ARIZONA
LAW REVIEW

VOLUME 12 FALL 1970 NUMBER 3

HOW TO SUCCEED IN BUSINESS WITHOUT BEING TRIED—THE POTENTIALITY OF ANTITRUST PROSECUTION*

LEE LOEVINGER**

Is success illegal?

Ridiculous as this question seems it is one which businessmen are being forced to ask today. Ironically, it is not the social dropouts or intellectual hippies who present this challenge but the government itself. Recent antitrust statements and enforcement activity seem to question the legal status of business success.

In May 1969 the head of the Antitrust Division of the Department of Justice spoke about mergers, viewing with alarm an increase in size and numbers. He said that the 200 largest industrial firms increased their share of corporate assets from 48 percent in 1948 to more than 58 percent by 1969, and that the Department of Justice would attempt to stem this tide.[1] Two weeks later the Attorney General repeated these figures, warned against the dangers of conglomerate mergers and "superconcentration," and threatened that the Department would prosecute any merger among "the top 200 manufacturing firms or firms of comparable size in other industries."[2]

These statements articulated the policy initiated in March 1969 when the Department began a series of suits against conglomerate mergers by large companies. The first was against Ling-Temco-Vought to force divestiture of its Jones & Laughlin Steel Company stock.[3] The second was

* This article is an adaptation of an address to the Downtown Rotary Club, Phoenix, Arizona, November 13, 1970.

** Partner, Hogan & Hartson, Washington, D.C.; member, District of Columbia and Minnesota bars; B.A., 1933, J.D., 1936, University of Minnesota. Mr. Loevinger was an Associate Justice on the Minnesota Supreme Court from 1960 to 1961 and Assistant United States Attorney General in charge of the Antitrust Division from 1961 to 1963.

[1] Address by Assistant Attorney General Richard W. McLaren, Current Antitrust Division Policy on Mergers, Acquisitions and Joint Ventures, to Town Hall of California, Los Angeles, Calif., May 27, 1969. (Mimeographed copies distributed by Department of Justice.)

[2] Address by Attorney General John N. Mitchell, to Georgia Bar Ass'n, Savannah, Ga., June 6, 1969, in BNA ANTITRUST & TRADE REG. REP. June 10, 1969 (No. 413) at X-9.

[3] BNA ANTITRUST & TRADE REG. REP. March 25, 1969 (No. 402) at A-25; BNA

against International Telephone and Telegraph to force divestiture of Canteen Corporation.[4] Then the Department sued Northwest Industries to prevent its acquisition of B.F. Goodrich Company.[5] On August 1, 1969, the Department filed two suits against ITT to prevent its merging with Hartford Fire Insurance Company or with Grinnell Corporation.[6]

These suits were based on claims that the mergers attacked would promote "super-concentration," or "aggregate concentration" in the general economy, would eliminate "potential competition" between the merging companies, and would provide opportunities or potentiality for the practice of reciprocity.

To date the suits have not been successful. Early in 1970 the Department consented to a decree giving LTV its option to divest either Jones & Laughlin or Braniff Airways and Okonite Company.[7] Having prosecuted LTV for restricting potential competition in the steel industry, the Department settled the case by forcing divestiture of an airline and a company making electrical cable and carpets. This is a little like accusing someone of burglary and then convicting him of bigamy. In the Northwest Industries case, the Department sought a preliminary injunction against takeover of B.F. Goodrich, but failed to prove probability of an anticompetitive effect, and was denied the injunction.[8] Later the stock tender offer of Northwest Industries failed and was terminated, so the case became moot.[9] The Department also sought preliminary injunctions against the mergers of ITT with Hartford and Grinnell, but the trial court denied the injunctions on the ground there was no probability of lessening competition or of the practice of reciprocity and there was a positive company policy against reciprocity.[10]

Despite rejection by the lower courts, the Department has continued to assert its theory that the antitrust laws prohibit any merger which may eliminate "potential competition" or involve potential abuse of economic power, contending that the mere possibility a company might enter a

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ANTITRUST & TRADE REG. REP. April 1, 1969 (No. 403) at A-1, X-3; BNA ANTITRUST & TRADE REG. REP. April 15, 1969 (No. 405) at A-19, X-12.

[4] BNA ANTITRUST & TRADE REG. REP. April 29, 1969 (No. 407) at A-38, X-2.

[5] BNA ANTITRUST & TRADE REG. REP. May 27, 1969 (No. 411) at A-23.

[6] BNA ANTITRUST & TRADE REG. REP. Aug. 5, 1969 (No. 421) at A-1. In June 1969, the Department of Justice announced that it would try to block the proposed merger of ITT and Hartford Fire Insurance Co., but it did not file suit until August 1st. BNA ANTITRUST & TRADE REG. REP. June 24, 1969 (No. 415) at A-22.

[7] BNA ANTITRUST & TRADE REG. REP. March 10, 1970 (No. 452) at A-1, X-1; *Ling-Temco Gets Court Consent to J & L Merger*, Wall Street Journal, June 11, 1970, at 4, col. 1. It is a reasonable inference that LTV was induced to make its deal with the Department of Justice by financial pressures. For the first nine months of 1970 the company had a net operating loss of $17.9 million, and Braniff Airways has been operating at a loss. *LTV's Net Loss Narrowed a Bit in 3rd Quarter*, Wall Street Journal, Nov. 4, 1970, at 2, col. 2.

[8] United States v. Northwest Indus., Inc., 301 F. Supp. 1066 (N.D. Ill. 1969).

[9] BNA ANTITRUST & TRADE REG. REP. Aug. 19, 1969 (No. 423) at A-30.

[10] United States v. International Tel. & Tel. Corp., 306 F. Supp. 766 (D. Conn. 1969). On December 31, 1970, the court filed its decision on the merits in the case seeking to enjoin the merger of ITT and Grinnell. Civil No. 13,319 (D. Conn. Dec.

new field makes it a "potential" competitor in that field, that the mere existence of "opportunity" for reciprocity involves the potentiality to get business by economic power rather than on the basis of price, quality or service, and that these possibilities should be prohibited under the antitrust laws.[11] In addition, the allegations concerning "aggregate," or overall economic concentration, together with the nature of the suits filed and the statements of the Attorney General and the Assistant Attorney General in charge of Antitrust, indicate quite clearly, although not explicitly stating, that antitrust enforcement policy is now aimed at limiting corporate size, at least if attained through acquisition or merger.[12]

What is the basis of the potentiality theory the Department is now using to attack mergers involving companies which it regards as too big or expansion of which it disapproves?

