OLD WINE IN NEW BOTTLES: SOME OBSERVATIONS ABOUT CURRENT MONOPOLIZATION LITIGATION

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I. INTRODUCTION

LAWYERS seldom have the luxury of speaking in generalities. The particulars of the cases and the client's problems we deal with usually limit our immediate concerns and thinking to the facts at hand. Facts, unlike the generalities law professors are allowed to dispense in the classroom or the unreal assumptions economists are sometimes allowed to ignore in constructing or applying abstract models, simply refuse to be put down. Because I count myself a lawyer first, at least when in the company of other lawyers, I welcome the opportunity to escape the limitations of particular facts and to speak at this Institute in generalities, namely some generalities about the current wave of monopolization litigation. Our hosts have indeed been generous not only by asking me to talk about the general features unique to current monopolization litigation, but by also asking me to be controversial because most of us are probably drowsy after consuming too much at lunch. How often does a lawyer have an invitation to be somewhat irresponsible in public, as well? The opportunity is even more inviting in light of the general confusion and shifts in doctrine which appear to be taking place in current monopolization litigation. It puts in one's mind the story about the stranger driving through a small town who noticed several fellows struggling to hold a long pole upright while one of their number gamely tried to climb the wavering pole. The stranger stopped and asked, "What are you fellows trying to do?" They responded, "We are trying to measure the pole." The stranger said, "Why not put it down and measure it on the ground?" They responded, "We do not want to know how long it is; we want to find out how tall it is." We all know how long current monopolization litigation is; permit me to suggest some general impressions about features of current section 2 litigation affecting how tall it may be.

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II. Some General Characteristics of Current Monopolization Litigation

Several general features of recent monopolization litigation, the "third wave"[1] if you will, are now quite apparent. They include the following. First, there is a significant and increased reliance upon economic analysis (particularly the brand espoused by the neo-classical ideologists) to decide specific cases and the limit the facts relevant to the decision of specific cases to those facts the economic model of the neo-classical religion defines as relevant.[2] Second, most of the current monopolization litigation is private treble damage litigation, as opposed to the bulk of the monopolization litigation in earlier "waves" being government-initiated litigation.[3] Third, relevant market analysis is becoming even more of a major battleground in many current monopolization cases, with a marked tendency to litigate the question endlessly and decide market definitions mechanically rather than functionally in light of the goals of the statute.[4] Fourth, the issue of what evidence in addition to the possession of monopoly power in a relevant market is necessary to prove unlawful monopolization — the conduct issue — has become even more central in most of the current cases than in past cases and even more confused than in the inscrutable opinions of Wave II cases.[5] Fifth, the procedural and discovery morass of the "big

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1. Flynn, *Monopolization Under the Sherman Act: The Third Wave and Beyond*, 26 Antitrust Bull. 1 (1981).

2. *See* Flynn, *The Misuse of Economic Analysis in Antitrust Litigation*, 12 Sw. U. L. Rev. 335 (1981).

3. *See* Flynn, *Supra* note 1, at 1-2, 22.

4. *See generally* Symposium, *Market Definition in Merger and Monopolization Cases: Concepts and Techniques*, 49 Antitrust L. J. 1143 (1980); Ames, *Evidentiary Aspects of Relevant Product Market Proof in Monopolization Cases*, 26 De Paul L. Rev. 530 (1977); Stein & Brett, *Market Definitions and Market Power in Antitrust Cases — An Empirical Primer on When, Why and How*, 24 N.Y.L.S. Rev. 639 (1979); Comment, *Relevant Geographic Market Delineation: The Interchangeability of Standards in Cases Arising Under Section 2 of the Sherman Act and Section 7 of the Clayton Act*, 1979 Duke L. J. 1152; Note, *The Role of Supply Substitutability in Defining the Relevant Market*, 65 Va. L. Rev. 129 (1979); Glassman, *Market Definition as a Practical Matter*, 49 Antitrust L. J. 1155 (1980); Schmallensee, *On the Use of Economic Models in Antitrust: The ReaLemon Case*, 127 U. Pa. L. Rev. 994 (1979).

5. *See generally* Blecher & Woodhead, *Bigness and Badness: A Review of the Requirement of "Deliberateness" in Monopolization*, 10 Sw. U. L. Rev. 117 (1978); Shepherd, *Anatomy of a Monopoly: Costs, Prices, and Innovation*, 12 Antitrust L. & Econ. Rev. 93 (1980); Lane, *The Conduct Standard for Legally Acquired Monopo-*

case"[6] has become so overwhelming that there should be a general concern in a profession dedicated to the "rule of law" with whether or not a government or private section 2 case attacking significant monopoly power can any longer be considered a reasonable course of action to regulate undue economic power in our society.[7] Finally, there has been a marked increase in political intervention in the litigation of significant monopolization cases through appeals to Congress or the White House which may be undermining the integrity of judicial implementation of section 2 of the Sherman Act.[8] With targets like these, how can one avoid being controversial? Permit me to explore the practical consequences of these features of current monopolization litigation more fully.

A. Reliance on Economic Models

Earlier monopolization litigation was carried on in the grand tradition of the common law process; social and political concerns, the legislative history of section 2, a dash of economic insights, and appeals to morality, fairness, equity, common sense, and the values and intuition of the judge all openly entered the calculus of whether it was appropriate to conclude that a defendant had violated the law under the facts and circumstances of a particular case. Economic theory was given its due, but only in a vague and general way, to support conclusions derived from some other basis and not as the sole determinant of the path of analysis. Judge Hand's opinion in

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lies Under Section 2 of the Sherman Act, 49 U. CINN. L. REV. 206 (1980); Comment, *Draining the* Alcoa *"Wishing Well": The Section 2 Conduct Requirement After* Kodak *and* CalComp, 48 FORD. L. REV. 291 (1980); Comment, *Sherman Antitrust Act: What is Wilful Acquisition or Maintenance of Monopoly Power?*, 23 TRIAL LAW. GUIDE 563 (1980).

6. For a summary of the procedural difficulties of the private antitrust suit against IBM by Control Data Corporation, see 786 ANTITRUST & TRADE REG. REP. (BNA) AA-10, AA-16 (Oct. 26, 1976); *In re* Exxon Corp., No. 8934, 3 TRADE REG. REP. (CCH) ¶ 21,866 (F.T.C. 1981). *See also* United States v. AT&T, 1031 ANTITRUST & TRADE REG. REP. (BNA) H-1 (Sept. 17, 1981).

7. *See* 1 REPORT, NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES 1-11 (1979).

8. Antitrust policy at bottom is a matter of political value judgment, both as to how the economy does in fact work and the role of government in determining how the economy should work. The kind of political intervention unique to current litigation is the marked increase of extra-judicial intervention in filed cases through Congress and by the Executive branch, only an occasional feature of past periods of antitrust enforcement.

United States v. Aluminum Co. of America[9] set the tone, painting with the broad brush of the common law process — weighing insights from several sources and blending the recipe with an underlying common sense and a feel for the broad purposes of the law. Cases like *United States v. E.I. duPont de Nemours & Co. (Cellophane)*,[10] from the same era relying on the economic concept of cross-elasticity of demand as the sole test for product market definitions, were soon recognized as aberrations by merger cases like *Brown Shoe Co. v. United States*.[11] *Brown Shoe* relegated cross-elasticity to the status of only one of several tests for defining the broad outer boundaries of a market. By no means was cross-elasticity to be the final word for defining relevant markets or the premise for why it was held in a particular case that the law was or was not violated, whatever "markets" were deemed relevant.[12]

In third wave monopolization litigation, on the other hand, many courts are turning with increasing frequency to one form of economic analysis for determining the objectives of the law,[13] the definitions of markets,[14] the existence or nonexistence of monopoly

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9. 148 F.2d 416 (2d Cir. 1945).

10. 351 U.S. 377 (1956). *See supra* note 1 at 9, 17-21, 25.

11. 370 U.S. 294 (1962). *See* Flynn, *supra* note 1 at 20, 24-5 (criticizing the practice of interchanging market tests developed in merger cases with monopolization cases and vice-versa).

12. *See supra* note 4. For criticism of the *du Pont* opinion, see L. SULLIVAN, ANTITRUST 53-58 (1977); Marcus, *Antitrust Bugbears: Substitute Products—Oligopoly*, 105 U. PA. L. REV. 185 (1956); Stocking & Mueller, *The Cellophane Case and the New Competition*, 45 AM. ECON. REV. 29 (1955); Turner, *Antitrust Policy and the Cellophane Case*, 70 HARV. L. REV. 281 (1956). *See also* United States v. AT&T, 1031 ANTITRUST & TRADE REG. REP. (BNA) H-1 at H-20 (Sept. 17, 1981) ("While cross-elasticity of demand is certainly the most important determinant of market definition under the antitrust laws, it is well-established that under certain circumstances markets may be aggregated on a basis other than economic substitutability."). *But see* Auburn News Co. v. Providence Journal Co., 504 F. Supp. 292 (D. R.I. 1980) (existence of monopoly power could be inferred from low cross-elasticity between the publisher's papers and the demand for suburban dailies and from an overwhelming market share — 90% for newspapers of general circulation to 65% for all dailies in the state).

13. A not unsurprising result given the vagueness of precedent from earlier section 2 cases, the vigor with which proponents of neo-classical theology have spread the word, and the availability of an all-expenses-paid trip for judges to hear the word in comfortable surroundings. *See* Barbash, *Big Corporations Bankroll Seminars for U.S. Judges*, Wash. Post, Jan. 20, 1980 at A-1, col. 3.

14. *See* cases cited *infra* note 26; Spectrofuge Corp. v. Beckman Instruments, Inc., 575 F.2d 256 (5th Cir.), *cert. denied*, 440 U.S. 939 (1978); Flynn, *supra* note 1 at 24-32.

power[15] and the evaluation of conduct claimed by plaintiffs as monopolistic and claimed by defendants as pro-competitive.[16] Increasing reliance has been placed on neoclassical economic analysis as a surefooted way to decide cases.[17] The model, with its unreal assumptions, extensive and abstract sub-rules and complex artificial predictions, is made the major premise of analysis and only those facts of the case fitting the assumptions of the model are allowed to make up the minor premise of a syllogism. The rules of the model are applied to some of the facts of the case to achieve the "right' "' result. Elsewhere, I have called the adoption of this form of reasoning the advent of the "gumball dispenser system" of legal decision-making:[18] one needs only to set up a model, plug in some factual sounding assumptions, pull the lever of deductive logic and out pops the right answer. Common sense, judicial intuition, facts of the case inconsistent with the assumptions of the model, the insights of different schools of economic thought, and the broader purposes of the law are all ignored or, at least, it is pretended they are ignored. Instead of the valuable insights of the model and their value being a place to begin analysis of the facts in dispute and of some weight in the final judgment, the insights become a straightjacket dictating what facts are relevant, what values may be weighed and what conclusions are permitted. It is indeed a strange form of reasoning,[19] one whose claim of an empirical basis ranks with similar claims made for

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15. Shepherd, *Anatomy of a Monopoly (II): The Power to Control Prices*, 12 ANTITRUST L. & ECON. REV. 73 (1980); Green, *An Economic Analysis of Monopoly and Anti-competitive Power*, 10 SW. U. L. REV. 65 (1978). *See* Weber v. Wynne, 431 F.Supp. 1048 (D. N.J. 1977).

