, such past “efficiencies” have not been adequately described or analyzed. Success may have been a manifestation of ruthless business practices as well as productive or marketing efficiencies; a result of misleading advertising campaigns as well as product superiority; a product of inefficiency and poor management by competitive firms as well as sagacity and business excellence by the successful dominant firm.<sup>50</sup> Second, whatever the past efficiencies involved, growth to monopoly or dominant size in the market tends to free the firm from effective present competition. This leaves only the threat of future entry to replace the actual competition that presumably was an incentive for the firm’s past market success. The threat of entry no doubt limits a firm’s freedom to exploit a monopolistic or dominant position, but most would not consider this as equivalent to actual competition, particularly in mature industries.<sup>51</sup> While one of the oligopoly theories discussed earlier does assert such an equivalence,<sup>52</sup> it is distinctly a minority view, and it is not supported by the data on patent innovation which showed dominant firms to be less than outstanding in innovation.<sup>53</sup>

Third, it is unclear in any event why deconcentration of dominant firms

48. See Williamson, *supra* note 29, at 1513, 1517.

49. The Neal Report, *supra* note 38, at 160. *But cf.* Posner, *A Program for the Antitrust Division*, 38 U. CHI. L. REV. 500, 506-07 (1971), urging that antitrust policy be limited to areas of virtual economic unanimity. Such an approach giving the Chicago School a virtual veto, would drastically confine antitrust, limiting it to action against horizontal collusion. The need for such a cautious, self-limiting policy would seem confined to situations in which appreciable economic risk is encountered. But this is the very contingency that the limited approach urged here seeks to avoid.

Professor Posner also opposes deconcentration on the ground that it would be inherently unstable, since efficiencies of scale would cause rapid reconcentration of the market. *Id.* at 505. If this be so, one might expect that an efficiency defense would prevail in the prior deconcentration proceeding; but if not, the efficiency loss would only be temporary under Posner’s assumption, and thus long run risk to our productive capabilities would seem to be avoided.

50. See note 29 *supra* and accompanying text.

51. See Williamson, *supra* note 29, at 1520-22. See also notes 41-43 *supra* and accompanying text.

52. See note 15 *supra* and accompanying text.

53. See notes 26 and 27 *supra* and accompanying text.



would destroy incentives. The shareholders do not lose their investment; rather they become shareholders in the newly created, spun off corporations (with perhaps an injunction against cross-voting). A severe long run loss would occur only if the divested companies were below efficient size or if the supply of managerial talent were too small to staff the new companies.<sup>54</sup> Fourth, even if it can be shown that substantial efficiencies would be lost through divestiture, the proponents of deconcentration—such as the Neal Report—provide for a defense.<sup>55</sup> Where the policy of continued vigilance against increased concentration and of moderate deconcentration falls short is in its failure to offer no solution to the macroeconomic problem of cost-plus inflation, toward which the joint forces of oligopoly markets and powerful labor unions have pushed.<sup>56</sup> Only a radical deconcentration could hope to change this condition, and even then, only through economic upheavals and risks too large to be assumed. Furthermore, the remedy seems to lie beyond the competence of effective antitrust policy.<sup>57</sup>

#### V. THE CLASSICAL MODEL AND HUMANISTIC VALUES

I cannot conclude this review without expressing a deeper response to what I have read. I have already used words such as "faith" and "belief," implying that mental responses in addition to strictly logical reasoning are evoked by the classical model. Indeed, McGee, and perhaps others of his persuasion, seem to be inspired by a belief in the classical model that goes beyond the empirical evidence that can be adduced for or against it. Their model is superior to other models, they seem to say, because of its inherent plausibility, its elegant simplicity and also because of the character of the human conduct it predicts—and even possibly evokes.

Hence a deeper meaning for social science models is revealed. The social science model is capable of influencing the very behavior it is seeking to analyze. The model becomes a prophecy of human conduct and as such may tend to mold, as well as model, reality. Thus, as it becomes a basis for thinking and policymaking, the model interacts with its materials. This may come through uncritical acceptance and rigidification of the values imbedded in the status quo, which the model may incorporate without explicit reference. Or it may come through over-emphasis of some par-

54. For a suggestion as to how divestiture might be carried out gradually and with cooperation of the firm involved, so as to obviate any such difficulties, see Williamson, *supra* note 29, at 1527-30.

55. An efficiencies defense is also provided in the recently introduced Industrial Organization Act bill. S. 3832, 92d Cong., 2d Sess. (1972). See 118 CONG. REC. 11494 (daily ed. July 24, 1972) (remarks of Senator Hart).