The theory that the economy is becoming more concentrated as a few large corporations gain economic control, and that mergers cause such "super-concentration," or "aggregate concentration" as it is now called, has repeatedly been discovered and proclaimed since as early as 1932. The first prominent statement of this view was by Berle and Means who claimed that in 1930 the 200 largest non-banking corporations "con-

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31, 1970). The court adopted the reasoning suggested in this article, holding that the antitrust statutes prohibit only mergers with a demonstrable and substantial anti-competitive effect and that the law is concerned with probability, rather than with mere possibility or complete certainty. The court held that the government had wholly failed to sustain its burden of proof and ordered the case dismissed on the merits. There is a separate action in which the government seeks to enjoin the merger of International Telephone and Telegraph Corporation and Hartford Fire Insurance Company, and the trial of that action on the merits has been set to begin September 15, 1971.

[11] *See* Address by Donald I. Baker, Deputy Director of Policy Planning, Antitrust Division of Department of Justice, to Corporation, Finance and Business Law Section of Michigan Bar Association, Oct. 1970, in BNA ANTITRUST & TRADE REG. REP. Oct. 6, 1970 (No. 482) at A-1. *See also* United States v. First Nat'l Bank, 301 F. Supp. 1161, 1195-1206 (S.D. Miss. 1969). The government has argued that the mere existence of economic power or of opportunities for reciprocity is enough to condemn a merger. Memoranda in Support of Motions for Preliminary Injunctions, United States v. International Tel. & Tel. Corp., Civil Nos. 13319 & 13320 (D. Conn.).

[12] Assistant Attorney General Richard W. McLaren still repeats the well established antitrust principle that "bigness as such is not bad, but you don't have to be a big, multi-plant firm to be good." Address by Assistant Attorney General McLaren, Sept. 17, 1970, to the Council on Antitrust and Trade Regulation of the Federal Bar Association, in BNA ANTITRUST & TRADE REP. Sept. 22, 1970 (No. 480) at D-1.

The tenor of that speech, however, as well as others given by Mr. McLaren, is that economic virtue is mainly associated with small firms, and his disavowal of the "bigness is bad" approach seems to be perfunctory. Thus he ends the speech by suggesting that Thurman Arnold, who established the modern antitrust enforcement tradition of the Department of Justice, would have agreed with a character from E.M. Forster's novel *Howard's End* who said that "[i]t is the vice of a vulgar mind to be thrilled by bigness . . . ."

Mr. Arnold's esthetic judgments presumably were private, but his views on antitrust were publicly declared and well known. In *The Bottlenecks of Business* published in 1940 while he was Assistant Attorney General in charge of the Antitrust Division, Mr. Arnold entitled chapter VI "The Test is Efficiency and Service—Not Size." He said:

> It is important, therefore, to emphasize that the fundamental objective of the antitrust laws is not to destroy the efficiency of mass production or dis-

trolled" about 50 percent of the corporate wealth.[13] Extrapolating from their data, they projected that by 1950 the 200 largest corporations would hold from 70 to 85 percent of corporate assets and that by 1970 practically all industrial activity would have been absorbed by the 200 largest corporations.[14]

The Chief Economist of the FTC re-discovered this phenomenon of creeping monopoly in 1968, publishing his conclusions in staff papers for the Cabinet Committee on Price Stability in January 1969,[15] and in a staff study for the FTC in November 1969.[16] These were obviously the basis for the Department of Justice alarm. Curiously, it was found that in 1950 the 200 largest industrial corporations had 48 percent of all assets, which was slightly less than the percentage found by Berle and Means in 1930, but that this ominously rose to about 59 percent by 1967.[17] Nevertheless, the 750 page FTC staff report (often referred to as the "Mueller Report") began with the conclusion that: "In unprecedented fashion the current merger movement is centralizing and consolidating corporate control and decision making among a relatively few vast companies."[18] The Report particularly attacked conglomerate mergers, although conceding that conglomerate activity is not new, many large firms having been engaged in it since 1900, while only the use of the term

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tribution. . . . It is not size itself that we want to destroy, but the use of organized power to restrain trade unreasonably, without justification in terms of greater distribution of goods.

Mr. Arnold continued to adhere to the view that size is not objectionable under the antitrust laws. *See* SELECTIONS FROM THE LETTERS AND LEGAL PAPERS OF THURMAN ARNOLD 117 (1961).

[13] A. BERLE & G. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 32 (1932).

[14] *Id.* at 40-41:

If the wealth of the large corporations and that of all corporations should continue to increase for the next twenty years at its average annual rate for the twenty years from 1909 to 1929, 70 per cent of all corporate activity would be carried on by two hundred corporations by 1950. If the more rapid rates of growth from 1924 to 1929 were maintained for the next twenty years 85 per cent of corporate wealth would be held by two hundred huge units. It would take only forty years at the 1909-1929 rates or only thirty years at the 1924-1929 rates for all corporate activity and practically all industrial activity to be absorbed by two hundred giant companies. If the indicated growth of the large corporations and of the national wealth were to be effective from now until 1950, half of the national wealth would be under the control of big companies by the end of that period. (footnote omitted).

Berle and Means were restrained enough to note that it was impossible to predict whether the future actually "will see any such complete absorption of economic activity into a few great enterprises." *Id.* at 41. Viewed retrospectively, however, the projections of this early survey, and the similarity of the Berle and Means statistics, analyses and projections and those of contemporary alarmists in this field, tend to discredit the remarkably similar contemporary contentions.

[15] STUDIES BY THE STAFF OF THE CABINET COMMITTEE ON PRICE STABILITY (1969) [hereinafter cited as STAFF STUDIES ON PRICE STABILITY].

[16] BUREAU OF ECONOMICS, FEDERAL TRADE COMM'N, STAFF REPORT: ECONOMIC REPORT ON CORPORATE MERGERS (1969) [hereinafter cited as FTC STAFF REPORT]. *See also FTC Study Hits Growing Closeness Among Biggest Concerns, Industries*, Wall Street Journal, Nov. 5, 1969, at 40, col. 1.

[17] STAFF STUDIES ON PRICE STABILITY, *supra* note 15, at 45-46, 92.