16. *See* Flynn, *supra* note 1 at 32. *See also* Cowley v. Braden Indus., Inc., 613 F.2d 751 (9th Cir.), *cert. denied*, 446 U.S. 965 (1980); Eliason Corp. v. National Sanitation Found., 614 F.2d 126 (6th Cir.), *cert. denied*, 101 S.Ct. 89 (1980); Brown v. Hansen Publications, 556 F.2d 969 (9th Cir. 1977) (exclusive dealing contracts may be procompetitive in purpose); Fleer Corp. v. Topps Chewing Gum, Inc., 1981-2 Trade Cas (CCH) ¶ 64,249 (3d Cir. 1981) (exclusive licensing contracts did not constitute monopolization because the parties had no power to exclude competition); Richter Concrete Corp. v. Hilltop Basic Resources, Inc., 1981-1 Trade Cas. (CCH) ¶ 63,947 (S.D. Ohio 1981); Cooney v. American Horse Shows Ass'n, 495 F.Supp. 424 (S.D. N.Y. 1980) (rules and regulations of horse show association promoted rather than restrained competition).

17. Flynn, *supra* note 2.

18. *See generally* Flynn, *Further Aside: A Comment on "The Common Law Origins of the Infield Fly Rule,"* 4 J. CONTEMP. L. 241, 242 (1978); *see* Flynn, *supra* note 1 at 30.

19. *See* Wiles, *Ideology, Methodology, and Neoclassical Economics*, 2 J. POST KEYNESIAN ECON. 155, 160-61 (1979).

"Ouija boards."

The unreal abstractions of the model and the mechanical use of deductive reasoning in its application are implicitly present in many monopolization cases, but are used more explicitly in other areas of antitrust litigation. For example, most of the reality of vertical market restraints is now shrouded in myths generated out of potentially worthwhile insights from the neoclassical model. "Free riders" are seen under every rock or are assumed to be a potential evil justifying every restraint. The ill-defined concept of "free rider" is apparently attached to buyers not abiding by any goal a seller seeks to achieve by a vertical restraint. The theology condemns "free riders" as a plague and their rights and "rationality" as beyond notice by the law. Exclusive weight is given to assumptions about the rationality of sellers but not the rationality of buyers entangled in a vertical restraint. Time and power are ignored in the analysis, along with market imperfections and countervailing social and political values inevitably involved in assessing facts unique to the dispute. Unjustified vertical restraints can only be explained by the assumption that there must be horizontal collusion lurking in the vicinity. The possibility that those imposing the restraints are acting in ways contrary to the assumptions of the model, or that the law ought to be concerned with goals and values not allowed by the model, are possibilities the theology cannot tolerate lest the entire edifice will crumble. The long discredited process of decision-making by hypotheticals and ruminations about what would happen in the unreal world of the model[20] are substituted for the complex, empirical and realistic analysis by the legal process of the facts and circumstances unique to the case.

If the views reported here today from the Antitrust Division[21] are followed by the courts, we will not only be afflicted by the religion of "monetarism" in our monetary affairs and the simplemindedness of "supply side" economics in our fiscal affairs, but also by the misuse of one brand of economic theology to dictate results in particular cases involving vertical market restraints. It is our common misfortune that the affairs of the world, particularly those of such significance that they provoke litigation, are far more complex than is assumed by the proponents of a simple magic potion to resolve all our economic ills. For the purveyors of such magical tonics, the practical

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20. *Cf.*, Thode, *The Indefensible Use of the Hypothetical Case to Determine Cause in Fact*, 46 TEX. L. REV. 423 (1968).

21. *See* Carr, *Some Reflections on Vertical Restraints*, 13 U. TOL. L. REV. 587 (1982).

affairs of the real world and the resolution of specific cases are both understood and decided by the narrow assumptions and predictions of a world that does not exist. The consequences of this line of thinking can easily be seen. In vertical restraint cases, for example, we have gravitated to the knee-jerk application of the inflexible dictates of an ideology out of touch with reality and the goals of the law[22] from the knee-jerk application of the inflexible common law rule against "restraints on alienation" designed to control medieval land transactions,[23] in circumstances where each approach has underlying policy considerations to contribute but neither should be allowed to dictate the ultimate outcome of a specific case.[24]

It would seem that past experiences with legal positivism should have taught us the risks of permitting abstract rules detached from their factual and moral assumptions and the circumstances of their birth to be deductively applied to the shifting and changing affairs of the real world. The possibility that there may be or ought to be justifications for imposing vertical market restraints in some circumstances should not be permitted to seduce one to believe the restraints are justified in all cases or even most of them.[25] While the security of a fixed set of beliefs and an unreal model of reality may be necessary to allay fears common to the insecure who enlist in causes like the "moral majority," a legal process devoted to the prin-

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22. *See* Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).

23. *See* United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

24. *See* Flynn, *The Function and Dysfunction of Per Se Rules in Vertical Market Restraints*, 58 WASH. U. L. Q. 767 (1980).

25. *Id.* If, of course, one ignores the history of the statute, precedent, and the functions of law in our society and defines the criteria for weighing the merits of specific decisions in terms of whether judicial intervention would "increase consumer welfare through a judicial decree," R. BORK, THE ANTITRUST PARADOX 61 (1978), trial of the effect of the defendant's behavior upon the maintenance of a competitive process for the benefit of one and all becomes a trial of the court's conduct. The statute has not been amended to ban every judicial decree interfering with "consumer welfare." Nor is "consumer welfare" a necessary byproduct of vertical or other restraints taking place in circumstances not in accord with the assumptions of the model. *See* DeLong, *The Role, If Any, Of Economic Analysis In Antitrust Litigation*, 12 SW. U. L. REV. 298, 324 (1981). The concept of "consumer welfare," an abstraction with meaning in the context of the model like that for the meaning of a "trick" in the game of bridge, does have the advantage of sounding like a worthwhile and identifiable goal. It becomes relatively formless and mushy, however, when translated into the affairs of the real world. At best, it is the expression of a moral value entitled to the same weight as other values in the adjudication of specific disputes. At worst, it is a slogan, not unlike other political slogans of the recent times which confuses rather than clarifies the complex task of antitrust litigation.

cipled but pragmatic resolution of disputes in the real world cannot permit its objectives and methodology to be replaced by a model detached from reality and a methodology at odds with that of the common law process. The principled and pragmatic resolution of specific cases involving vertical market restraints, if current Antitrust Division theology is followed, will result in the useless exercise of the litigation of all cases confirming the self-fulfilling prophecies of the model, rather than dealing realistically, constructively, and justly with the reality of specific cases in light of the complex goals of the law.

The most pronounced current use of this kind of economic modeling to dictate results mechanically in monopolization cases from the real world is, of course, reliance upon marginal or average cost pricing theory to measure whether a monopolist has engaged in predatory pricing.[26] It is a topic I will defer for later discussion by other speakers except to note that some courts[27] have begun to realize the Areeda-Turner test[28] is a "defendant's paradise,"[29] impractical to administer in most circumstances, and a concept of pricing peculiar to one form of abstract and theoretical economic theorizing,

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26. William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 652 F.2d 917 (9th Cir. 1981); Chillicothe Sand & Gravel Co. v. Martin-Marietta Corp., 615 F.2d 427 (7th Cir. 1980); Northeastern Tel. Co. v. American Tel. & Tel. Co., 1981-1 Trade Cas. (CCH) ¶ 64,027 (2d Cir. 1981).

27. Transamerica Computer Co. v. IBM Corp., 481 F.Supp. 965 (N.D. Cal. 1979).

28. Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975).

29. Transamerica Computer Co. v. IBM Corp., 481 F.Supp. 965, 994-95. The Areeda-Turner position has provoked many responses, among them the following: Scherer, *Predatory Pricing and the Sherman Act: A Comment*, 89 HARV. L. REV. 869 (1976); Areeda & Turner, *Scherer on Predatory Pricing: A Reply*, 89 HARV. L. REV. 891 (1976); Scherer, *Some Last Words on Predatory Pricing*, 89 HARV. L. REV. 901 (1976); Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 YALE L. J. 284 (1977); Areeda & Turner, *Williamson on Predatory Pricing*, 87 YALE L. J. 1337 (1978); Williamson, *A Preliminary Response*, 87 YALE L. J. 1353 (1978); Williamson, *Williamson on Predatory Pricing II*, 88 YALE L.J. 1183 (1979); Areeda & Turner, *Predatory Pricing: A Rejoinder*, 88 YALE L.J. 1641 (1979); Greer, *A Critique of Areeda-Turner's Standard for Predatory Practices*, 24 ANTITRUST BULL. 233 (1979); Areeda, *Predatory Pricing*, 49 ANTITRUST L. J. 897 (1980); McGee, *Predatory Pricing Revisited*, 23 J. L. & ECON. 289 (1980); Note, *Apraisal of Marginal Cost and Predatory Pricing Under Section 2 of the Sherman Act*, 30 ALA. L. REV. 562 (1979). For excellent summaries of the debate and suggested alternative standards, see Brodley & Hay, *Predatory Pricing: Competing Economic Theories and the Evolution of Legal Standards*, 66 CORNELL L. REV. 738 (1981); Joskow & Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 YALE L. J. 213 (1979); FED. TRADE COMM., STRATEGY, PREDATION AND ANTITRUST ANALYSIS (1981).

but not followed by most businesses in the unhappy reality of the real world where business is done and lawsuits are decided. A *sine quo non* for "predatory pricing" it is not, although precisely what alternative standard is generally appropriate and legally permissible in particular circumstances is not altogether clear. The Ninth Circuit has now traveled halfway around the circle, from *California Computer Products, Inc. v. IBM Corp.*[30] and similar cases[31] applying a marginal cost standard rigidly as the test for predatory pricing, to cases such as *W. Inglis & Sons Baking Co. v. ITT Continental Baking Co., Inc.*[32] recognizing pricing below "average total cost" as legally suspect in light of other factors in the case. Several other cases[33] have encountered the further problem of the practical difficulties with proving a defendant's pricing fell above or below the imiginary line of either marginal cost or full cost, in light of the fact that most businesses do not price products in neat conformity with the assumptions of the model or do not keep their books in a way that makes a reasoned guess defensible.[34] Whichever test one follows,[35] the complexity of proving predatory pricing will probably deter pricing behavior monopolization suits by plaintiffs in all but clear-cut cases of below cost selling or instances of pricing tactics aimed at the plaintiff and accompanied by conduct which is otherwise predatory.

Economic theorizing — the gumball variety — creeps in elsewhere in the analysis of contemporary monopolization cases. This is

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30. 613 F.2d 727 (9th Cir. 1979).

31. *See, e.g.*, ILC Peripherals Leasing Corp. v. IBM Corp., 458 F.Supp. 423 (N.D. Cal. 1978).

32. 652 F.2d 917 (9th Cir. 1981).

33. *See, e.g.*, Transamerica Computer Co. v. IBM Corp., 481 F. Supp. 965 (N.D. Cal. 1979) (prices below average cost should be considered illegal if they are unreasonable); Chillicothe Sand & Gravel Co. v. Martin-Marietta Corp., 615 F.2d 427 (7th Cir. 1980).

34. Joskow & Klevorik, *A Framework for Analyzing Predatory Pricing Policy*, 89 YALE L. J. 213 (1979); for an analysis of the empirical data, see Harris & Sullivan, *Passing On the Monopoly Overcharge: A Comprehensive Analysis*, 128 U. PA. L. REV. 269, 303-309 (1979). For a more general analysis of the questionable nature of the rationality assumption, see M. HOLLIS & E. NELL, RATIONAL ECONOMIC MAN (1975); Heilbroner, Book Review, 27 N.Y. REV. OF BOOKS, Feb. 21, 1980 at 19 (reviewing A. EICHNER, A GUIDE TO POST KEYNESIAN ECONOMICS (1980)).