56. See Slawson, *Price Controls for a Peacetime Economy*, 84 HARV. L. REV. 1090, 1091 (1971).

57. *Id.* Professor Slawson suggests that the profits in concentrated markets be limited by imposing direct government price controls on firms in such markets. Under such controls firms would be permitted to earn a fixed percentage on invested capital. Although Slawson is aware of the problems, the experience of rate making by federal and state utility commissions (though based on different rules) is not encouraging.

ticular value made explicit in the model. As will be seen, both of these phenomena have occurred here.

Therefore there is need for a high sensitivity to what might be called the interactive effects (or externalities) of the model itself. The intellectual task is such that no type of thinking ought to be held repugnant before a model is found acceptable. A full human response to the model is called for, not only analytic and systematic, but emotional, imaginative, intuitive; for by this means we may sense dimensions that elude a more structured approach. I now turn to such a consideration of the classical model in the hope that I may help to bring to light two neglected parameters found in that model: the flow of consumer information, and the acceptance of competition as the prime force that moves the economic system.

### A. *The Flow of Consumer Information*

Behind the fundamental proposition of classical economics that the free market functions efficiently in the consumer interest is the basic premise that the goal of the system is the maximum satisfaction of consumer wants. For the purposes of this discussion let us accept this goal and the value system it incorporates; and similarly let us accept the dynamic of competition as a wholly desirable mechanism to achieve that goal. Having made these assumptions, we are brought face to face with the problem of consumer information. Consumer desires can be satisfied only if they are effectively expressed and impressed upon the economic system. Thus, McGee must, and does, affirm consumer sovereignty—that is, consumers in their innumerable individual buying decisions reveal their desires and preferences for all the world to see, and thereby compel producers to compete in satisfying these wants.

The classical model is insensitive to the distinction between the production of goods and services themselves and the flow of information about such goods and services, for it views information as simply another field of battle on which rival firms struggle for the favor of the sovereign consumer. It is assumed that rivalry among sellers will motivate them to supply consumers with the information that will persuade them to buy. The result will be that consumers receive the kind and quality of information which they desire and for which they are willing to pay.<sup>58</sup> Some have even sought to use a political analogy, asserting that the consumer “votes” with his dollars in the same way that he votes with his political ballot; and that if we trust him with the latter, it hardly makes sense not to trust him with the former.<sup>59</sup>

A far different model is more reflective of reality. It is so different, that

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58. Pp. 47–48.

59. See, e.g., Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47, 62 (1969).

what I wish to state is best expressed by an allegory. Notwithstanding the influence of consumerism, there remains a need for a new paradigm, as McGee's book perhaps demonstrates. Imagine, if you will, two enormous containers. In one are consumers; in the other are goods and services in uncounted variety. Each consumer, a finite being with limited time and resources, wishes to obtain a narrow selection of the available goods and services, but he has no way of finding out what is available except by observing narrow bands of light flowing from the goods and services container to the consumer container; and, the lights are continually flashing on and off. The bands of light are themselves sold to producers for varying lengths of time, but they are costly and relatively few producers can afford to buy them in any quantity. Nor is there effective control over how much of the available spectrum may be preempted for any one type of goods or by any one producer. As a result, information about some goods and some producers is flashed with high frequency, while little or no information is flashed about other types of goods and other producers. The only way that the consumer can communicate with producers is through the feeble imprint of his own individual buying decision. Yet the buying decisions of any single consumer are utterly insignificant. The producer is concerned with aggregate, not individual, buying behavior. Reduced to a mere receptor of information, inundated by a massive flow of data, the consumer must somehow filter out from a sea of inputs the information he needs in order to make numerous buying decisions each year.<sup>60</sup> A consumer can afford to give this task only a small fraction of his time, yet all of his time would not be sufficient.

Finally, as a responsive human being, not an inanimate object, the consumer's behavior is in part determined by his environment. Thus, the vast inflow of messages eventually influences his response to future messages, and tends to some degree to mold him into the type of man who will respond to the messages sent.<sup>61</sup> Only a diminished view of man can lead the observer to the acceptance of a situation, in which, to quote McGee, a consumer lighting up a particular cigarette "thereby enjoys the company of silent, smiling, and carefree nymphs who caress watercress and mountain creeks with bare toes."<sup>62</sup> If the described consumer response to advertising is accurate then the information flow is even more than a distorting factor inhibiting the free expression of consumer wants. It becomes an assault on the human psyche itself.