[18] FTC STAFF REPORT, *supra* note 16, at 3. It should be noted that at the

is recent.[19]

A basic fallacy invalidating the whole concept of aggregate concentration is the fact that both practical significance and theoretical ability to measure require us to deal with markets rather than vague abstractions such as manufacturing or the economy. Law and economics are based on this, and the Cabinet Committee study says that "measures of *market concentration* are recognized as the best available index of the degree of market power in an industry."[20] The controlling economic force is competition and the purpose of the antitrust laws is to maintain it. But competition takes place only within markets, not within vague sectors like manufacturing or the economy. It is difficult to define markets precisely, or to gather very accurate data about them, but it is impossible to be precise or accurate about vague abstractions like manufacturing or the economy. Thus sweeping generalizations about aggregate concentration in manufacturing or the economy tell more about the emotional attitude of their authors than they do about the economic condition of the country.[21]

The reason alarmists and those seeking to promote and expand enforcement activities use aggregate concentration figures is that a market analysis shows no cause for concern. The Cabinet Committee staff report says that "[a]verage market concentration of manufacturing industries has shown no marked tendency to increase or decrease between 1947 and 1966,"[22] and that "the numbers of highly concentrated indus-

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time of issuance of the staff study Commissioner Mary Gardiner Jones noted that, "In my opinion, the staff recommendations and many of their conclusions are premature and not supported by the type of hard empirical data which is potentially available to the Commission and indeed which the Commission intends to assemble and analyze. . . . Indeed staff's conclusions and recommendations could have been made before this study was initiated." *Id.* at XIII.

19 *Id.* at 266-67.

20 STAFF STUDIES ON PRICE STABILITY, *supra* note 15, at 44. *See also* United States v. E.I. duPont de Nemours & Co., 353 U.S. 586, 593 (1957), where the Court said: "Determination of the relevant market is a necessary predicate to a finding of violation of the Clayton Act."

21 The emotional nature of the attack on business size and diversification is illustrated by reactions to the recent bankruptcy of the Penn Central Railroad. Financial difficulties of the merged company are being used as an argument for legislation to condemn all conglomerate mergers and establish a new super federal anti-merger agency. Wall Street Journal, July 20, 1970, at 26, col. 1. But before the New York Central and Pennsylvania railroads were permitted to merge there were extensive studies and formal hearings; the Department of Justice strongly opposed, the ICC approved; there were several court appeals and remands, and after years of legal proceedings the Supreme Court permitted the merger. *See* Penn Central Merger Case, 389 U.S. 486 (1968); Baltimore & Ohio R.R. v. United States, 386 U.S. 372 (1967).

If, after all this, a bad merger was approved this shows only that government agencies are no better economic prophets than businessmen, and that the ultimate determination of economic soundness will still be made by the marketplace regardless of the size of the enterprise involved or the structure and complexity of the government machinery for review. If there is any lesson relevant to antitrust in the Penn Central experience it is that government lacks competence to make the complex, delicate and subtle economic determinations required in complicated merger matters.

22 STAFF STUDIES ON PRICE STABILITY, *supra* note 15, at 58.

tries (those where 4 firms held 75 percent or more of shipments) fell from 30 to 22 [out of 213 industries]."[23]

Furthermore, there are a number of statistical flaws which discredit the concentration figures relied on by the Department of Justice. First, these figures are taken from census data which attribute all shipments from a plant or business to the industry in which it is primarily engaged. Since industry leaders are the larger companies and are most likely to be diversified, this exaggerates concentration ratios based on such data. As *Fortune* points out, this leads to ludicrous results. Although oil companies account for about 70 percent of U.S. production of lubricants and greases, this production is included in the census classification for the oil industry and there is a separate category for "lubricating oils and greases."[24] Thus, concentration ratios for the lubricating oils and greases industry cover only one-third of American production of these products, and it is probable that none of the largest producers are included in statistics for the field.

Second, accepted measures of economic concentration are the percentages of business controlled by a small number (commonly 4 or 8) of the leading firms in a market.[25] Such statistical measures do not disclose asymmetry of market structure which affects market power. For example, a market in which the four largest firms control over 90 percent of the business would be called "concentrated" by anyone familiar with antitrust. Yet there is a vast difference between a market in which the four largest firms each control between 20 and 25 percent of the business and a market in which the largest firm controls 85 percent of the business, the second largest about seven percent, the third about one percent, and all others fractions of one percent. The latter corresponds roughly to conditions in the telephone market, reflected in the market structure of telephone equipment manufacturing. Even conventional concentration statistics for such a market indicate little about its structure or power distribution.[26]

A third distorting factor in such statistics is that production which is exported is included in the totals for the domestic market, but that imports produced abroad are excluded. This tends to attribute to domestic producers a larger market share than they actually have. Similarly, statistics based on assets include not only domestic assets but also foreign assets of companies engaged in foreign markets. Since larger companies are most likely to have substantial foreign assets, this exag-

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23 *Id.* at 59.

24 Rose, *Bigness is a Numbers Game,* FORTUNE, Nov. 1969, at 113, 114. For another critique of the concentration statistics used by the Department of Justice, see Bock, *Antitrust and Emerging Information Technology,* CONFERENCE BOARD RECORD, Nov. 1970 (Vol. 7, No. 11) at 26.

25 STAFF STUDIES ON PRICE STABILITY, *supra* note 15, at 44.

26 *See* Shepherd, *On Appraising Evidence About Market Power,* 12 ANTITRUST BULL. 65 (1967).

gerates the percentage of assets apparently owned by larger companies in the domestic market.

A fourth factor making concentration figures unrealistic is that they are based upon industry classifications established for census purposes by product differentiation, which may or may not correspond to actual competitive markets. Census classifications give national totals for such products as steel, automobiles, bread, and milk regardless of whether economic realities permit these products to be sold in national, regional or local markets. As a result, it is possible to find contrary and conflicting trends in the statistics. For example, many products in the past have been sold in local markets that were highly concentrated or monopolized. As larger national companies diversify and move into these concentrated local markets there may be a statistical trend apparently showing national concentration, while in fact there may be more actual competition in local markets.

As a result of such flaws, the statistics relied on by the Department grossly distort the concentration in an economic sector such as manufacturing. Larger manufacturing companies have been the most active in diversifying into non-manufacturing markets in recent years. They own hotel chains, rental car services, credit card services, broadcasting stations, financial service companies, and many other service enterprises, as well as foreign subsidiaries. Yet the aggregate concentration statistics attribute all assets of such service enterprises and foreign subsidiaries to the diversified manufacturing companies in calculating percentage of national manufacturing assets controlled by such companies. Politicians who have tried to count votes this way have gone to jail.