35. For a comparison of the diverse tests for predatory pricing, see generally Brodley & Hay, *Predatory Pricing: Competing Economic Theories and the Evolution of Legal Standards*, 66 CORNELL L. REV. 738 (1981); Baumol, *Quasi-Permanence of Price Reductions: A Policy for Prevention of Predatory Pricing*, 89 YALE L. J. 1 (1979); Koller, *When is Pricing Predatory?*, 24 ANTITRUST BULL. 283 (1979).

particularly the case with market definitions, where cross-elasticity of supply and demand remain significant factors in defining markets, along with a myriad of practical factors influencing the decision from case to case.[36] Market definitions have become a central issue in many third wave cases, a not surprising development, because a narrow "submarket" can magnify the defendant's market share,[37] while a broad market definition can diminish both a defendant's market share and the likelihood of a resulting inference of monopoly power.[38] This reality has not escaped lawyers grappling with winning their case and the battle over market definition has become, in many lawsuits, the end of the case rather than only a potential beginning of a case. Recent cases have included protracted battles over whether the power to grant franchises at Thistledown Racetrack is a separate market from the concession market generally,[39] whether wholesaling orthodontic face bows is a market separate from the retail sale of orthodontic face bows generally,[40] and whether reprocessed lemon juice is a market separate from the juice of fresh lemons.[41] Defining a market is usually dressed up in references to economic tests like cross-elasticity, the strange concept of "submarkets," consumer recognition of a way of selling a product as a separate market, and product substitutability.[42] Economic tests

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36. *See supra* notes 10-12.

37. Submarkets were invoked by the Court in Brown Shoe Co. v. United States, 370 U.S. 294 (1956). *See* Flynn, *supra* note 1 at 24-26. *See also* United States v. Grinnell Corp., 384 U.S. 563 (1966) (narrow market definition); Photovest Corp. v. Fotomat Corp., 606 F.2d 704 (7th Cir. 1979), *cert. denied,* 445 U.S. 917 (1980) (drive-thru photographic processing stores as a relevant submarket).

38. General Business Sys. v. North Am. Philips Corp., 1980-81 Trade Cas. (CCH) ¶ 63,607 (N.D. Cal. 1980) (narrow product definition rejected); Malcolm v. Marathon Oil Co., 642 F.2d 845 (5th Cir. 1981) (failure to establish relevant product and geographic markets fatal to gasoline dealer's monopolization charge against a gasoline franchisor).

39. Raceway Properties, Inc. v. Emprise Corp., 613 F.2d 656 (6th Cir. 1980).

40. Eastern Dental Corp. v. Isaac Masel Co., Inc., 502 F.Supp. 1354 (E.D. Pa. 1980).

41. Borden, Inc., [1976-79 Transfer Binder], TRADE REG. REP. (CCH) ¶ 21,490 (F.T.C. 1978). *See* Schmalensee, *On the Use of Economic Models in Antitrust: The ReaLemon Case,* 127 U. PA. L. REV. 994 (1979).

42. *See* L. SULLIVAN, ANTITRUST, 74-93 (1977); Stein & Brett, *supra* note 4, at 669-75; Areeda & Turner, *Antitrust Law,* 321-45 (1978). *See also* Nifty Foods Corp. v. Great Atl. & Pac. Tea Co., 614 F.2d 832 (2d Cir. 1980); United States v. E.I. du-Pont de Nemours & Co., 351 U.S. 377 at 404 (product interchangeability); Pacific Mailing Equip. Corp. v. Pitney Bowes, Inc., 499 F.Supp. 108 (N.D. Cal. 1980) (product market: new vs old machines); Reid Brothers Logging Co. v. Ketchikan Pulp Co.,

are used in many cases to justify a result a party desperately seeks for his client, rather than to supply illumination to the court and a reasoned precedent from cases in the past in light of the complex goals of the law.

An observer from another planet would likely view the exercise as some sort of expensive, time-consuming, religious exercise — meaningful only to true believers in the primitive tribe practicing the ritual. Despite nearly uniform theoretical recognition that market definitions are only a beginning of the analysis, and a fiction to boot (unless you really believe there is a physical thing out there in time and space called a market), lawyers and courts strain long and hard over market definitions. In the *Borden, Inc. (ReaLemon)*[43] case the FTC went through many of these exercises, but finally settled on Borden's profit rate to justify inferring processed lemon juice is a separate market for antitrust purposes. A consistent profit rate of 16.9% to 35.2% is certainly a basis for drawing an inference that the arena of the business in which the defendant operates is probably less than competitive, regardless of how one manipulates other economic tests for defining markets.

The entire exercise should be placed in a broader perspective, because market tests are only one potential starting place for an analysis of the subtle and complex question of whether monopoly power has displaced the competitive process in a particular case and in ways which "ought" to be declared unlawful. If the theology of the neoclassical model were strictly followed, any demonstration of power over a "market" would be inconsistent with a model of pure competition. In such a model, consumers have all the power and firms have none.[44] The law, of course, has long recognized that it is unrealistic to follow that standard for identifying monopoly power. By the same token, excessive reliance upon market definitions as the path to certainty in identifying monopoly power is also misleading. In some cases, market tests should be dispensed with because the presence or absence of monopoly power (in the sense of power to fix prices or exclude competitors) is readily apparent to all but the contestants.[45] The litigation can get out of focus because too much em-

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1981-2 Trade Cas. (CCH) ¶ 64,228 (W.D. Wash. 1981) (variety of product markets in lumber business: sale of land; logging; milling; processing; sale of lumber).

43. *See supra* note 41.

44. *See* Thompson, *Competition as a Strategic Process*, 25 ANTITRUST BULL. 777 (1980).

45. Woods Exploration & Prod. Co. v. ALCOA, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972); Denver Petroleum Corp. v. Shell Oil Co., 306

phasis is placed on an element which is not the central concern of the case, but only one potential means to the end of identifying the possession of the power or its exercise. Like high priests of a religion, however, we all go through the exercise of identifying markets, "measuring" power (quantitatively) and searching for smoking-gun conduct evidence because our formula for proof of a violation tells use we must do so, and do so to inordinate lengths. As an observer of the passing scene, I must confess that the game of market definition often appears to be played out to its fullest for reasons other than sensibly deciding what is the appropriate realm in which to decide whether or not a defendant's conduct or structure ought to be found in violation of the policies and goals of the law. Winning by exhaustion and obfuscation rather than just winning by intimidation or on the merits all too often appears to be the real objective of the combatants in litigating market definitions to the death.[46]

The numbers game continues to be played with market shares — over 70%, presumptively monopoly power; 50% to 70%, maybe; and, below 50%, no. For example, the court in the *Platt Saco Lowell Ltd. v. Spindelfabrik Suessen-Schurr*[47] case held that a fifty percent or below market share was conclusive evidence of a lack of monopoly power, while the Second Circuit has held erroneous a lower court instruction that a fifty percent or less market share was insufficient to show unlawful monopolization.[48] A particular market share is not conclusive of the question of whether a firm possesses monopoly power, because a firm with a small market share (however manipulated or defined) may still possess the power to fix prices or exclude competition.[49] The statistical game of percentage shares can cause

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F.Supp. 289 (D. Colo. 1969).

46. *See* Nifty Foods Corp. v. Great Atl. & Pac. Tea Co., 614 F.2d 832 (2d Cir. 1980) (seven years of discovery).

47. 1978-1 Trade Cas. (CCH) ¶ 61,898 (N.D. Ill. 1978).

48. Broadway Delivery Corp. v. United Parcel Serv., 1981-1 Trade Cas. (CCH) ¶ 64,068 (2d Cir. 1981).

49. Filmdex Chex Sys. v. Telecheck Washington, Inc., 1979-2 Trade Cas. (CCH) ¶ 62,976 (D. D.C. 1979) (more than mere possession of a monopoly share of a market has to be shown; defendants must have had the ability to control prices or exclude competition); Van Dyk Research Corp. v Xerox Corp., 478 F.Supp. 1268 (D. N.J. 1979), *aff'g* 631 F.2d 251 (3d Cir. 1980), *cert. denied*, 101 S. Ct. 3029 (1981). (Xerox's 35% market share did not give it the power to control prices or exclude competition); FDI, Inc. v. W.R. Grace & Co., Inc., 1980-81 Trade Cas (CCH) ¶ 63,823 (C.D. Cal. 1980) (first firm in market, with 100% market share; no showing defendant had a right or power to exclude competition or control prices).

one to overlook the fact that, as in *DuPont (Cellophane)*,[50] a firm earning a sixty percent rate of return with a thirty percent share of whatever "market" or "submarket" one defines probably has the power (like the proverbial gorilla) to do whatever it wishes to do. The game of finding some magical percentage share of the market is traceable to Judge Hand's offhand comment in *Alcoa* that ninety percent of a market is a monopoly, sixty-six percent may be and thirty-three percent is not.[51] It is dicta which has become hardened into inflexible tests for legality and illegality and dicta which has contributed grealty to the efforts to gerrymander market tests to magnify or diminish market share percentages in just about every case which comes along.[52] The time has come to discard this much abused piece of dicta, useful in its day in the process of circumventing unduly restrictive cases from the past, but which has blinded present analysis rather than liberated it.

Like market definition games, monopoly power games are usually dressed up in some analytical clothing from economic theorizing, lending respectability, if not insight, to the game. One view infers that statistical measures of market share justify an inference that monopoly power is magically present or that monopoly power is not present.[53] There are few lawyers or even economists who would agree with this proposition, despite the tendency of courts, with which we all must deal, to look for shorthand formulas to resolve a most complex *qualitative* question. When all is said and done about market share, a court remains confronted with a question requiring a factual and legal value judgment, whatever the percentage share may be: Whether the conduct or structure of the firm involved, in the context of the industry and the circumstances unique to the case, warrants a legal judgment that it possesses or has exercised monopoly power — the power to fix prices or exclude competition free of the constraints of the competitive process. A belief that reliance solely on economic analysis or shorthand legal rules can give one the ultimate answer to this complex question, rather than only

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50. 351 U.S. 377 (1956).

51. 148 F.2d 416, 424 (2d Cir. 1945).

52. Vietnamese Fishermen's Ass'n v. Knights of Ku Klux Klan, 1981-2 Trade Cas. (CCH) ¶ 64,260 (S.D. Tex. 1981) (failure to show defendants possessed the requisite degree of monopoly power in the relevant market was fatal to monopolization charge); D.E. Rogers Assoc., Inc. v. Gardner-Denver Co., 1981-1 Trade Cas. (CCH) ¶ 64,024 (E.D. Mich. 1981) (70-80% market share of submarket does not prove monopoly power in the relevant product market).

53. *See* articles cited *supra* note 15.

some tentative insights, or that statistical measures of market shares resolve the mystery, is a form of certitude not found elsewhere in human experience — and for good reason. That good reason is that detecting whether monopoly power exists or has been exercised for Sherman Act purposes requires a complex judgment based upon a number of intangible variables including an understanding of the industry, assumptions about what is acceptable industry structure or behavior in comtemporary society, the social, political and other goals of the Sherman Act, and an acute awareness of the facts of a particular case.[54] An economist's hypothesis of what would happen in an abstract world not in conformity with the facts of the case can be of some assistance in guiding a decision, but not a shining beacon lighting the only path and illuminatng the ultimate answer. At bottom the question remains a legal and moral one of whether the defendant's structure or behavior under the circumstances "ought" to be found consistent or inconsistent with the purposes of section 2 of the Sherman Act.[55] Substituting a mechanical formula for the com-

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54. For some unique factual circumstances in monopolization cases, see Hecht v. Pro-Football, Inc., 570 F.2d 982 (D. D.C. 1977), *cert. denied*, 436 U.S. 956 (1978) (natural monopoly); Structure Probe, Inc. v. The Franklin Inst., 450 F.Supp. 1272 (E.D. Pa. 1978) (natural monopoly of first market entrant includes customer loyalty); Fulton v. Hecht, 580 F.2d 1243 (5th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979) (monopoly power thrust upon regulated dog track by racing board); Speed Auto Sales, Inc. v. American Motors Corp., 477 F.Supp. 1193 (D.C. N.Y. 1979); Island Tobacco Co. v. R.J. Reynolds Indus., Inc., 1981-1 Trade Cas. (CCH) ¶ 63,988 (D. Hawaii 1981) (every manufacturer has a natural and complete monopoly over its particular product, especially where sold under its own private brand); Shayne v. National Hockey League, 504 F.Supp. 1023 (E.D. N.Y. 1980) (unique business of professional sports team); Parrish's Cake Decorating Supplies v. Wilton Enter., 1980-81 Trade Cas. (CCH) ¶ 63,769 (N.D. Ill. 1981) (use of lawful means to achieve unlawful monopoly); Pacific Engineering & Prod'n Co. v. Kerr McGee Corp., 551 F.2d 790 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977) (behavior of duopolists).