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60. It is therefore hardly remarkable that he shows such high loyalty to familiar brands, and that he will pay more for a well advertised Clorox than a chemically identical bleach. See Procter & Gamble Co., 63 F.T.C. 1534, 1538 (1963), *aff'd* 386 U.S. 568 (1967).

61. Cf. J. GALBRAITH, *supra* note 23, at 4-7 (increasing consumer affluence makes consumers more susceptible to producer control). See also K. BOULDING, *ECONOMICS AS A SCIENCE* 15-17 (1970).

62. P. 47.

Without question the growth of consumerism manifested by Ralph Nader's influence, the prospect of a vigorous federal consumer protection agency, and a greater consumer self-awareness, have made important inroads into the extreme described above. The existence of explicit and specialized advocates for the consumer interest hopefully may end gross abuses, such as unsafe automobiles and life-threatening ecological damage. It has become "good business" for some firms to adopt highly publicized consumer-oriented stances.<sup>63</sup> Yet this progress does not establish the rule of consumer sovereignty.

Eventually, whether modified by the forces of the new consumer movement or not, the classical assumption of consumer sovereignty breaks down when applied to the information flow.<sup>64</sup> What is needed is a radical re-ordering of our thinking. We need to recognize what Professor Boulding has called the "infosphere": the existence of an entirely distinct system of information inputs, outputs and feedbacks, which at every point conditions the preferences and responses of consumers.<sup>65</sup> For this approach to make consumers sovereign in fact, as well as in theory, requires a drastic intervention into and change in the existing system. The most basic problem is to alter the essentially one-way flow of consumer information, whereby the initiative always rests in the hands of producers.<sup>66</sup> By way of contrast, suppose that consumers were provided with the means, via a computer-communication network, to ask for and receive specified information on goods and services; to screen themselves from a barrage of information that they do not desire; to communicate with other consumers and consumer groups; and by this and other means, gradually to open the channels of information to a variety of consumer voices. To be sure, the feasibility and costs of such a change in the information system are unknown. This is particularly true in light of two obstacles the system would have to meet: (1) the consumer response must not be made so unpredictable that market and production planning become impossible, and (2) the cost of goods and services in the aggregate should not be affected adversely (changes in costs of particular goods would be expected). The conclusion that seems in-

63. See Shafer, *A Food Chain Recruits a Consumer Advocate to Shape Its Policies*, Wall Street Journal, Jan. 13, 1972, at 1, col. 6; McGregor, *Skeptical Consumers, Tough Regulators Spur a New Candor in Ads*, Wall Street Journal, Jan. 12, 1972, at 1, col. 1.

64. See K. BOULDING, *supra* note 61, at 17.

65. *Id.* at 15-17. See also E. MISHAN, *THE COSTS OF ECONOMIC GROWTH* 109-12 (1967).

66. See Katona, *Consumer Behavior: Theory and Findings on Expectations and Aspirations*, 58 AM. ECON. REV. 19, 28-30 (1968), which suggests that neither the classical consumer-sovereignty model nor the consumer-dominated model is realistic, but that a more appropriate model is one of joint producer-consumer interaction. This model, which would incorporate "principles of social learning," sees producers and consumers as engaged in a two-way learning process. Far from entirely dominating consumer response, producers must "swim with the current and . . . find out in what direction the consumer is moving and what is acceptable to him . . ."

The above producer-consumer interaction model appears to me to have more credence in the short run than in the long period unless the system of information flow is altered. Time works against consumer autonomy when channels of communication are mostly in the hands of producers.

escapable, however, is that if the classical concept of consumer sovereignty is to be realized new methods of consumer expression and communication must be developed.<sup>67</sup> If it should turn out that there is no effective way to realize the consumer sovereignty doctrine then we must indeed face the question of who should have the power to plan our markets, and by what standards.

In the meantime, analysis of economic markets, and perhaps gradually economic and antitrust regulations, could be deepened by treating the information flow as a separate parameter of market description. Thus, the definition of the economic market might be expanded to include accurate data on how producers transmit and consumers receive information about the product market, the frequency and type of information received, and some assessment of how the information flow affects competition and consumer choice in the market. It would be pertinent to ask what part the information flow (*e.g.*, product information) plays in the creation and maintenance of market concentration. Does the concept of economic efficiency have the same meaning when applied to information about goods, as it does to their other characteristics?<sup>68</sup> A sharper focus of economic regulatory policy on the parameter of information may already be observed in the Federal Trade Commission's sustained attack on advertising claims.<sup>69</sup>

### B. *The Value of Competition*

To suggest that the flow of information about goods cannot be left solely to unregulated competition does not require a fundamental rejection of the classical model. The same cannot be said for the role of competition itself. While all capitalist systems include competition or interfirm rivalry as an important dynamic, the classical model is distinctive in making competition for profits the prime and self-sufficient instrument.