Finally, determining whether there has been an increase in aggregate concentration, even without regard to defects in the statistics, depends entirely upon the data base selected. For example, taking the ten largest industrial companies by asset size, in 1954 they had 27.4 percent of the assets of the largest 500 but by 1968 held only 24.3 percent of all such assets. Taking the largest 50 industrial corporations, in 1954 they held 54.6 percent of the assets of the largest 500 while this percentage dropped to 52.2 percent by 1968.[27]

The 200 largest industrial corporations do not remain the same from year to year, and to make a fair or rigorous comparison over a period of time it is necessary to specify the corporations involved, the years for which lists are drawn and the method of ranking.[28] The increase in assets of the 200 largest industrials between 1954 and 1968 ranges from 173 to 248 percent depending upon whether you take the 200 largest at the beginning of the period, at the end of the period, or for the first and

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[27] Rose, *supra* note 24, at 238.

[28] Bock, Statistical Games and the "200 Largest" Industrials in 1954 and 1968, (1970) (The Conference Board, Studies in Business Economics, No. 115).

last year separately.[29] All manufacturing corporations taken together increased their assets by 171 percent over the same period.[30] Similarly, large acquisitions or mergers made about the same contribution to the growth of the 200 largest as they did to the growth of all manufacturing corporations over the period.[31] A rigorous statistical analysis of large mergers in the manufacturing sector suggests that large mergers were more important in allowing companies below the 200 largest to challenge the position of those first in that group than in supporting the growth of those already among the 200 largest.[32]

The Department claims about aggregate concentration are also discredited by the reports of two Presidential Commissions of experts which the Department has simply ignored. President Johnson appointed a Task Force on Antitrust Policy which reported that the concentration of economic activities in a few large firms "is not now imminent," and that "among the largest firms, the net effect of mergers has been to expand the size of smaller firms relative to the top few."[33] President Nixon appointed a Task Force on Productivity and Competition which cautioned the Antitrust Division against "an active program of challenging conglomerate enterprises on the basis of nebulous fears about size and economic power," and said that such action on the basis of present knowledge "is not defensible."[34]

One of the most recent, careful and scholarly reviews of this subject concluded that monopolistic control of manufacturing industry actually declined from 32 percent in 1899 to 29 percent in 1958.[35] This conclusion is corroborated by the traditional and significant test of market price behavior. The head of the Antitrust Division recently testified before the Joint Economic Committee of Congress that a statistical study of price behavior showed that during periods of price stability there was no correlation between economic concentration and price changes and that during periods of inflation price increases were much less in concentrated indus-

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29 *Id.* at 23.
30 *Id.*
31 *Id.* at 22.
32 *Id.* at 24.
33 Report of the White House Task Force on Antitrust Policy (The Neal Report), 1 J. OF REPRINTS FOR ANTITRUST LAW & ECON. 633, 677-78 (1969), ATRR No. 411, supplement, 5/27/69.
34 REPORT OF THE TASK FORCE ON PRODUCTIVITY AND COMPETITION (The Stigler Report) in 1 J. OF REPRINTS FOR ANTITRUST LAW & ECON. 829, 852 (1969), and BNA ANTITRUST & TRADE REG. REP. June 10, 1969 (No. 413) at X-1 and June 24, 1969 (No. 415) at X-1.

Former Assistant Attorney General in charge of the Antitrust Division, Donald F. Turner, although criticized by the Stigler Task Force for the merger guidelines promulgated under his administration, has stated a similar conclusion to that of the Stigler Task Force. Professor Turner has stated that conglomerate mergers should be examined carefully on a case by case basis for substantial anticompetitive consequences, and that since we really do not know much about the economics of this field we should "proceed with caution." Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 HARV. L. REV. 1313, 1318, 1394 (1965).
35 G. NUTTER & H. EINHORN, ENTERPRISE MONOPOLY IN THE UNITED STATES: 1899-1958, at 91 (1969); *see also id.* at 88-89.

tries than in those that are highly competitive.[36] During the past decade, the cost of living has been increased substantially more by increases in the cost of services than by increases in the cost of manufactured commodities.[37] Recent research at the UCLA Graduate School of Business Management has found that there is no significant relationship between market concentration and profit rates of companies in various markets, that the number of independent business enterprises has not declined, but has increased over the last half century at the same rate as the population, and that the proportion of individuals who are independent entrepreneurs is larger today than it was 30 years ago.[38] On the demonstrative evidence of performance in market price and increase in number of independent enterprises, as well as rigorous economic analysis of markets, the conclusion is compelled that there has been no overall, or aggregate, increase in economic concentration.

The logic of the theory on which conglomerate mergers are being attacked is as false as the premises on which the attack is based. The basic fallacy in the potentiality theory is that it ignores the difference between mere possibility and reasonable probability. Anything and everything is possible. A pan of water on a hot stove may freeze; all the air in the room may suddenly collect near the ceiling, leaving the

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[36] BNA ANTITRUST & TRADE REG. REP. (No. 470) at A-6.

[37] Wall Street Journal, Oct. 19, 1970, at 1, col. 1; *Learning to Live with Inflation*, NEWSWEEK, Nov. 2, 1970, at 87, 88.

[38] Dean Harold L. Williams of the UCLA Graduate School of Business Management has made a statement to the press reporting the findings of an economic research program conducted at that school. Delugach, *UCLA Researchers Claim U.S. Antitrust Theory 'Disproved,'* Los Angeles Times, Nov. 27, 1970, pt. 3, at 1, col. 3. The full report of the research has not yet been published although drafts have been circulated for comment and criticism but not for quotation. The statements in the text are taken from the press statement of Dean Williams. The author of the present article, however, has examined the data reported in preliminary drafts and believes that they fully support the conclusions stated. A full report of the research will be published in due course.