55. For cases analyzing the facts of particular cases in this way, see Official Airline Guide, Inc. v. FTC, 1980-2 Trade Cas. (CCH) ¶ 63,544 (2d Cir. 1980) (refusal to deal by a monopolist not benefitted by refusal, not unlawful monopolization); Byars v. Bluff City News Co., Inc., 609 F.2d 843 (6th Cir. 1979) (refusal to deal by monoopolist judged by its overall economic impact and not the subjective intent of the monopolist); Fount-Wip, Inc. v. Reddi-Wip, Inc., 568 F.2d 1296 (9th Cir. 1978) (refusals to deal which are anti-competitive in purpose or effect or both, constitute an unreasonable restraint of trade in violation of the Sherman Act); Janich Bros., Inc. v. American Distilling Co., 570 F.2d 848 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1979) (the Sherman Act is not a subsidy for inefficiency); Americana Indus., Inc. v. Wometco de Puerto Rico, Inc., 556 F.2d 625 (1st Cir. 1977) (cutting admission prices in motion picture industry not per se unlawful); International Railways of Central America v. United Brands Co., 532 F.2d 231 (2d Cir. 1976), *cert. denied*, 429 U.S. 835 (abandonment of unprofitable operation not act of monopolization); Hanson v. Shell

plex judgment required by the legal process is about as productive as assuming that counting bodies, pacified villages, and tons of bombs dropped can reliably forecast who is winning a war.[56]

One can also detect the force of a misuse of economic theorizing in some other gross generalities indulged in by the third wave monopolization courts. For example, in *Berkey Photo, Inc. v. Eastman Kodak Co.*,[57] the court assumed and stressed that Kodak was entitled to reap "the competitive rewards attributable to its efficient size," and that "an integrated business does not offend the Sherman Act whenever one of its departments benefits from association with a division possessing a monopoly in its own market."[58] No inquiry was made about the "efficiencies" or "inefficiencies" of Kodak's size, nor about the propriety of its vertical integration.[59] A rule of "what will be, will be" was applied without deciding whether what was was an appropriate size or form of vertical integration in light of the dynamics of the industry and the policies of the Sherman Act. The Sherman Act is a constraint upon the freedom of a firm's size, its

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Oil Co., 541 F.2d 1352 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977); Natrona Service, Inc. v. Continental Oil Co., 435 F.Supp. 99 (D. Wyo. 1977) (bad business judgment is not a violation of the Sherman Act); Copperstone v. Griswold Sporting Goods Co., 1977-2 Trade Cas. (CCH) ¶ 61,623 (E.D. Mich. 1977) (manufacturer's refusal to deal with distributor was unilateral independent business decision based upon a legitimate business reason). *See generally* Buffalo Courier-Express v. Buffalo Evening News, 601 F.2d 48 (2d Cir. 1979) (purchaser of dominant newspaper intended to do as well as he could with the newspaper and had not lain awake thinking what the effect of competition might be on the competitor); Shapiro v. General Motors Corp., 472 F.Supp. 636 (D. Md. 1979), *aff'd*, Nos. 79-1792, 79-1794 (4th Cir. Nov. 20, 1980), *cert. denied*, 101 S.Ct. 1979 (1981) (favoring in-house inventor staff not violation of Sherman Act); SmithKline Corp. v. Eli Lilly and Co., 575 F.2d 1056 (3d Cir. 1978), *cert. denied*, 439 U.S. 838 (1978) (company's entrenched position as drug supplier and rebate plan prevented competition for new non-patented drug); Note, *Refusals to Deal By Vertically Integrated Monopolist*, 87 HARV. L. REV. 1720 (1974); Collin, *Refusals to Deal by Monopolist — Recent Decisions*, 14 AKRON L. REV. 549 (1981).

56. *See* Flynn, *supra* note 2, at 342.

57. 603 F.2d 263 (2d Cir. 1979).

58. *Id.* at 276.

59. For an argument suggesting otherwise, see Note, *Sherman Section 2: A Case of Misplaced Faith in the Innocence of Size*, 4 SAN FERN. V. L. REV. 259 (1975). *But see* Photoland Stores, Inc. v. Eastman Kodak Co., 1980-1 Trade Cas. (CCH) ¶ 63,030 (S.D. N.Y. 1979) (plaintiff's bare bones allegation that since the defendant is large — a "giant monopoly" — it must be guilty of antitrust violations against a small firm which competes against the defendant in a limited area, was without any type of factual support and did not set forth a cognizable antitrust claim).

vertical integration and its behavior,[60] notwithstanding the meaningless cliché that "bigness is not necessariy bad." Bigness is not necessarily good either, and it is clear that the Congress which adopted the Sherman Act had grave suspicions about "bigness."[61] Assuming whatever firm size and integration exists is a part of the natural order of things and beyond scrutiny by the court in a monopolization case is like requiring the plaintiff to kick off from behind its own goalpost or even from outside the stadium. It is the fallacy of determining the propriety of acceptable institutional structure and behavior by the predictions of a model detached from its moral and factual assumptions, or by the strange belief that an inexorable force like gravity dictates firm size and integration and that the resulting size or integration is or should be beyond examination.

We have yet to understand the workings of gravity in realms where there may be some justification for believing there are universal and immutable rules governing the behavior of celestial and other bodies. The affairs of humanity, however, are another matter. It is a part of the teachings of the common law that fixed and immutable rules are as dangerous as no rules at all. A fixed belief in the existence and workings of a magical and neutral force of competition and markets in all places and at all times belies an historical record and common experience to the contrary. If only the Supreme Court in *Otter Tail Power Co. v. United States*[62] and similar cases[63] held such fixed beliefs, many power companies and other natural and unnatural monopolists might rest a bit easier tonight about their vertical integration and the advantages of size. If one assumes the conditions of perfect competition exist at all times and that markets really work with the frictionless beauty of a perpetual motion machine in all circumstances, there might not be much to quarrel with in the *Berkey* court's overly broad generalizations and assumptions. The problem is that the conclusions stated assume one of the basic questions the court was required to decide.[64] As every lawyer trained

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60. This is the primary assumption behind Judge Hand's opinion in *Alcoa*. *See supra* note 9. *See also*, L. BRANDEIS, THE CURSE OF BIGNESS (1935); Schwartz, *Institutional Size and Individual Liberty: Authoritarian Aspects of Bigness*, 55 NW. U.L. REV. 4 (1960).

61. *See generally* H. THORELLI, THE FEDERAL ANTITRUST POLICY (1955).

62. 410 U.S. 366, *reh'g denied*, 411 U.S. 910, *on remand* 360 F.Supp. 451 (D. Minn.), *aff'd*, 417 U.S. 901 (1974).

63. *See, e.g.*, Standard Oil Co. v. United States, 221 U.S. 1 (1911).

64. The court's assumptions are stated at 603 F.2d at 273. For a critical analysis of the assumptions, see Flynn, *supra* note 1, at 77-82.

in the common law process knows, it is a bit silly and self-defeating to decide real world controversies by the unexamined assumptions of a model which may or may not be relevant to the case before the court, takes on different meanings in light of the facts and circumstances peculiar to the case before the court, and is applied in different ways depending on the unique characteristics of the case and the particular goals of the law brought to the fore by the characteristics of the case before the court. It puts one in mind of Holmes' attempt to settle "once and for all" railroad-crossing cases by decreeing that the auto driver must not only look and listen but also stop and get out of the vehicle, walk up to the tracks and investigate whether a train is coming.[65] By the time all this was accomplished and a driver got back to the vehicle, several trains could be on their way to destroy the hapless "reasonable man" who followed the demands of an unrealistic set of assumptions and the requirement that the assumptions dictate the rule to be followed in all cases. Even law school novitiates can see through the gossamer veil of such assumptions and the unacceptable consequences of such a methodology. Reality refuses to conform itself to the assumptions of even Justice Holmes.

Economic analysis of legal issues makes many lawyers uncomfortable. Part of the problem is that lawyers do not like to admit that the jargon of economics is sometimes incomprehensible or that one's knowledge of statistics, algebra, and calculus is either nonexistent or buried in one's dim and distant past of high school or college. Moreover, you can be so impressed by the certitude with which many economists express their conclusions and the apparent scientific certainty of the methodology used to arrive at conclusions[66] that you fear making yourself look foolish if you raise some simple questions about the veracity of the assumptions of the model, its predictions in light of the facts of a particular case, or the relevance of its narrow goals and the methodology wrapped up in the use of the model in light of the different demands of the goals and methodology of the legal process. The model appears one-dimensional,

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65. B. & O. Ry. Co. v. Goodman, 275 U.S. 66 (1927), purportedly distinguished by Justice Cardozo, in Pokora v. Wabash Ry. Co., 292 U.S. 98 (1934).

66. A distinguished legal historian, commenting on the "scientific pretensions" of economic analysis of legal issues has rightly (I believe) observed:

> I have the strong feeling that the economic analysis of law has "peaked out" as the latest fad in legal scholarship and that it will soon be treated by the historians of legal thought like the writings of Lasswell and McDougal. Future legal historians will need to exercise their imaginations to figure out why so many people could have taken most of this stuff so seriously.

Horwitz, *Law and Economics: Science or Politics?*, 8 HOFSTRA L. REV. 905 (1980).

while the legal issue is multi-dimensional. A further ground for discomfort is the possibility that what some forms of economic analysis claim to be telling us and what lawyers in an antitrust case are concerned about are two different things. It is in the last sense, let alone the others, that I think your discomfort about the way economic analysis is often used in antitrust cases is well justified.

Many forms of economic analysis are premised on constraints not present in the circumstances of most litigation — the model's constraints of perfect competition, rational maximizers, pareto optimality and so on. The realities of cases lawyers encounter, cases like *Berkey*,[67] the computer cases,[68] and ReaLemon,[69] and so on, do not abide by the factual assumptions and policy constraints of the model, its predictions or the ultimate question of whether the competitive process has been or has not been unlawfully displaced by the structure or conduct of the alleged monopolist in ways at odds with the goals and policies of the law. Pretending otherwise, as too many recent monopolization cases have been doing, only confuses what lawyers and those with more sophisticated forms of economic analysis are interested in — what facts and factors in light of the broad policies underlying section 2 of the Sherman Act, the teachings of history, the moral policies behind the antitrust laws and the circumstances of a particular case ought to be weighed and relied upon to prove or disprove a violation of the law? Mechanical application of an abstract and artificial model to the facts of a case not in conformity with the assumptions of the model or the policies and methodology of the law is a process incapable of providing a rational and acceptable answer to the questions the law is asking or the goals the legal process seeks to achieve.

