Vanderbilt Law Review

Volume 14
Issue 2 *Issue 2 - March 1961*

Article 4

3-1961

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Recommended Citation

Philip Marcus, Monopoly Profits, Economic Impossibility, and Unfairness as Anti-Trust Tests, 14 *Vanderbilt Law Review* 581 (1961)
Available at: https://scholarship.law.vanderbilt.edu/vlr/vol14/iss2/4

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MONOPOLY PROFITS, ECONOMIC IMPOSSIBILITY, AND UNFAIRNESS AS ANTI-TRUST TESTS

PHILIP MARCUS*

Judge Wyzanski, one of our more perceptive judges, recently had occasion to make some observations of far reaching significance with respect to the antitrust laws and our economic system. By taking certain action he may have expressed also a philosophy as important as that to which he gave words, a philosophy which seems to have been accepted also by the first circuit which has affirmed Judge Wyzanski's action, with one modification. The setting for Judge Wyzanski's commentary was *Union Leader Corp. v. Newspapers of New England, Inc.*,[1] in which the complaint charged violation of sections 1 and 2 of the Sherman Act[2] and of section 7 of the Clayton Act.[3] To this one of the defendants counterclaimed with charges of violations of sections 1 and 2 of the Sherman Act. This article deals with the case in terms of three problems central to the determination of this dispute: the use of monopoly profits, economic impossibility, and unfairness.

I. The Factual Situation

Prior to the events which culminated in this suit, the city of Haverhill, Massachusetts boasted a single newspaper, the Haverhill *Gazette*. In 1957, the *Gazette's* prosperity was disturbed by a strike of certain of its printers. While it was not forced to suspend publication, its circulation fell by about fifty per cent. Some Haverhill merchants, responding either to conviction or to pressure, then induced the publisher of the sole newspaper in Manchester, New Hampshire, to open a newspaper in Haverhill. Soon Haverhill had the Haverhill *Journal* as well as the *Gazette*.

One can hardly read Judge Wyzanski's statement of the facts without concluding that the newcomer was an unfair and heavy-handed competitor. Less blameworthy, but not without blemish, were the

* Antitrust Div., Dept. of Justice. The views expressed in this article are those of the writer and do not necessarily represent those of any government agency.

1. 180 F. Supp. 125 (D. Mass. 1960), *aff'd as modified*, 284 F.2d 582 (1st Cir. 1960). A comment on the district court decision appears in 73 Harv. L. Rev. 1632 (1960).
2. 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1, 2 (1958).
3. 38 Stat. 730 (1914), as amended, 15 U.S.C. § 18 (1958). Neither court found any Clayton Act violation, and this article deals principally with the alleged violations of the Sherman Act. The Clayton Act problems are discussed at some length in the first circuit opinion of Judge Aldrich. 184 F.2d at 588-91.

retaliatory efforts of the *Gazette.* After a short time, the publisher of the *Journal* tried, without success, to purchase the *Gazette.* Other New England publishers watched this internecine struggle with growing concern. These publishers, motivated either by a desire for commercial investment or by fear that they might be the next to experience the *Gazette's* plight, or by both, formed a corporation to which the stockholders of the *Gazette* preferred to sell out rather than to the publisher of the *Journal.* Shortly after this sale was made, the publisher of the *Journal* filed this suit.

For the purposes of this discussion, the findings of the court can be roughly stated as follows: (1) The use of monopoly profits, both in the establishment of the *Journal* and in the formation of the publishers association, to enter the Haverhill newspaper market was not a violation if done for a legitimate purpose, not "primarily to cause loss of business to another." (2) The Haverhill market could not support two high grade dailies, so that a natural monopoly situation existed. (3) Therefore, the use of unfair methods, such as advertising rate discrimination, also establishes the existence of an exclusionary intent.