Published data also support similar conclusions. The FTC staff report states that the number of manufacturing corporations was 150,868 in 1959 and increased to 194,593 in 1969. FTC STAFF REPORT, *supra* note 16, at 164. The population of the United States increased from approximately 180 million in 1960 to an estimated 202 million in 1969 and an estimated 208.6 million in 1970. NEW YORK TIMES ENCYCLOPEDIC ALAMANAC 1970, at 205; THE 1970 WORLD ALMANAC 310. Thus during a period when the population was increasing some 12 to 16 percent, the number of manufacturing corporations increased about 29 percent. The FTC staff report argues that the data show increasing economic concentration because manufacturing corporations with assets of more than $1 billion increased their percentage share of corporate manufacturing assets from 26 to 46 percent during the same period. However, the report fails to point out that the number of manufacturing corporations with assets exceeding $1 billion increased from 24 to 87, according to the same data. The increase in number of large corporations was, thus, considerably greater than the increase in the share of assets held by such corporations.

What is obviously happening in the United States is that the population is increasing, the size of the economy is increasing, the number of business corporations is increasing, and the size of business corporations is increasing. Simply abstracting a few statistics showing this general increase does not demonstrate any increase in economic concentration. As indicated in the analysis of the text and other references cited, neither hard data nor rigorous analysis support the thesis of an increase in "aggregate concentration," and more markets are being deconcentrated than are being concentrated.

occupants to suffocate.[39] Such things are not impossible, only extremely improbable. But such possibilities are so remote they must be disregarded for all practical purposes. The only rational basis for action is probability. Yet the potentiality theory disregards probability and seeks to enforce the antitrust laws on the basis of hypothetical possibility. Under potentiality theory, anyone who puts a pan of water on a hot stove may be found guilty of causing it to freeze—potentially! By the same reasoning, anyone who achieves business success may be found guilty of monopolizing—potentially!

Assistant Attorney General McLaren conceded that potentiality theory is not based on legal precedent or established principle when he testified before a Congressional Committee that previous Department of Justice policy had required a "reasonable likelihood of a substantial lessening of competition" as a basis for antitrust action.[40] He declared that under his administration the Department of Justice might sue to prevent or undo mergers even though they met standards previously established, saying: "I have tried to warn businessmen and their lawyers that they cannot rely on the Merger Guidelines issued by my predecessors in this area—that we may sue even though particular mergers appear to satisfy those Guidelines . . . ."[41] He suggested, in effect, that firms desiring to merge should first come to the Department of Justice for permission.

The earlier antitrust enforcement policy of attacking only those mergers which evidence showed would have a probable anticompetitive effect was soundly based on general legal principles and precedent.[42]

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[39] *See* A. EDDINGTON, THE NATURE OF THE PHYSICAL WORLD 75-76 (1928); G. GAMOW, ONE TWO THREE . . . INFINITY 213-15 (1947); K. POPPER, THE LOGIC OF SCIENTIFIC DISCOVERY 203 (1959); H. REICHENBACH, ATOM AND COSMOS 172, 275-76 (1933); H. REICHENBACH, EXPERIENCE AND PREDICTION 38-39 (1938); HEISENBERG, *Planck's Discovery and the Philosophical Problems of Atomic Physics,* in ON MODERN PHYSICS 16 (1962).

[40] BNA ANTITRUST & TRADE REG. REP. March 18, 1969 (No. 401) at X-17.

[41] *Id.*

[42] *See* Berger & Peterson, *Conglomerate Mergers and Criteria for Defining Potential Entrants,* 15 ANTITRUST BULL. 489 (1970), for a discussion of the decided merger cases involving potential competition. These authors suggest that the courts may previously have gone too far in preventing mergers on the basis of potential competition theory. With reference to the cases cited in notes 3-6 *supra,* the authors say:

> In the light of several recent suits brought by the Department of Justice, the Department appears to be contemplating entirely new approaches to the issue of potential competition. In [these cases] the Department strays far beyond its own guidelines in alleging abuses such as the diminishing of the 'number of firms capable of entering concentrated markets' and the eliminating of 'potential independent competition' between two merging parties which are considered potential entrants, as a result of their diversity and size, in many common markets.
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> Neither idea makes much economic sense. 15 ANTITRUST BULL. at 501-02 (footnotes omitted).

The authors also point out that unless the potential competitor or entrant into a market eliminated by a merger is the only potential competitor or entrant into that market, then the elimination of one such potential entrant will increase the probability of entry by other potential entrants and thus actually increase the effect of potential competition.

The law generally requires a preponderance of evidence establishing a reasonable probability and does not permit cases to be decided on the basis of speculation or surmise. With respect to the merger sections of the antitrust statutes, the Supreme Court has said that congressional concern was with probabilities, not with certainties, and not with "ephemeral possibilities."[43] It seems clear that potentiality theory has been devised in an effort to block conglomerate and other mergers which have no adverse effect on competition but are objected to on grounds of other social goals or views.

If potentiality theory can be applied to merger cases to prohibit economic power because of mere possibility of abuse, there is no logical basis for refusing to reach the same conclusion with respect to economic power acquired by expansion or growth. Furthermore, the principles established for the prosecution of big business inevitably come, by a process of bureaucratic dilution and judicial extension, to be applied to small business as well.

The merger provisions of the antitrust laws were first applied to banks in 1961 when Antitrust brought three cases against proposed mergers of directly competitive banks with offices across the street from each other in Philadelphia, Chicago and New York, and with combined assets of $1.8 billion, $3.2 billion and $6 billion, respectively. In 1963 the Supreme Court held the anti-merger provisions of the antitrust laws applied to such banks.[44] In June 1970, the Court held the same rules applicable to the merger of two small banks located in Phillipsburg, New Jersey (population 18,500), and in Easton, Pennsylvania (population 32,000).[45] These small towns are separated by a river and connected only by two bridges. The combined assets of the two banks was $41 million—about one-hundredth the size of the banks involved in the original banking merger cases. As Justice Harlan said in dissent, the *Phillipsburg Bank Case* places in doubt the legality of a merger of any two competing banks no matter how small.[46]

Under potentiality theory the size of monopolies found and prosecuted by the government will surely and progressively diminish until any expansion of business without advance permission comes to be regarded as potential monopolization or restraint of trade and illegal.

The potentiality theory is so specious that even the Department is unable or unwilling to follow it consistently. In several recent cases it has consented to mergers of large companies engaged in competitive activities on condition that the companies split off directly competitive

[43] United States v. El Paso Natural Gas Co., 376 U.S. 651, 658 (1964); Brown Shoe Co. v. United States, 370 U.S. 294, 323 (1962).

[44] United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963). This case involved a merger of banks in direct competition with each other, with principal offices located across the street from each other in Philadelphia, and having combined assets of $1.8 billion.