I do not wish to be understood as a total naysayer on the use of economic analysis in antitrust litigation, for I believe it can have a most significant and helpful role to play if properly invoked and used in antitrust cases. The careful but skeptical use of inductive economic analysis of the facts and circumstances of particular cases can lend helpful insights, but not fixed rules, for the attainment of

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67. Berkey Photo Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979).

68. *See* Memorex Corp. v. IBM Corp., 636 F.2d 1188 (9th Cir. 1980), *cert. denied*, 101 S.Ct. 3126 (1981); California Computer Prod. v. IBM Corp., 613 F.2d 727 (9th Cir. 1979); Greyhound Computer Corp., Inc. v. IBM Corp., 559 F.2d 488 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040, (1978); Transamerica Computer Co. v. IBM Corp., 481 F. Supp. 965 (N.D. Cal. 1979) Telex Corp. v. IBM Corp., 367 F.Supp. 258 (N.D. Okla. 1973), *rev'd*, 510 F.2d 894 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975).

69. *See supra* note 41.

the legal system's objectives. Among the many examples of this type of helpful economic analysis are Professor Schmallensee's analysis of the *Borden* case,[70] Joskow and Klevorick's analysis of predatory pricing[71] and that of Brodley and Hay on the same subject.[72] The values underlying the model are entitled to some weight in light of the circumstances of the case, but not an exclusive or overriding weight. Unfortunately, however, many recent monopolization cases have not only been using economic insights as a limited potential beginning place for understanding the dynamics of the particular case for decision, but also as a deductive guillotine to dictate a result without regard for the facts of the case or the broader objectives of the law. It is this misuse of simplistic economic analysis, the gumball machine methodology, which is both characteristic of too many of the current antitrust cases and the type of economic analysis I think is objectionable, misleading, and irrelevant to the purpose of the Sherman Act and the function of law in our society.

B. Evolving Conduct Tests

Another feature of many of the recent monopolization cases is the emphasis courts place on the conduct element of the offense. It will be remembered that Judge Hand in *Alcoa*[73] stated it was not enough to prove a section 2 violation simply to show a firm possesses a persistent and overwhelming share of a relevant market. There must be some additional evidence of conduct in the sense of "not honestly industrial"[74] conduct directed toward acquiring or maintaining that overwhelming market share. Judge Hand never quite explained what kind of conduct beyond mere existence and living day-by-day would constitute the kind of conduct sufficient to convict a firm with a large market share of unlawful monopolization. Nor was it clear why conduct of this sort was required to prove a violation, although the harsh penalities of the antitrust laws probably justify a requirement that some kind of blameworthiness be laid at an offender's door before punishment is justified. Even less clear was the question of what conduct by a firm with less than an overwhelming market share — particularly the non-*Alcoa* type behav-

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70. *See supra* note 41.

71. *See* Joskow & Klevorick, *supra* note 29.

72. Brodley & Hay *supra* note 29. *See also* FED. TRADE COMM., STRATEGY, PREDATION AND ANTITRUST ANALYSIS (1981).

73. United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945).

74. *Id.* at 431.

ioral case — might constitute unlawful monopolization or an attempt to monopolize. *United States v. United Shoe Machinery Corp.*[75] and *United States v. Griffith*[76] grappled with, but never clearly settled, the question of what kind and how much conduct evidence is necessary to show a firm with a monopoly has "monopolized" as that concept is used in section 2 of the Sherman Act.

More recent cases, particularly the *Berkey*[77] case and most of the computer cases, save *Greyhound Computer Corp., Inc. v. IBM, Corp.*,[78] have appeared to increase the emphasis on the conduct element of the offense by requiring proof that the conduct necessary to complete the offense be "predatory" rather than just "unnecessarily exclusionary" conduct. Hard competition by a monopolist, such as selective price cuts aimed at preventing inroads into the monopolist's market,[79] design changes to inhibit hooking up a competitor's products to a defendant's computer or phone system,[80] or refusal to

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75. 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

76. 334 U.S. 100 (1948).

77. 603 F.2d 263 (2d Cir. 1979).

78. *See supra* note 68. *See also* Note, Greyhound v. IBM Corp.: *Price Increases as a Form of Predatory Pricing*, 7 RUTGERS J. COMPUTERS TECH. & L. 77 (1979).

79. *See* Flair Zipper Corp. v. Textron, Inc., 1980-2 Trade Cas. (CCH) ¶ 63,555 (S.D. N.Y. 1980) (a manufacturer's price reduction to meet a competitor's prices did not establish a specific intent to monopolize or predatory conduct with a monopolistic purpose; the firm was merely meeting a competitive situation). *See also* William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 652 F.2d 917 (9th Cir. 1981); California Computer Products v. IBM Corp., 613 F.2d 727 (9th Cir. 1979); Transamerica Computer Co. v. IBM Corp., 481 F. Supp. 165 (N.D. Cal. 1979).

80. Northeastern Telephone Co. v. AT&T Co., 1981-1 Trade Cas. (CCH) ¶ 64,027 (2d Cir. 1981); Memorex Corp. v. IBM Corp., 636 F.2d 1188 (9th Cir. 1980) (defendant's development and introduction of a new generation of computers, as well as its development of more advanced peripheral products, were reasonable responses to the competition of plug compatible equipment manufacturers); California Computer Products v. IBM Corp., 613 F.2d 727 (9th Cir. 1979) (industry leader, though a monopolist, had the right to redesign its products to make them more attractive to buyers, by reason of lower manufacturing cost and price or improved performance; monopolist under no duty to help peripheral equipment manufacturers to survive or expand); ILC Peripherals Leasing Co. v. IBM Corp., 458 F.Supp. 423 (N.D. Cal. 1978) (technological justifications for new peripheral parts: reasonable response to the competition); *In re* Use of Carterphone Device, 13 F.C.C. 2d 420, *reconsideration denied*, 14 F.C.C. 571 (1968) (validity of design changes and refusals to allow terminal equipment hookups to the phone system); Rapid Print, Inc. v. Minn. Mining and Manufacturing Co., 1980-81 Trade Cas. (CCH) ¶ 63,787 (D. Mass. 1981) (machine supplier had no duty under the antitrust laws to tailor the design of its product to aid potential competing manufacturers' sales of rival products); Gribbon, *Does the Law of Monopolization Inhibit Innovative Behavior?*, 49 ANTITRUST L. J. 925 (1980).

predisclose new film formats or photo finishing processes prejudicing competing camera sellers and photofinishers respectively,[81] is treated as pro-competitive conduct and not "predatory" conduct one can rely upon to prove unlawful monopolization. In part, this change from the *Alcoa* and *United Shoe* conduct standards may be attributable to the fact that most of the current monopolization litigation is treble damage private litigation, while most of the litigation in earlier times was government-initiated litigation seeking equitable relief displacing monopoly power rather than punishing specific conduct exercising monopoly power.[82] As we shall see later, whether the plaintiff is the government or a private plaintiff seeking treble damages can make a significant difference in both the kind and the quality of conduct evidence courts will allow a plaintiff to rely upon to prove a firm with a monopoly has unlawfully "monopolized." For the moment, however, it would appear that most of the current monopolization litigation — government or private — has been focusing inordinately on conduct issues when the case is not dismissed on market definition issues. The conduct relied upon must be conduct which sinks below the ordinarily competitive level or the standard of "unnecessarily exclusionary" to some ill-defined level of "predatory" or unfair conduct. Little significance is given by most of the opinions to the fact that the conduct is by a firm with monopoly power, rather than just an ordinary firm. Earlier cases[83] did so, perhaps in a common sense recognition of the well-known observation by the mouse who purportedly fell asleep one night next to an elephant. When the badly injured mouse reported his experience to his fellow mice the next day, he observed: "It was frightening — you sure know it when one of those damn things sneezes or rolls over."

Judge Browning, in *Greyhound Computer Corp. v. IBM Corp.*,[84] took the view of the mouse by holding that once a jury has found a defendant has monopoly power, the monopolist is "precluded from employing otherwise lawful practices that unnecessarily excluded

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81. Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979); GAF Corp. v. Eastman Kodak Co., 1981-2 Trade Cas. (CCH) ¶ 64,205 (S.D. N.Y. 1981) (manufacturer's failure to fully disclose technical information regarding its new film and finishing process not the basis of any Section 2 liability here).

82. *See* Flynn, *supra* note 1, at 2, 22.

83. Particularly *Alcoa*, *United Shoe*, and *Grinnell*. *See also* Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927); United States v. Klearfox Linen Looms, 63 F. Supp. 32 (D. Minn. 1945).

84. 559 F.2d 488 (9th Cir. 1977).

competition"[85] from the market. Few other recent cases have adopted a similar standard, with the most prominent of those refusing to do so being the *Berkey* case, although the Government's case charging AT&T with monopolization,[86] still underway in the District of Columbia (unless Congress and the Administration prevent Mr. Baxter from litigating it "up to the eyeballs"),[87] should raise the issue once again. In *Greyhound,* IBM has engaged in several marketing practices that an ordinary competitor might choose to follow, just as Kodak's conduct in the *Berkey* case might be viewed as normally competitive activity in an industry not dominated by a single firm. The *Greyhound* case allowed the otherwise normal but "unnecessarily exclusionary" conduct evidence to go to the jury, however, because IBM could be found to have monopoly power over the leasing of general purpose computers and its conduct must be weighed in light of that reality. The *Berkey* case would not allow otherwise normal but exclusionary under the circumstances conduct by a monopolist to go to the jury unless it was first deemed to be legally predatory conduct. The fact that the conduct was engaged in by a monopolist was not sufficient in *Berkey* to allow the conduct to be weighed by a jury on the unnecessarily exclusionary basis derived from the *Alcoa* and *United Shoe* tradition. *Berkey* ignores the fact that, as elsewhere in the law, the elements in a legal test for drawing the line of illegality are relational and not independent categories. Treating each step of the analysis as separate and distinct produces the incomplete portrait of a paint by the numbers exercise rather than an artistic effort.

In a preliminary opinion in the *United States v. AT&T Co.*[88] case, upholding the Government's case over Bell's motion to dismiss at the end of the Government's case, the court applied the *Greyhound* standard to Bell's conduct and took account of the relationship between monopoly power and conduct. Once a firm has been found to possess monopoly power, the traditional test has been that the firm has an affirmative duty to avoid unreasonably excluding others.[89] If there is a substantive conflict here, and I believe there is,

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85. *Id.* at 498.

86. United States v. AT&T Co., 1031 ANTITRUST & TRADE REG. REP. (BNA) H-1 (Sept. 17, 1981) (remarks prepared tentative to settlement of the case).

87. N.Y. Times, April 10, 1981, § A, at 1, col. 6.

88. *See supra* note 86.

89. *See* Flynn, *supra* note 1, at 118. *See also* Massena v. Niagara Mohawk Power Corp., 1980-2 Trade Cas. (CCH) ¶ 63,526 (N.D. N.Y. 1980) (follows *Greyhound* standard, but carries the reasoning one step further to find that nothing in the Sherman

sooner or later the conflict must be resolved by the Supreme Court. The conflict can be viewed either as an evidentiary one of what kind of conduct a plaintiff must show before a jury or trial court acting as a fact-finder will be permitted to consider the case, or as a conflict over the standard of proof a jury or fact-finder must apply before it may conclude a monopolist has illegally monopolized. The conflict is one between defining a monopolist's duty and the level of the burden of proof the plaintiff must bear before a fact-finder may find the duty has been breached. *Berkey* requires proof that the conduct be "predatory" as a way to draw a line between conduct which is an exercise of monopoly power and conduct which is an expression of "efficiency" and legitimate competition by the presumably efficient vertically integrated possessor of the inherently right size. *Greyhound* sees the question as one of increasing the duties of elephants as they grow in size to avoid disrupting the competitive process, with the elephant's otherwise normal behavior an issue of fact for jurors to weigh once the court has defined the duty and the standard of proof for its breach.