Absent from both McGee's and the classical analysis is any recognition of the social, emotional and psychological costs of competition. Yet today the costs of competition may well be under the heaviest scrutiny since the Industrial Revolution.<sup>70</sup> Ecological concerns call into question the virtues

67. Steps that have been taken to improve consumer information thus far have been rudimentary. Voluntary organizations, such as Consumers Union, reach only relatively small numbers of predominantly middle class consumers, and effective use of the information generally requires careful reading, research through back issues, and diligent shopping.

68. See *Procter & Gamble Co.*, 63 F.T.C. 1534, 1562-66 (1963), for an example of one decision which sought to address itself to such an inquiry. The Supreme Court, affirming, did not discuss this aspect of the case, however. *F.T.C. v. Procter & Gamble Co.*, 386 U.S. 568 (1967).

But see Posner, *Advertising and Product Differentiation*, 1 J. REPRINTS FOR ANTITRUST LAW & ECON. 874-78 (1969).

69. The Wall Street Journal, June 11, 1971, at 2, col. 5. Moving in the same direction is the recent statement of the FTC to the Federal Communications Commission supporting "counteradvertising" or right of media access by proponents of opposing views on topics of public importance in advertising. *FTC Announces Its Support for Concept of Counter-Advertising*, BNA ATRR No. 545, at A-1 (Jan. 11, 1972).

70. Thus, reflecting a rather widely held view of the "counter-culture," Charles Reich writes:

of a competition which would penalize the conservation-minded firm over its less socially aware competitors. The ecological problem might be met to some extent by new taxes and subsidies keyed to ecological costs; furthermore, profits as the exclusive measure of desirable firm behavior might be broadened to include new indicators of social responsibility.<sup>71</sup> Nevertheless, there is no escaping the fundamental question posed by the competitive ethic: Do we really want our economic lives ruled by a system of naked competitive rivalry? By relying wholly on the force of competition the classical system exalts that force. Ecological taxes and new corporate responsibility indicators become simply additional constraints to be surmounted or circumvented, as may be most expedient in the light of cold, pragmatic assessment.

The single minded concentration of business energies on the competitive struggle reduces other values to mere instrumentalities for securing the end of competitive success. The classical model thereby not only enshrines the competitive ethic, but makes it self-perpetuating and self-intensifying. The system thus works to maximize not only profits, but it increases the number of men who will serve that goal; men who would play each advantage to the hilt, and who in the name of profits would, to the extent the law permits and public opinion tolerates, destroy a competitor, fire a long standing distributor or dismiss an aging employee. Can it be doubted that the logic of the system points in this direction, when each such act serves to make the firm more efficient in the classical sense, better able to serve consumer desires and to maximize its profits. What cannot be registered in the classical system is the consideration that whatever gain might result from higher productivity would be more than offset by the cruelties inflicted. And the "costs" would be borne not only by the victims, but by all of us who would have to exist in such a desensitized world. That this degree of harshness may seldom be fully realized does not solve the problem of whether we should guide our economic action by a theory that accepts it as a norm. The "iron law of competition" of classical economics turns out to be simply too Prussian a value to guide our economic lives.<sup>72</sup>

In sum, the competitive system of classical economics, geared solely to the maximum satisfaction of material consumer wants, fails to reflect essential human values. The elegant simplicity of the classical model is

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"Consciousness III does not believe in the antagonistic or competitive doctrine of life." C. REICH, *THE GREENING OF AMERICA* 226 (1970).

71. See Andrews, *Government Statistics Are Termed Misleading as Gauges of Society*, *The Wall Street Journal*, Dec. 16, 1971, at 1, col. 1.