[45] United States v. Phillipsburg Nat'l Bank & Trust Co., 399 U.S. 350 (1970).

[46] *Id.* at 373 (Harlan, J., dissenting).

segments of their business.[47] It is obvious that a company which has been forced to get rid of a small part of its business in a particular area in order to attain greater scope is a potential competitor in the vacated area. Consistent application of the potentiality theory would preclude such mergers. This does not mean that those mergers were improperly approved, but it does demonstrate that the Department either doesn't really believe in potentiality theory or is unable to follow it consistently.

This is not surprising. Potentiality theory is a kind of legal ESP—extra-sensory proof. It relies on potentiality instead of reality, substitutes the ectoplasm of hypothesis for the protoplasm of fact, and offers faith in place of proof. If it is accepted by the courts, it will subvert some of our most important legal principles, with consequences far beyond the field of antitrust.[48]

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[47] United States v. Atlantic Richfield Co., Civil No. 69 Civ. 162 (S.D.N.Y. July 28, 1970); United States v. Ciba Corp., Civil No. 70 Civ. 3078 (S.D.N.Y. July 17, 1970); United States v. British Petroleum Co., (N.D. Ohio Dec. 1, 1969), in BNA ANTITRUST & TRADE REG. REP. Nov. 18, 1969 (No. 436) at A-19; Nov. 25, 1969 (No. 437) at A-16; Dec. 2, 1969 (No. 438) at A-12.

Assistant Attorney General McLaren has said that this is a completely new way of settling antimerger cases which may serve as a pattern for future settlements. BNA ANTITRUST & TRADE REG. REP. Nov. 25, 1969 (No. 437) at A-16.

[48] In the Washington Evening Star, Nov. 4, 1970, § A, at 16, columnist Frank Getlein writes about an incident in which an Army general was awarded a medal on the basis of fictitious reports of exploits. Mr. Getlein says that this incident

> casts a frightening light on the most important single element of our government. It is not too strong to say that because the Army could so automatically produce the bogus medal for Gen. Forrester, we are locked into the arms race with Russia. . . . To begin with the literary side, Moliere was very fond of the decayed scholastic reasoning of the late Middle Ages, which he burlesqued again and again. One of his favorite ploys has the learned, slightly crooked savant conning the bumpkin by blurring the difference between the potential for existence and actual existence. Thus: 'Since this could exist, it has potency for existence, but since potency is the very essence of existence, therefore, for all practical purposes, this does exist and we may proceed on that basis.' . . . But the basic late medieval confusion between potency and existence guides the military mind in matters far more important than the endearing rather childlike custom of generals festooning each other with fiction. Thus: If the Russians or Chinese possibly can come up with a new, menacing weapons system, they assuredly will; if they will, then they certainly are planning it now and if they are planning it, it is in progress. For all practical purposes, it already exists, . . . In the shadowy kingdom between potency and existence, bogus medals are the cheapest price we have yet been asked to pay for the confusion.

Regardless of views as to the wisdom of armament or disarmament, Mr. Getlein's point is valid, that government agencies use potentiality theory to blur the distinction between potentiality and reality and to extend their power and appropriations in fields far beyond antitrust. In the Washington Post, Nov. 25, 1970, § A, at 15. Columnist John P. Roche discusses the recent suspension of certain civil rights in Canada. He notes that more than 2,000 years ago Aristotle said that the virtuous tend to get carried away by their own righteousness, and that they come to define justice as the decisions of just men—that is, themselves. Mr. Roche says that

> justice depends on the existence of certain institutions, most particularly of independent courts, where an individual can go and demand proof of his malfeasance. And from my own point of view, malfeasance involves committing a crime—not thinking about committing a crime, or associating with people who are thinking about committing a crime.

As a purely practical matter, the attack on conglomerates under potentiality theory is shortsighted and unwise. It threatens our economic welfare in both domestic and world markets. Most of our material needs are for economic goods, such as better housing, transportation, communication, food, and medical facilities, which are provided by business and industry. The experience of other countries shows that such needs are best satisfied where governments do least to interfere and most to encourage business development. The most rapidly growing economy since World War II has been that of Japan. Analysis of the Japanese economy indicates that its growth is not based, as some think, on cheap labor or exports, but on its own independent research and development effort. This, in turn, is the result of the very large capital made available to business firms through government guaranties and highly diverse or conglomerate activities.[49] Second only to Japan in economic growth has been West Germany, followed by other countries of the European Community, where government effort has been toward encouragement of larger multinational conglomerate firms better able to operate across the artificial borders of nations and to provide capital and competence needed to furnish the goods and services required by the people.[50]

These foreign developments not only offer a lesson as to the effective role of government, but also present a real and immediate challenge. In international trade, and in domestic markets, American business is increasingly challenged by foreign competition. This country no longer has an inherent advantage by virtue of quality, productivity or other special economic virtues. In textiles, radios, television, automobiles, shipbuilding, cameras, appliances, electronic devices, and many other fields, Japanese goods are not only competing but replacing American production. This competition has caused some to demand tariff protection and others to seek non-tariff trade restrictions. The danger of such measures[51] should warn that before we institute trade barriers against for-

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It is clear that the rationale underlying the suppression of civil liberties in most cases is essentially the same as the potentiality theory of antitrust, that is the potentiality of anti-social or forbidden conduct by those whose liberties are suppressed, without proof that anti-social or forbidden conduct has been engaged in or is actually threatened. As Mr. Roche points out, this was the basis on which some 75,000 U.S. citizens were interned during World War II for no offense other than Japanese ancestry.

[49] *See* Abegglen, *The Economic Growth of Japan*, SCIENTIFIC AM., Mar. 1970, at 31. *See also Japan's Remarkable Industrial Machine*, BUSINESS WEEK, Mar. 7, 1970, at 59.

[50] *See* European Community, Aug. 1970 (No. 137) at 4. *See also* Siekman, *Europe's Love Affair with Bigness*, FORTUNE, Mar. 1970, at 95.

[51] *See Trade War Threat—Retaliation is Feared if U.S. Should Enact Protectionist Measure*, Wall Street Journal, Oct. 14, 1970, at 1, col. 1; European Community Press Release, Oct. 19, 1970, "Common Market Tells U.S. of Concern About Trade Bill;" *Brimmer Hits Bill to Put Quotas on Textiles, Shoes*, Wall Street Journal, Nov. 12, 1970, at 22, col. 4. The last cited reference quotes Federal Reserve Board Governor Andrew F. Brimmer as saying that the imposition of import quotas on textiles and shoes will "add significantly to domestic inflationary pressures."

eign competition we should at least give American industry opportunity and freedom to compete without imposing arbitrary limitations and restrictions on its growth. Japanese and European enterprises are not only permitted but encouraged to expand. If American industry is to survive in the world market, and compete equally even in the American market, it must have freedom to build size, diversity and financial strength as a foundation for its activity.