The division of judge and jury functions and the scope of appellate review of contested lower court findings is deeply affected by which path one chooses to follow. An elephant's size, even when it is doing the same innocent things as other beasts in the forest, is seen by the *Greyhound* court as a factor a jury must weigh in light of the potential consequences for those who innocently get in the way and are injured by conduct which would not otherwise harm the innocent when engaged in by non-elephants. The *Berkey* court is willing to let elephants have their way so long as their conduct is not objectively "predatory," without reference to the elephant's size, whatever "predatory" may mean standing alone and without reference to the other facts of the case.

These conflicting approaches are at the heart of many current monopolization cases. It is a conflict presenting the troublesome task of how we go about sorting out pro-competitive and anti-competitive behavior in light of a defendant's size, structure of the industry and other facts unique to the case. Both pro- and anti-competitive behavior injure competitors; some better standard capable of consistent application must be found to distinguish one from the other.[90] The issue is also one of finding a means for drawing the line

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Act requires a monopolist to affirmatively assist potential competition by subsidizing their entry into the marketplace or granting them preferential access to a unique facility).

90. For some suggested standards, *see* Flynn, *supra* note 1, at 114-28.

between judge and jury functions, a responsibility ignored in too many antitrust cases. What is needed is a better standard to accomplish both the objective of distinguishing pro-competitive conduct from that which unreasonably displaces the competitive process, and the objective of protecting the constitutional right of plaintiffs and defendants to have questions of fact determined by a jury. Until a workable standard is found, conflicting precedent on the conduct standard guarantees conduct will be the major issue in most future monopolization litigation, public or private.

C. *The Impact of Deregulation*

Several recent monopolization cases have also involved regulated industries or industries in the process of being deregulated. The Burger Court has been particularly activist in following up on the Warren Court's narrowing of the scope of exemptions from the antitrust laws. In the Warren Court era, several cases restrictively interpreted the scope of federal regulation exempting the regulated from antitrust liability by tightening up the doctrine of primary jurisdiction and its application.[91] The Burger Court has been doing the same thing with state-regulated monopolists by narrowing the state action exemption for inconsistent schemes of state regulation[92] and by limiting the scope of state regulation by expanding constitutional doctrines by devices such as finding a first amendment right of commercial speech.[93] This has meant that many of the practices of regulated industries previously thought immune from examination on antitrust standards might be open to antitrust attack where the specific practice is not expressly exempt, or where it is not an activity aggressively and affirmatively regulated by some "sovereign" authority of the state. In *City of Mishawaka v. American Electric Power Co.*[94] federal regulation of wholesale electric rates and state regulation of the retail rates of an electric power company did not preclude the application of federal antitrust policy to a price squeeze by A.E.P.'s manipulation of its regulated wholesale and retail rate

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91. *See, e.g.*, Carnation Co. v. Pacific Conference, 383 U.S. 213 (1966); United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963); California v. FPC, 369 U.S. 482 (1962). *See generally* Sullivan, *supra* note 12, at 746-49.

92. *See* California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980); Fox, *The Supreme Court And The Confusion Surrounding The State Action Doctrine*, 48 ANTITRUST L. J. 1571 (1980).

93. *See* Bates v. State Bar of Ariz., 433 U.S. 350 (1977); Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748 (1976).

94. 616 F.2d 976 (7th Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981).

structure to injure competing municipal power companies. In the government's *AT&T*[95] case, the trial court has held the existence of regulation of Bell's activity is not dispositive of the Government's monopolization claim, and that deregulation of connecting equipment by the *Carterphone*[96] decision of the FCC opens Bell's practices restricting the use of non-Bell equipment in the phone system to antitrust scrutiny.

Lawsuits by Bell's competitors seeking treble damages for various Bell activities have reached divergent results. M.C.I.'s billion dollar plus judgment is on appeal[97] and a federal district court in New York has entered a $277 million verdict for Litton against Bell.[98] Meanwhile, the Second Circuit reversed a $16.5 million judgment against Bell in *Northeastern Telephone Co. v. AT&T*[99]. In all three cases, FCC regulation was found not to preclude application of the antitrust laws to a variety of activities by AT&T. For example, in *Northeastern Telephone Co.* the absence of FCC action pursuant to a specific congressional grant of authority or a pervasive scheme of regulation evidencing a congressional intent to exempt the activity in question from antitrust constraints subjected Bell to potential antitrust liability for practices in dealing with another phone company. The court, by applying the Areeda-Turner marginal cost standard[100] to Bell's pricing practices, held Northeastern failed to prove AT&T's conduct constituted predatory pricing or that Bell had engaged in an anti-competitive manipulation of coupler designs for P.B.X.s. The *Northeastern* case stands for a narrow reading on the scope of exempted activity of a previously assumed regulated industry. Even in this additional Second Circuit opinion ignoring the section 2 "elephant" precedent of *Alcoa* and *United Shoe,* the presumption against exemption from antitrust constraints for a regulated industry is a strong one and cases like *Northeastern* appear to be making it stronger than in the past.

If one surveys the monopolization cases of the past ten years, many of them are cases involving an industry partially or exten-

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95. United States v. AT&T, 1031 ANTITRUST & TRADE REG. REP. (BNA) H-1 (Sept. 17, 1981).

96. 13 F.C.C. 2d 420 (1968).

97. MCI Inc. v. AT&T Co., 947 ANTITRUST & TRADE REG. REP. A-20 (Jan. 17, 1980); 969 ANTITRUST & TRADE REG. REP. (B.N.A.) A-3 (June 19, 1980).

98. Litton Sys., Inc. v. AT&T Co., 1981-2 Trade Cas. (CCH) ¶ 64,306 (S.D. N.Y. 1981).

99. 1981-1 Trade Cas. (CCH) ¶ 64,027 (2d Cir. 1981).

100. *See supra* note 28.

sively regulated.[101] The explanation for this state of affairs is a combination of several factors, including the shift in doctrine on the scope of the primary jurisdiction and state action concepts. In both areas the scope of the exemption has been substantially narrowed by the courts, thereby greatly expanding the potential antitrust liability of firms which have long assumed they are vaccinated against antitrust liability. Moreover, many regulated industries are monopolies by definition, and therefore are usually sued under section 2 of the Sherman Act when their conduct strays from the shelter of the regulatory scheme. Regulated companies in many industries are not yet sensitive to their potential antitrust liability, and act accordingly. Competitors are not just injured, but they are injured by less than subtle, and often blatant, anti-competitive conduct.[102] In other cases, the intersection of antitrust and regulation is not very clear and little or no precedent exists on the question of the scope of immunity.[103] A regulated industry acts with the peril that judicial hindsight may find the activity not clearly or validly exempt and therefore subject to antitrust scrutiny. In still other cases the aura of regulation generates activity later judged not to be within the scheme of regulation or not actively enough regulated to escape scrutiny under antitrust policy.[104]

These realities, and the fact that the defendant by definition is usually a monopolist, make many regulated industries a happy hunting ground for antitrust litigators and will likely insure significant future monopolization litigation in the regulated industries area. It is a characteristic of several recent monopolization cases and one likely to continue. Lawyers serving such clients should not only take note, but should also keep abreast of the rapidly changing doctrine in the area because today's standards have a way of being ignored or

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101. *See* cases cited *infra* notes 102-04. *See also* United States v. AT&T Co., 1031 ANTITRUST & TRADE REG. REP. (BNA) H-1 (Sept. 17, 1981). Town of Mishawaka, Inc. v. American Elec. Power Co., 616 F.2d 976 (7th Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981); Mid-Texas Communications Sys. v. AT&T Co., 615 F.2d 1372 (5th Cir.), *cert. denied*, 101 S.Ct. 286 (1980); City of Groton v. Connecticut Light & Power Co., 497 F.Supp. 1040 (D. Conn. 1980); T.V. Signal of Aberdeen v. AT&T Co., 1981-1 Trade Cas. (CCH) ¶ 63,944 (D. S.D. 1981).

102. *See* Otter Tail Power Co. v. United States, 410 U.S. 366, *rehearing denied*, 411 U.S. 910 (1973); Woods Exploration & Prod. Co. v. Alcoa, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972).

103. *See* Ricci v. Chicago Mercantile Exch., 409 U.S. 289 (1973); United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963).

104. *See* Cantor v. Detroit Edison Co., 428 U.S. 579 (1976); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975); Silver v. New York Stock Exch., 373 U.S. 341 (1963).

rapidly displaced by tommorrow's court decisions in this era of "deregulation."

D. The Significance of Private Monopolization Cases

A further characteristic of recent monopolization litigation is that most of it, by a surprisingly large margin, is treble damage litigation rather than government-litigated cases.[105] In the past few years there has been a veritable epidemic of private section 2 cases, compared to previous generations of section 2 litigation. This is a factor which was not present in the *Alcoa-United Shoe* era of monopolization litigation. It is a factor of more significance than merely a confirmation of the growth in private antitrust and litigation expertise by the private bar and the growing willingness of major businesses to sue each other. In the genteel past, members of the economic establishment simply did not sue each other but usually resolved conflicts at the "club." The fact that a monopolization case is a private damage action has a substantive impact, particularly on the conduct element of the case. This is because conduct occurs in two different senses in a private monopolization case: one must not only show that some conduct by a firm with monopoly power caused unlawful monopolization, but also that the unlawful monopolization is in fact the conduct which caused the specific antitrust injury about which the plaintiff complains.[106] To put it another way, there are two levels of causation — one in law, the other in fact. A private plaintiff needs to show a violation of law caused the plaintiff measurable antitrust injury (factual causation), but to show a violation, a plaintiff must show conduct proving a defendant with monopoly power has caused monopolization to take place (legal causation).

As the *Berkey*[107] case illustrates, proof of conduct completing a section 2 violation (i.e., monopolization), without proof that the specific violation caused the plaintiff specific antitrust injury (is factually connected to claimed antitrust injury), is not sufficient to uphold a verdict. The element of factual causation justifying a damage verdict has not been proved. Berkey's camera claim and its claim

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105. *See* Flynn, *supra* note 1, at 33.

106. *Id.*

107. Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979). "Recently we have also seen conduct evidence used to exculpate monopoly power where it clearly seemed to exist and its existence appeared to injure the public interest, even though the private plaintiff bringing the case had problems with proving causation and the fact of damage." Flynn, *No Conduct Monopolization: An Assessment for the Lawyer and Businessman*, 49 ANTITRUST L. J. 1255, 1271 (1980).

that Kodak unlawfully monopolized by refusing to disclose its new film format to competing camera manufacturers failed on this ground. Berkey's additional claim for overcharges in the film and color paper markets was also reversed, in part by the creation of an impractical and ridiculous causation test that required Berkey to prove a factual connection between the amount of overcharge and Kodak's wrongful conduct making a monopoly many years in the past and making the present day monopoly overcharge possible. A more sensible test would have imposed the burden on Kodak to disprove a connection between illegal conduct in the past and plaintiff's damage in the present, and would allow the jury to determine if that burden had been carried and by what margin.[108]

The interrelationship between conduct to prove a violation and conduct to prove damages places unique limitations on the conduct element in private cases, because the conduct evidence in a private case must do double duty — prove both a violation of the law, and a nexus or factual connection between the violation and measurable antitrust injury to a particular plaintiff. Cases like *Berkey* pivot on the conduct and causation element, a factor which can severely limit the kind of conduct a private plaintiff may rely upon to prove a violation of the law, measurable antitrust damage to the particular plaintiff, and the amount of damage. Whether such cases are strong precedent on the conduct element in subsequent government cases, or even in other private treble damage cases, is problematical at best, because the conduct element of each case is necessarily *sui generis* in light of the double function conduct must usually play in the liability and damage phases of the case.