72. See FUSFELD, *Post-Post-Keynes: The Shattered Syntheses*, *SAT. REV.*, Jan. 22, 1972, at 36, 39 (stressing the need for a new paradigm that would incorporate a greater concern for human values); cf. J. HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES* 68-70, 84, 109-11, 163-64 (1970) (tracing the growth of the policy motivating corporate law from a primary focus on increased economic productivity to wider, if not yet fully articulated, social goals).

possible only because of its narrow, materialistic view of human aspiration and fulfillment. To say that the model does not include values that are sensitive to non-economic needs may evoke cynicism, but that response would only underscore what I have been trying to say about the exclusiveness of the competitive ethic in an economic system built upon the classical assumption, a system which in the words of Chicago economist Frank H. Knight "teaches men to *think* of each other as competitors and not as co-workers."<sup>73</sup>

Must we then reject the value of competition altogether? Is there no acceptable human meaning for competition? I find it unnecessary to reach this extreme. It is the raising up of competition to a position of exclusive value that is the abuse, not its existence as one of a constellation of values. Indeed, the force of competition, when properly controlled and bridled, may play an indispensable role. Ascertaining the appropriate role for competition begins with the recognition that a social organization, similar to an individual personality, is inherently imperfect. Both, however, are capable of learning and improvement. Perhaps the greatest indictment of a monopoly is that like the sole merchant in an isolated town, the monopoly is saddled with its own imperfections. How is it to find out where it is falling short? How can it avoid becoming self-satisfied and stagnant? How can it learn to improve? Despite the importance of more humanistic values, how else can these needs be met except by competition?

Competition so viewed can be seen as a corrective force. Competition confronts the firm or individual with alternative approaches. It provides a feedback effect. It assures that the consumers will have alternatives. Diversion or threatened diversion of business to competitors compels a firm to ask itself periodically whether there may be better, more effective ways of doing what it is now doing. While under this interpretation we cannot do without competition, it is unnecessary that it be unremitting, destructive or ruthless.<sup>74</sup> If we abandon consumer want satisfaction as our single goal,

73. F. KNIGHT, *Economic Psychology and the Value Problem*, in *THE ETHICS OF COMPETITION AND OTHER ESSAYS* 103 (1935): "People . . . are coming to feel that much of our toil and trouble serves no end but to feed the increasing fires of competitive display and greed of power, and are asking whether life has to be a relentless struggle for distinction and domination, or whether a bit more of friendliness might not be worth some sacrifice, if necessary, of the touted physical ease and comfort which few get and fewer have time to enjoy . . . and it may yet be far more important that competition teaches men to *think* of each other as competitors and not as co-workers, and to see their relation to their work as that of the slave to his treadmill" (emphasis in original). See also Berle, *Modern Functions of the Corporate System*, 62 COLUM. L. REV. 399, 444 (1962), referring to "this curious free-market world where an obviously moral or decent or humane action has to be apologized for on the ground that conceivably, you may somehow make money by it."

74. For an analogy between economic and biological competition, stressing the feedback effects in a competitive model, and the necessity for long term stability of the model maintaining competition within a zone where competitive forces are neither too strong nor too weak, see Harding, *The Cybernetics of Competition: A Biologist's View of Society* in *MODERN SYSTEMS RESEARCH FOR THE BEHAVIORAL SCIENTIST* 449 (W. Buckley ed. 1968).

Supporting this thesis is the historic reluctance of public authority—legislative, executive or

it is no longer necessary for the system to squeeze every ounce of efficiency and profit out of the market regardless of cost. We need not chafe if small competitors are somewhat protected. The more restrained, teaching function of competition is fulfilled if the market provides viable alternatives in the production of goods. This function is not fulfilled if there is a single dominant firm, or even if two or three firms dominate the market; or if the firms in the market collude. Therefore an antitrust policy that insists on maintaining and expanding structurally competitive markets and vigorously opposes collusion is desirable. This view of competition also leads to the suggestion that greater recognition be given, as it is in European anti-trust theory, to promoting equality of firm size in concentrated markets as a desirable goal in itself.<sup>75</sup> Thus, other things being equal, four leading firms, having roughly equal market shares of 10 percent each, would provide a preferable market structure to one firm with 25 percent and the next three with 5 percent each, although in both cases the four-firm concentration ratio is the same. The more equalized market gives greater assurance of avoiding single-firm dominance and preserving a system of viable alternatives for consumers.<sup>76</sup>

Moreover, such a view of competition lessens the tension between the classical objective of maximizing consumer welfare and the economic goals based on such broader political and social values as equality of economic opportunity and free access to markets.<sup>77</sup> This is not to suggest that there is an easy answer to the questions of when and to what extent economic efficiency should be sacrificed for other values. It is to suggest that the question is legitimate, and that it becomes so just as soon as the mind is freed from the narrow tyranny of devotion to the single principle of competitive advantage.<sup>78</sup> To free the mind is, surely, only a first step. For one then must go on to build a creative, viable alternative. This would require a precise

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judicial—to tolerate destructive competition, but almost invariably to intervene and to ameliorate the destructive effects of competition. See *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933); J. BAIN, *INDUSTRIAL ORGANIZATION* 428-39 (1959); L. WEISS, *ECONOMICS AND AMERICAN INDUSTRY* 111-18 (1961).