The potentiality theory thus, ironically, involves great risk of frustrating the economic goals it ostensibly serves. If mergers can be forbidden on the basis of the potentiality theory, the size of permissible business mergers will inevitably be reduced over the years, as has happened in the banking field. There is substantial probability this will stifle economic development in the United States so that we will be unable to compete effectively in the world market, technological progress will be retarded, and we will lose much of our domestic market to foreign competition unless we surrender the idea of free world trade and isolate ourselves by exclusionary trade barriers.

Furthermore, undue limitations on the activities and expansion of business from unwise government policies will have effects beyond the economic sphere. While the economic function is the primary and obvious role of business, it is not its only function or responsibility. The broader responsibility of business to society in general is rapidly gaining widespread recognition. *Time* says the new job of business is "Reform Without Revolution," and that many United States corporate leaders have the philosophy that as a part of the total society business has an obligation to attack a broad range of social problems, if need be, in a way that temporarily retards profits.[52] In accordance with this philosophy many American business enterprises and leaders have taken significant action in recent years which has required economic size, strength and diversity.

Henry Ford has established a Detroit Ghetto Recreation Center, and Ford Motor Company has opened employment centers in the Detroit ghetto recruiting and training Blacks and the poor who have not previously been able to get such employment. Michigan Bell Telephone, Chrysler, and Parke-Davis have each adopted ghetto high schools which they are assisting with equipment and services.[53] ITT devoted two pages of its last annual report to a brief description of contributions in the social-environmental field, mentioning a large increase in employment of minority groups, activities in pollution control, narcotics education, and other fields, and pledging to bear its share of social responsibility in the future.[54] Not all businesses have adopted this philosophy

[52] *The Executive as Social Activist,* TIME, July 20, 1970, at 62.
[53] *Id.* at 65.
[54] International Telephone and Telegraph Corporation, 1969 Annual Report 13-14.

yet, but the number of large businesses that are following a similar course, and the scope and variety of their activities, are too great to be described or summarized briefly. My view is that the conflict between private business interests and the general public interest is usually the result of a short-term appraisal and that as the basis of judgment is lengthened in time these interests tend to converge.

Beyond this, business has a less dramatic but equally important social role that is often overlooked. This is to act as a counterpoise or check to the unlimited power of government. There are few forces in society capable of offering any effective check to unlimited expansion of governmental power. Historically business has been the strongest and most effective of these. Organized labor has recently grown to a stature of comparable power. The fact that the freedom and welfare of the individual requires limitation of government power, as much as action by the government, is seldom mentioned by activists who seek government support for a particular cause, or even by many who pass as social leaders or philosophers. With respect to monopoly, it is significant that historically monopoly has been the result of government action, and that the earliest cases and law against monopoly were directed not against business but against government power.[55]

Economic and industrial developments of the 19th century made it possible for business combinations to acquire monopolistic power without government grants, and this, in turn, resulted in the Sherman Act of 1890, which is still the basic American antitrust law. The philosophy and purpose of the Sherman Act, as the Supreme Court has held, is not to inhibit business growth and expansion but to prevent abuses by private economic power of the kind which had formerly arisen out of government grants of monopoly power.[56]

We have now lived so long with the notion that business is properly limited in power and that we will not tolerate monopoly that we have almost forgotten the original source of economic abuse was in government power. But in the contemporary world the democratic and free society is still the exception. The majority of the world's peoples today live in societies that are authoritarian and tyrannical by American standards. Yet it is not the power of business that has made these societies as they are, it is the power of government. The maintenance of democracy and liberty in the United States depends upon our ability to sustain a delicate balance among the elements and forces within society. As the size and the power of government grows we must have other institutions similarly growing in

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55 *See* L. LOEVINGER, THE LAW OF FREE ENTERPRISE ch. 1 (1949). The earliest anti-monopoly statute was an Act of Parliament, passed in revolt against the numerous monopolies granted to favorites of Queen Elizabeth and her successor. Statute of Monopolies, 21 James I, c. 3 (1623).

56 Standard Oil Co. v. United States, 221 U.S. 1 (1911); United States v. American Tobacco Co., 221 U.S. 106 (1911).

size and power to insure that the balance within society is maintained.

In ultimate impact the potentiality theory is inconsistent with basic antitrust philosophy. The premises of antitrust law and theory are that society is better served and democracy made more secure by the maintenance of numerous decision making centers.[57] Under the undefined and undefinable scope of potentiality theory the determinations as to where and how much business can expand will inevitably be shifted from the numerous markets, executive suites and board rooms to the tight little group comprising the government antitrust enforcement bureaucracy. The power of the public, consumers, management and stockholders over economic development will be decreased and the power of government will be increased. The ultimate effect will be that of establishing government regulation to control the expansion, through internal growth or acquisition, of every business, large and small. The concentration of such power in government is as dangerous, and as contrary to the historical and fundamental spirit of antitrust, as the concentration of economic power in private hands. Thus the potentiality theory cannot be viewed simply as an attack on the size of a few large corporations, but must be seen as a disturbance of that basic balance of social forces upon which not only the economic growth but also the democratic and libertarian institutions of this country depend.

Further, the policy of the potentiality theory is a direct and immediate threat to the civil rights and political liberties of every individual. The basic thrust of potentiality theory is to equate the mere possibility of social harm or abuse with proof that such consequences are likely to occur. If potentiality equals proof, then accusation equals conviction; every citizen is a presumed criminal, and every prosecutor has the power of a tyrant. Under potentiality theory, dissent equals revolution, protest equals violence, profits equal success, and success equals monopolization. Under potentiality theory, business success is illegal and so is political opposition and social dissent. The potentiality theory is, thus, potentially the most subversive legal principle proposed to American courts in recent years.