E. Other Characteristics

There are some other noticeable characteristics of present day monopolization litigation. The procedural and discovery complexity of the big monopolization cases, a feature noted by President Carter's Antitrust Commission,[109] has begun to get out of hand — well out of hand. The Antitrust Division's IBM case is in its twelfth year, now dismissed — almost six years of it in trial. Over at the FTC, a case challenging the structure of the oil industry in the Southeast United States was finally abandoned this year after it was admitted the case was too big for even Ralph Nader to hope it could

108. Flynn, *supra* note 1, at 89-90.

109. *See supra* note 7, at 151-54.

ever be successfully litigated.[110] Among the motions filed and fully litigated by such friends of the environment as Mobil, Gulf, Shell and Socal was one claiming the FTC was required to file an environmental impact statement when filing its case.[111] Upon reflection, after seeing how many trees have been sacrificed to keep the paper flowing in the case, maybe the motion was not as specious and farfetched as it first seemed. The "Cereal Case" on a shared monopoly theory has probably seen its last days as a result of the administrative law judge finding the FTC had failed to prove its case.[112] After seven or eight years of the respondents hysterically fighting the case in every conceivable forum, including lawsuits by the city of Battle Creek,[113] union demonstrations[114] and assaults on the FTC budget by hometown members of Congress from Michigan,[115] it is anticlimactic to see a case which has exposed the current meaning of "propriety" for legislators and generated so much heat and so little light disposed of on such a mundane ground as failure to prove the claim.

The discovery and procedural morass characteristic of most monopolization litigation cannot help but have several effects upon the decision to bring cases, the standards courts and the FTC apply in the cases which are brought, and the overwhelming drain a case can mean for a court or client confronted with the case. Fear of the morass itself may begin killing off the litigation or preventing the trial of legitimate defenses, because few firms or even the government can afford to bring or defend a case when it gets out of control. I suspect, and with good reason, that the ability to make a case a pro-

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110. *In re* Exxon Corp., No. 8934, 3 TRADE REG. REP. (CCH) ¶ 21,866 (F.T.C. 1981).

111. *See* Mobil Oil Corp. v. FTC, 562 F.2d 170 (2d Cir. 1977).

112. *In re* Kellogg Co., No. 8883, 3 TRADE REG. REP. (CCH) ¶ 21,864 (F.T.C. 1981) (administrative law judge dismissed FTC complaint on grounds the staff failed to substantiate their conspiracy to monopolize or shared monopoly theories). *See* Mueller, *Advertising, Monopoly and the F.T.C.'s Cereal Case: An 'Attack on Advertising'?*, 6 ANTITRUST L. & ECON. REV. 59 (1973).

113. 945 ANTITRUST TRADE REG. REP. (BNA) A-27 (Jan. 3, 1980) (W.D. Mich. 1979).

114. Union pressure in the cereal case did cause the FTC to permit union intervention in antitrust proceedings which threaten jobs. *See* 955 ANTITRUST & TRADE REG. REP. (BNA) A-12, F-1 (Mar. 13, 1980); Wall St. J., Mar. 13, 1980, at 12, col. 2.

115. *House Subcommittee Approves Restriction on FTC's Cereal Case, 1020* ANTITRUST & TRADE REG. REP. (BNA) A-10 (June 25, 1981). *See also* 1002 ANTITRUST & TRADE REG. REP. (BNA) A-2 (Feb. 19, 1981); 1039 ANTITRUST & TRADE REG. REP. (BNA) A-22 (Nov. 12, 1981) (Sen. Riegle reportedly held up FTC budget to prevent appeal of the case from Administrative Law Judge dismissal of the action).

cedural morass has itself become a prime litigating strategy on the part of both plaintiffs and defendants; one likely to be followed if it appears that a case can be won by litigating everything but the merits. The recent action by the federal district court in *Litton Systems, Inc. v. AT&T Co.*[116] of denying attorney's fees to the successful ($277 million verdict) plaintiff's lawyers for alleged gross negligence and willful misconduct in responding to discovery requests may be part of a trend toward preventing abuse of the morass of a big case by the use of sanctions. In *United Nuclear Corp. v. General Atomic Co.*,[117] a state supreme court upheld an antitrust default judgment worth hundreds of millions of dollars for a refusal to comply with valid discovery orders. To the extent that these cases may represent a strategy of winning by excessive gamesmanship, the tactic may backfire if the noticeable trend of some courts getting tough with those charged with engaging in such conduct continues to develop.

A further feature of modern monopolization litigation is the greater willingness of the parties to politicize the process of litigating the case. Whether rightly or wrongly, the cereal companies took their case to Congress while it was pending at the FTC. In Congress, the issue was not whether the companies had violated the law or not, but whether Congress should fiddle with the FTC's budget as the budget applied to a specific case.[118] Winning a case by a line item vetoing the enforcement agency's budget to maintain the case may be shrewd politics, but scarcely comports with, among other things, the traditional limits on the propriety of tactics for litigating cases. At one time, the consensus of the profession and members of Congress was that cases were tried on their merits in the forum designated by law and not by one's political clout in Congress. There was a time when even Congress was shocked by such tactics and gave short shrift to such special interest legislation in cases like the attempt to overrule the *El Paso* merger case by special legislation.[119]

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116. 1981-2 Trade Cas. (CCH) ¶ 64,306 (S.D. N.Y. 1981).

117. 597 P.2d 290 (N.M. Sup. Ct.), *cert. denied*, 444 U.S. 911 (1979).

118. 1000 ANTITRUST & TRADE REG. REP. (BNA) A-14 (manufacturers attack charges of monopoly as a discredited theory); 1006 ANTITRUST & TRADE REG. REP. (BNA) A-20 (Mar. 19, 1981) (Members of Congress from Michigan have introduced bills to place a moratorium on any decision in the FTC case until Congress has considered the question of prosecuting shared monopolies. Kellogg, based in Battle Creek, Michigan, has endorsed the shared congressional effort).

119. Litigation of the *El Paso* case began in 1957 with a government challenge of El Paso Natural Gas Company's acquisition of the Pacific Northwest Pipeline Corpo-

Times and the members of Congress change, however, and if litigating pending cases by legislative attacks becomes an accepted tactic and the new ethical standard for defining a legislator's duty to the folks back home and a lawyer's duty to his client, future antitrust institutes should devote sessions to lobbying skills rather than litigating skills. Lawyers handling tax cases and defending criminal cases might take note and follow the same tactics if their clients have enough funds and friendly members of Congress complain enough to respond. Law schools and CLE Programs should offer courses in how to channel campaign contributions to P.A.C.s with a minimum of publicity and how to achieve technical compliance with the minimal standards of campaign finance laws.

AT&T has been a bit more direct in response to Mr. Baxter's original but quickly evaporating promise to litigate the Government's *AT&T* case "up to the eyeballs."[120] Instead of seeking to undermine the case by amending the enforcement agency's budget, AT&T has sought legislation legalizing that structure of the Bell system that the government claims is illegal.[121] For some reason the Administration has given the Commerce Department a big say in the Justice Department's case and the Department of Defense has trotted out "national security"[122] as a grounds for Congress to avoid application to AT&T of the law with which everyone else is supposed to live. The Senate has passed the Bell bill by a lopsided margin[123]; it will be interesting to see what happens in the House now that the lobbying battle has heated up.

While there may be some truly unique cases where Congress should intervene to stay the hand of a mistaken prosecution, one not in the broader national interest, or by an agency gone amuck, I do

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ration. Litigation of the case to full divestiture, 17 years later, in 1974, involved at least eight proceedings in the Supreme Court, four of which provoked significant Supreme Court opinions. Utah Public Serv. Comm. v. El Paso Natural Gas Co., 395 U.S.. 464 (1969), *reh'g denied*, 399 U.S. 937 (1970); Cascade Natural Gas Co. v. El Paso Natural Gas Co., 386 U.S. 129 (1967), *on remand*, 291 F.Supp. 3 (D. Utah 1968), *vacated*, 395 U.S. 464 (1969), *reh'g denied*, 399 U.S. 937 (1970); United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964); California v. FPC, 369 U.S. 482 (1962).

The political battles of the case are reported in *Hearings, The Antitrust Improvements Act of 1975*, Part I, U.S. SENATE ANTITRUST MONOPOLY SUBCOMM., SENATE JUDICIARY COMM. 432 (1975).

120. *See supra* note 87 (now dismissed on tentative settlement).

121. *See* S.898 96th Cong. 1st Sess. 1980; H.R.6121 96th Cong. 1st Sess. 1980.

122. N.Y. Times, April 10, 1981, § A, at 1, col. 6, & § D, at 3, col. 1.

123. Wall St. J., "A. T. & T. Measure Passes Senate on 94-to-4 Vote", October 8, 1981, at 6, col. 1.

not think these two cases present such a circumstance. If "Baby Bell"[124] can be sufficiently separated from the regulated side of the business by the Bell bill, for example, to meet the antitrust and regulatory concerns of opponents of the bill, it is difficult to understand why Baby Bell should not be spun off completely. Special interest legislation of this sort represents a noticeable trend in some modern monopolization litigation — a disturbing and undue politicizing of the process of enforcing the law in the courts. For those apparently large enough or those with sufficient political clout, appeal to the rule of law through the judicial process is not good enough. A few years ago, this kind of response — politicizing the process — usually met with universal disdain or at least indignant columns in the press by muckrakers. Things have gone so far the other way, however, that even the Assistant Attorney General and the Chairman of the FTC can implicitly claim the authority to amend laws Congress has passed by decreeing they will not bring cases against those persons to whom Congress intended the law be applied[125] and that they will intervene in private cases they believe of no merit, even though Congress gave private parties the exclusive right to bring their own cases. The law makes no mention of the government coming in on one side or the other of a private case. In a case with which I was involved where government intervention was repeatedly hinted, I hoped the government would do so. It would have been interesting to undertake a little discovery from the government's files and phone logs to learn who or what was behind the government's interest in the case and why the government appeared so anxious to bring information I thought irrelevant to the case to the trial judge's attention. The government should be treated as a party, if they intervene in private cases, in light of the substantial risk generated by the realities of modern politics that the intervention is on behalf of a friend of a litigant and not because the government is acting as a friend of the court.

I have no doubt that well-intentioned enforcement officials can and should become irritated with the fact that most of the litigation defining the meaning and scope of the antitrust laws is beyond their control. That is because the vast majority of litigated cases are pri-

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124. Wall St. J., "Bill to Deregulate Much of Bell's Phone Business and Let It Enter Data Field Goes to Senate Today," October 1, 1981, at 48, col. 1.

125. This is particularly the case with regard to vertical and conglomerate mergers and enforcement of the Robinson-Patman Act. Congressional criticism is mounting, and properly so, on just this basis. *See* 1037 ANTITRUST & TRADE REG. REP. (BNA). A-8 (Oct. 28, 1981).

vate ones, not government cases. At times, the decision in a private case can have widespread ramifications for public enforcement. Congress has mandated such a system, however, and has made no allowance for public officials in the exercise of their enforcement discretion to intervene in the exercise of a private litigant's enforcement discretion. In this area, the only tampering with public or private enforcement discretion has been Congress' decision to permit the intervention of private parties in public enforcement and not vice versa. Government abuse in the consent decree process[126] led to the amending of Section 5 of the Clayton Act[127] to open the consent decree process for comment by those having an interest in the decree. No similar amendment of our basic antitrust statutes has been proposed, justified or enacted to provide for government intervention or comment in private cases. Moreover, I believe it would be unwise and counterproductive to do so or to permit the government to do so by appealing for the exercise of judicial discretion to permit amicus participation out of an undue judicial respect for government expertise. Government intervention in private cases should be limited to amicus curiae participation at the unilateral invitation of the court, and only then at the appellate level in unusually significant cases where the court concludes it wishes to have the views of those charged with public enforcement of the antitrust laws.