75. Mueller, *The Policy of the European Coal and Steel Community Towards Mergers and Agreements by Steel Companies*, 14 *ANTITRUST BULL.* 413, 429 (1969).

76. Other things would not be equal, of course, if the equalized market could be achieved only by a severe loss of scale efficiencies. Yet in that case the future existence of the smaller firms becomes highly questionable, unless they can grow to the scale of the efficient firm; but then the conditions of equality would be achieved.

77. See Kauper, *The "Warren Court" and the Antitrust Laws: Of Economics, Populism and Cynicism*, 67 *MICH. L. REV.* 325, 332, 334 (1968) (equality of opportunity and free access to markets are in the nature of social and political rights akin to civil rights). See also Blake & Jones, *In Defense of Antitrust*, 65 *COLUM. L. REV.* 377 (1965) (equality of opportunity as a legitimate goal of antitrust); Note, *The Logic of Foreclosure: Tie-In Doctrine After Fortner v. U.S. Steel*, 79 *YALE L. J.* 86 (1969) (applying concept to tie-in area).

78. Some economists have come to recognize this concept. Cf. D. DEWEY, *THE THEORY OF IMPERFECT COMPETITION: A RADICAL RECONSTRUCTION* 199 (1969): "No intellectually respectable argument for antitrust can be advanced that does not rest squarely on the value judgment that some amount of economic welfare ought to be sacrificed to ensure some amount of intra-industry competition."



statement of the revised values and goals for economic legal policy, and eventually the development of a model to give such goals operational meaning. Clearly this is a future task that is as massive as it is urgent, involving philosophical as well as economic and legal considerations. Perhaps it will be helpful, nevertheless, to attempt a statement of possible interim goals for economic policy which seem to move in the correct direction.

## VI. CONCLUSION: A TENTATIVE RESTATEMENT OF GOALS

The classical model with its single goal of consumer want maximization is seriously inadequate as the foundation of legal economic policy. It cannot effectively support a policy of toleration toward unchecked industrial concentration. Indeed, McGee's *In Defense of Industrial Economics* has not demonstrated, except by assumption, that such concentration is necessary even to serve the model's own goal of consumer want maximization. Moreover, the model is deficient in two fundamental essentials: first, in its failure to consider the separate parameter of information flow; and second, in its failure to evaluate the implications and costs of an exclusive reliance on competitive rivalry for profit as the motivation for business behavior. A more humanistic and holistic approach requires inclusion of other values. In this spirit and without attempting to be definitive, I would suggest the following interim economic-legal goals in the area of microeconomic policy. These would be in addition to the goal of consumer want maximization, which is retained: (1) a reasonable distribution of economic power so that no one, or even three or four firms, is dominant in a market; (2) the opening up of the channels of commercial communication to incorporate a greater diversity of viewpoint and freedom of expression to, from and by consumers; (3) the recognition of equality of business opportunity and free access to markets as legitimate policy goals in themselves; and (4) a quality of economic life which, while intolerant of collusion and market dominance, is not impelled even in theory toward ruthless or unrestrained competition, and thereby remains free to recognize other social values. Whether in mathematics or public policy, the maximizing of several functions at once is a task of far greater complexity than is the maximizing of a single function. The complexity is unavoidable. It is but another reflection of the difficulty of actualizing human values in a complex world.<sup>79</sup>

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79. Cf. Von der Groeben, *Competition Policy as Part of Economic Policy in the Common Market*, 1965 BULLETIN OF THE EUROPEAN ECONOMIC COMMUNITY, No. 8, reprinted in E. STEIN & P. HAY, *LAW AND INSTITUTIONS IN THE ATLANTIC AREA*, 564-66 (1967): "[O]ur competition policy is not an end in itself but a means of attaining maximum productivity, satisfaction of demand, well-being and economic freedom for everybody in the Community. Competition also provides the basis for a distribution of income and property consonant with social justice, which must be supplemented by an effective social and incomes policy."