Of course, the able and well intentioned lawyers of the Department of Justice neither intend nor expect potentiality theory to be used oppressively. But the theory carries its own refutation. The potentiality for abuse of government power is as great as that for abuse of economic power. Self-interest is not confined to business or to desire for profit. It is as often a drive for power or status as for money. It motivates government officials, politicians and bureaucrats as much as it motivates busi-

[57] Northern Pac. Ry. Co. v. United States, 356 U.S. 1 (1958). The opinion of the Court stated that the objectives of the Sherman Act include economic liberty, free and unfettered competition, and material progress, "while at the same time providing an environment conducive to the preservation of our democratic political and social institutions." *Id.* at 5.

nessmen; and the urge to extend the scope of a law or the power of an agency is as great as the urge to make more profit.[58]

There is today no field in which any unregulated business enterprise even approaches a monopoly of power.[59] In its own field the government has, and always has had, a monopoly of power. The potential for the abuse of power is inherently infinitely greater in the unwise exercise of government power than in the improvident use of private economic power.[60] To put it bluntly, the Department of Justice attack upon business under the potentiality theory carries a much more immediate threat of infringing upon individual liberty by government tyranny than any threat of business monopoly against which this attack could be directed.

Let it be clear that this argument carries no implication that either the premises or the principles of established antitrust law are wrong or should be limited in their enforcement. Established antitrust principles prohibit monopolization and mergers which have the actual or probable effect of substantially lessening competition. If any actual abuses occur or threaten, if any actual reciprocity develops, if any large corporation takes advantage of its size to secure business on the basis of reciprocal patronage or economic power rather than competitive merit, such things can readily be stopped under the antitrust laws, and there are numerous recent court decreees to prove it.[61]

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[58] *See* Loevinger, *The Sociology of Bureaucracy*, 24 BUS. LAW. 7 (1968).

[59] *See* Ways, *More Power to Everybody*, FORTUNE, May 1970, at 173. Mr. Ways argues persuasively that the general trend of 20th century society, particularly in the United States, is toward wider distribution and greater dispersion, rather than concentration, of power among and within corporations and other social institutions. Evidence of this is seen in the increasing demands by and influence of consumers, ethnic minorities, stockholders and other groups. As a result, in such matters as access to capital, entry to markets and acceptance of new products, the American economy is much more open than it was a half century or century ago.

[60] Secretary of Labor James Hodgson has recently said: "I think people are more afraid of big government than they are of big business or big unions, because of the ham-handed way government has acted in many cases." NEWSWEEK, Nov. 16, 1970, at 84. In Loevinger, *Lexonomic Analysis and Antitrust*, 14 ANTITRUST BULL. 313, 318-19 (1969), it is argued in more detail that,

> private decision making is by no means always better informed or more astute than government decision making. But, conversely, government decision making is by no means always better informed, wiser or more beneficial to the public than private decision making. . . . But there is one aspect in which government and private decision making differ significantly. . . . A wrong or unwise decision by [government] can be a disaster for society. A wrong or unwise decision by a private business is likely to be a disaster only for that business.

[61] The prosecution argument against the opportunities for, or potentiality of, reciprocity practices in the conglomerate merger cases seems particularly weak in view of the notable success of the Department of Justice in securing consent decrees against such practices specifically. *See, e.g.*, United States v. General Tire & Rubber Co., 1970 Trade Cas. ¶ 73,303 (N.D. Ohio Oct. 21, 1970); United States v. Armco Steel Corp., 1970 Trade Cas. ¶ 73,283 (S.D. Ohio Aug. 31, 1970); United States v. Republic Steel Corp., 1970 Trade Cas. ¶ 73,246 (N.D. Ohio July 30, 1970); United States v. Inland Steel Co., 1970 Trade Cas. ¶ 73,197 (N.D. Ill. July 1, 1970); United States v. United States Steel Corp., 1969 Trade Cas. ¶ 72,826 (W.D. Pa. Aug. 25, 1969).

The greatest present threat to the public interest lies in establishment of the notion that government can act on the basis of theories of potential abuses. If this potentiality theory is valid in antitrust, it is equally valid in other fields. If potentiality theory permits the government to prohibit any situation in which a theoretical possibility of abuse might exist, our basic constitutional principles are in clear jeopardy. Under potentiality theory everyone who has ever had an improper thought is a potential criminal, subject to injunction or penalty. Certainly the risks to democratic society are far greater from such legal theory than from any possibility of an improper or uneconomic merger.

Despite our democratic tradition, we live in a world where the tyranny of total government control is all around us, and even within our society there are individuals and groups who would destroy democratic institutions to establish authoritarian regimes. The potentiality theory has been used by totalitarian governments and would be a ready philosophical justification for unlimited extension of government power in this country.

The good society must ultimately be one where the culture pattern is such that there is no inherent conflict between private interests and the public interest or common welfare. The strength and virtue of the free enterprise concept is that it provides means whereby pursuit of private interest may also serve the common good and public interest.[62] The greatest damage that we suffer from the present physical and philosophical turmoil may be the triumph of the notion that the public interest is something altogether different from and contrary to any private interest. We shall fail to maintain our democratic tradition and social institutions to the degree that society accepts and acts upon this premise.

Thus the ultimate question that the present period of turmoil and trial poses for us is not simply how we may achieve success in particular business enterprises, or even in our economy as a whole. The challenge we must face and meet is how to achieve success in maintaining democratic social institutions and a society in which individuals may, singly and to-

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[62] Of course this does not mean that government does not have a large and important role to play in economic activity. Both politicians and businessmen are increasingly coming to realize that naked self-interest cannot be permitted to become greed, satisfying itself in the marketplace at the expense of injury to the general public. We must have laws preventing gross abuses and confining business activities to those not harmful to the public. Traditionally the role of government has been to act where business and the marketplace cannot perform adequately. In such matters as the prevention of environmental pollution, establishment of high standards of safe construction and operation of dangerous instrumentalities, prohibition of price fixing and conspiracies to monopolize or otherwise abuse economic power, government must act. Most businessmen are grateful for reasonable government action that protects not only the public but responsible business against irresponsible competition. Indeed, the role of government in modern society is so broad that the question is not how it may be increased but whether the capacity of government is adequate to perform the tasks which society requires of it and which cannot be performed by other institutions.

gether, earn the economic security and rewards which men in all ages have sought. The only power that is greater than the government in our society is the good sense of the people. Our only hope for maintaining democracy and personal freedom, or for achieving a good society, is that the good sense of the people will reject both the strident counsel of those who would destroy our governmental structure and the unwise doctrines of those who would extend government power beyond reasonable limits to dominate all our economic and social lives.