Enforcement discretion is a valuable and necessary thing, but it can be carried too far, constituting an assumption of legislative or judicial functions. For example, the proposal of Mr. Baxter to selectively intervene in private suits is an unwise, as well as unauthorized, step because the enforcement agencies will find themselves besieged by lobbyists pleading for government intervention on one side or the other in many, if not every, private case. Enough lobbying of this type currently takes place with regard to inducing or preventing amicus participation by the government in private litigation reaching the Supreme Court. While our present leaders of the enforcement agencies may be persons of impeccable integrity and the highest ideals, sooner or later in our present climate of excessive financial influence in our political life, an undue politicizing of the process can be expected, if not predicted. Politicizing the process becomes undue when the appearance, as well as the reality, of political favoritism influencing a decision to intervene takes place. With

126. For the legislative history of the amendment, see [1974] U.S. CODE CONG. & ADMIN. NEWS 6535.

127. 15 U.S.C. § 16 (1976).

all the corporate and other special interest P.A.C.s about, I do not see how either risk can be avoided, no matter how upstanding enforcement officials may be. The proposal that the Antitrust Division be free to intervene in private cases strikes me as not only poorly thought out and unwise, but also naive and dangerous for the effective, honest, and evenhanded enforcement of the law. Moreover, it is arrogant to believe that all the wisdom for what "ought" to be a violation of the law in particular cases resides in the Antitrust Division. Congress has placed its trust elsewhere — in an adversary process supervised by the courts and subject to appellate review, the objective review of judges with a perspective not confined by a theology out of touch with reality, nor by the transitory political needs of an incumbent administration, nor by a politically distorted view of the practical affairs of the world.

It is likely that the current attitude of enforcement officials will result in a substantial decline in government section 2 cases and efforts to slow down the filing of private ones or, if Mr. Baxter is to be believed, an unwise and dangerous attempt to intervene in private cases the incumbent Administration does not like. While changing the emphasis of enforcement policy is probably justified as a matter of enforcement discretion and because of shifts in philosophy as a result of the election returns in some instances, the basis on which the authority to change that emphasis is now being claimed skates perilously close to an undue exercise of executive and administrative power. It is a risky venture inviting an undue politicizing of the process of enforcing the antitrust laws. It does not seem that Abscam, Watergate and Dita Beard were quite that far in the past. Apparently, times have changed or our memories are indeed short.

III. Thoughts For Improving the Process

Given these characteristics of current monopolization litigation — its costs, its length, its complexity, and its political sensitivity — are there better ways to deal with monopoly power in the economy? Some proposals have been made in recent years, although not many appear likely to be adopted in the current political climate. I mention them only in summary fashion, but note that other reforms of the antitrust laws, such as the Celler-Kefauver Act and the Hart, Scott, Rodino Act, took a decade to achieve — but they did become law.

A. *Adoption of No Conduct Monopolization*

President Carter's Antitrust Commission recommended study of something called "no conduct monopoly."[128] This idea suggests that Section 2 of the Sherman Act be amended to provide for a government—initiated case against firms found to possess persistent monopoly power. The action would not be available in private cases, nor would it have any res judicata or collateral estoppel effect in subsequent private cases. The Government would be required to show that a defendant possessed persistent monopoly power in a significant part of commerce. Upon such a showing, the case would proceed to the remedy issue, where the normal remedy would be dissolution or divestiture. In the remedy phase of the case, "efficiencies" would be a defense to dissolution or divestiture and, where shown, would preclude dissolution or divestiture. Conduct issues would play little or no role in the case, because the focus of the case would be the defendant's persistent possession of monopoly power. The rationales for the proposal are that no conduct monopolization would deal efficiently with the central issue in major structural monopolization cases without undue conduct evidence, that issues of efficiency would receive their due in the remedy phase of the case, and that the absence of a risk of treble damage litigation or other penalties following the Government's case imposed thereby would reduce the present tendency toward and oppportunity for endless litigation.[129]

B. *Adoption of a Duty-Risk Methodology in Private Litigation*

We do not have time here to elaborate upon a proposal for treble damage monopolization litigation I have made elsewhere.[130] Under this method of breaking down a case, there would be four distinct issues a treble damage plaintiff would be required to prove before a

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128. *See supra* note 7, at 154.

129. *See* Dougherty, Kirkwood & Hurwitz, *Elimination of the Conduct Requirement in Government Monopolization Cases*, 37 WASH. & LEE L. REV. 83 (1980); Flynn, *Proposed Elimination of the Conduct Requirement for Proving Monopolization in Government Cases Under Section 2 Statement*, 48 ABA ANTITRUST L. J. 845 (1979); Flynn, *No Conduct Monopolization: An Assessment for the Lawyer and Businessman*, 49 ANTITRUST L. J. 1255 (1980); Hart, Milman, Stein, Brett, Cassirer, Holcomb & Lobenfeld, *Comments on the Proposal of Professor John J. Flynn on No-Fault Monopoly*, 49 ANTITRUST L. J. 897 (1980); McKinney, *The Case Against No-Conduct Monopolization*, 37 WASH. & LEE L. REV. 73 (1980).

130. Flynn, *supra* note 1, at 111-30; Flynn, *Rethinking Sherman Act Section 1 Analysis: Three Proposals for Reducing the Chaos*, 99 ANTITRUST L. J. 1593 (1980).

defendant would be held liable in treble damages: 1) Is there a factual connection between plaintiff's injury and the defendant? 2) Does the legal system's protection extend to the interest that plaintiff seeks to vindicate and, if some protection is afforded, what standard of care does the legal system impose on the defendant? 3) Was the standard of care breached by the defendant? 4) What are the damages?

This system of analysis avoids confusion of legal and factual cause and makes clearer the central issue of whether a defendant has violated the law or not vis-à-vis the particular plaintiff bringing the suit. It avoids the problem illustrated by cases like *Berkey* and *CalComp*—confusing questions about proof of a violation of the law with questions about proof of damages to a particular plaintiff which is claiming the violation caused it measurable antitrust damage. A close reading of many current monopolization cases indicates that they were brought by plaintiffs who had not carefully thought through their case. Others present a confused mishmash of analysis by a court because no consistent methodology for sorting out the issues of violation and damages is followed by the courts in treble damage monopolization cases. The standards for determining what it is that violates the law, who may sue, which party has the burden of proof on what issues, which are questions of fact and questions of law for court and jury for trial and appellate review purposes, what level of proof is required to get to a jury on each issue of the case, and confusion of issues like causation in law with causation in fact occur regularly or vary greatly from case to case and court to court. Consistent patterns of analysis, other than that plaintiffs usually win or defendants usually lose in a particular court, circuit, or combination of judges on a panel, are few and far between. The problem is particularly acute in private litigation where more than just violation of the law must be proved. It is not enough to prove the law was violated; a private plaintiff must also prove it is a violation causing the particular injury about which the particular plaintiff complains. The converse is also true. It is not enough to show a defendant's conduct injures a plaintiff; the plaintiff must also show that its injury has been caused by virtue of a violation of the antitrust laws. Too many recent monopolization cases have proved one-half of the case without proving the other or have resulted in a court confusing one with the other, an indication that the lawyers involved have not carefully thought out their case or that the courts involved have not kept analytically distinct the basic elements of a private cause of action grounded in Section 2 of the Sherman Act. Adoption of a duty-risk format for organizing the analysis would bring a much

needed reform to private monopolization litigation.

C. *Closer Judicial Supervision of the Litigation*

A final suggested reform for monopolization litigation is that of the N.C.R.A.L.P. Report: active judicial management of the big case.[131] This is being tried in the government's AT&T case. It will be interesting to watch whether it makes a difference. Thus far, the case is moving along with relative dispatch, a dispatch relative to the complexity and significance of the case. Active judicial management and supervision cannot but help to speed along the truly big case. What it means for lesser cases remains to be seen, but I remain a skeptic about whether active judicial management without lawyer self-discipline can accomplish much. Winning at any cost and by just about any means is beginning to infect the litigation of too many cases. The self-imposed ethical consensus of what are acceptable tactics in the litigation process are just as important as the explicitly defined standards by ethical codes and criminal statutes. When those unwritten standards sink to new lows of what is considered legitimate behavior, judicial enforcement of some written ethical code will prove to be of no avail. The morass of the big case will continue because the principal architects of the morass will want it to do so and they or their clients will benefit from doing so.

IV. Conclusion

We have been living through one of the three great waves of monopolization litigation under the Sherman Act. It is similar in its size and scope to the pre-World War I wave and the post-World War II wave of significant and substantial monopolization cases.[132] It remains to be seen whether the wave has reached its zenith and is about to crash or whether it is a "roller" destined to keep moving on for a sustained period of time. In my judgment, the wave is quickly receding to the extent it has been kept going by the big government case. The current Administration is not likely to initiate significant new monopolization litigation or even horizontal merger cases, let alone vertical or conglomerate merger cases. The Administration even appears reluctant to keep pushing those cases that are in the mill and apparently wishes to devote its resources to complicating cases private parties choose to bring. By the time Orwell's 1984 rolls

131. *See supra* note 7, at 12-13.

132. *See* Flynn, *supra* note 1, at 4-8.

around, Fortune's 500 may shrink to Fortune's 50, assuming "supply side" economics does not wipe them all out, as a result of a policy of benign neglect by enforcement officials and the drive by large firms to merge, apparently only for the sake of doing so.

A parasitic industry of lawyers, banks, securities specialists, accountants and others has grown up with a vested interest in keeping large mergers going. Many of the current mergers make little economic sense and promise no observable public benefits. The only beneficiaries appear to be the parasites, napoleonic managements, and unemployed bureaucrats whose skills will be needed to create the vast and unwieldy new bureaucracies that will be required to mismanage new empires of privilege and power. It is peculiar to watch the Reagan Administration strenuously dismantling vast government bureaucracies on efficiency grounds while blessing or tolerating the creation of inefficient private bureaucracies because it is assumed they are "efficient" by the dictates of the theology by which the Administration lives. The clear message appears to be one of laissez-faire in government enforcement efforts, along with laissez-faire in the other general activities in which government engages, with the exception of defense contractors, tax subsidies for the rich, pork barrel in Tennessee and subsidies for sugar and tobacco producers from the states of politically useful legislators.

The continuation of private litigation, however, is another matter. There is still steam behind private treble damage litigation; it would not be surprising if wave three monopolization litigation keeps rolling along because of private lawyer and client "free enterprise" combined with the relaxation of active government enforcement of section 2. We may well witness the advent of laissez-faire in government enforcement stimulating a resurgence in private litigation — a result I am not certain will be widely appreciated or warmly received in Washington circles. Washington objections notwithstanding, however, private litigation faces the prospect of a growing number of hurdles. Restrictive lower court standards on the conduct issue and widespread confusion about the elements of the offense make recourse to section 2 risky at best and defense of a section 2 case a gamble which might not be worth taking. Judicial reliance on abstract economic models, the type promoted at the corporate financed finishing school for federal judges in Miami,[133] may result in a purely coincidental relationship between the analysis a court brings to a case and the reality of the case.

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133. *See* Barbash, *supra* note 13.

Any survey of recent monopolization litigation can only conclude that while the bottles may have changed the same old wine is involved. How do we define markets, measure the presence or absence of monopoly power and sort out pro-competitive and anti-competitive conduct by a monopolist? What values is the law designed to express and what goals is it meant to achieve? An exclusive reliance upon economic models does not seem up to the task; perhaps it is time we took another look at the old bottle of the common law process.