II. THE USE OF MONOPOLY PROFITS AND MONOPOLY POWER

The first major question in the case, as the district court stated it, was whether the Union Leader Corporation (publisher of the *Journal*) "was free to use in the second market the profits it had made in the monopoly market . . . ."[4] The court answered this by stating a general principle: "[O]ne who enjoys a lawful monopoly in one market is free to enter another market but is prohibited from using in that other market what is technically called the 'market power' he enjoys in the first market."[5] The court did not feel that in general Union Leader was making such use of its Manchester market power. There was no proof of combination advertising contracts for the Manchester paper and the *Journal,* and while the two were printed in the same plant, it was not shown that the *Journal* thereby obtained any substantial economic advantage.[6]

The same principle applied, in the court's view, in the case of the use of profits derived from newspaper monopolies in other cities by the members of the association which purchased the *Gazette.* As Judge Wyzanski phrased it:

4. 180 F. Supp. at 139.
5. *Ibid.*
6. Thus the problem of the joint venture was obviated. For an interesting discussion of joint ventures, see Bork, *Ancillary Restraints and the Sherman Act,* 15 A.B.A. ANTITRUST SECTION 211, 224 (1959).

> Here there is no evidence of interlacing of policies, practices or operations of . . . [the association's] stockholders *inter se* or with . . . [the *Gazette*]. Each runs a wholly separate enterprise. Each is king in its own city. None has joined an imperial federation holding sway in New England.[7]

In summary, the court's attitude on the use of monopoly profits is best indicated by its use of a passage from the *Restatement of Torts:*

> [O]ne who . . . owns the only newspaper (that is, a so-called monopoly newspaper) in a city is not merely on that account prohibited from using its funds to start a newspaper in another city where there is competition. If all that is involved is the use of money, and if the money is invested with relation to a reasonable expectation of ultimate profit, or, let us say, to promote some political end, or to accomplish some other legitimate purpose and not *"primarily* for the purpose of causing loss of business to another" (Restatement, Torts § 709), the investment is not a tort and ordinarily is not a restraint of trade nor an attempt to monopolize.[8]

The quoted statements raise some arresting problems. It is not entirely clear from the opinion whether the court was making a distinction between the case where one was using primarily monopoly profits to put someone out of business, and the situation where one was using moneys not so derived but for the same purpose primarily. If this is the distinction that is being drawn, the source of the means to achieve a purpose becomes more important than the purpose. If not, the reference to monopoly profits with respect to causing someone a loss rather than with respect to achieving another monopoly seems a fertile source of confusion.

Whatever the precise implications of the statement, surely Judge Wyzanski is not stating that the source of funds used to achieve a monopoly by putting a competitor out of business is irrelevant to the decision. Would the situation be the same where the owner of the sole newspaper in one city does this in another city as where this is done by one whose newspaper voice is already the sole voice in a much larger part of the same region, although not in the identical area? Would it be all right for one to open a newspaper in a few, in many, in all New England cities with the intent that his newspaper succeed and the existing one fail and that ultimately he be the newspaper lord of all he surveys, but gained "without unfair means"? To

7. 180 F. Supp. at 144.

8. 180 F. Supp. at 139. Judge Aldrich's opinion for the first circuit explicitly approves this holding: "We agree with the [district] court that the use of financial resources alone was not such an exercise of the Manchester 'monopoly power' in Haverhill as would imply an intent by Union Leader wrongfully to exclude its competitor." 284 F.2d at 584 n. 5. See also the later statement: "But we have never heard of a principle that a corporation having affluent shareholders could not compete." 284 F.2d at 589. The source of the affluence is notably not mentioned.

bring a section 2 case under such circumstances, must one wait until the monopoly stage has been reached?

It would seem inadvisable to lay down any general rule as to the use of profits from one monopoly to attain another. At some point, certainly, consideration might be given as to whether other buyers are available. The courts in dicta and the pundits in statements as to the law have taken the position that there may be reasonable monopolies, such as where monopoly power is the result of natural circumstances, thrust upon one or earned by one's honest sweat.[9] But the validity of a monopoly may be judged by what it does after creation as well as by how it was created. And, since it is the corruptibility of monopoly power that presents an ever-present and well recognized problem, one's use of the fruits of that monopoly power to gain another monopoly may well merit a stricter test than in the case of one who must operate without such power. Where monopolies are in the same field, it would seem unlikely that the absence of geographical identity would prevent the market position of the owner from being enhanced in each area as a buyer, seller, or employer because he has more than one monopoly.[10]

The circuit court opinion seems to have recognized these implications, although it fails to specifically apply them to the relationship between monopoly profits and monopoly power. It speaks in terms of the concept of the "wider market":

> We cannot agree with the district court that there could be no proscribed activity here because there was nothing but a number of narrow markets in each of which a shareholder [in the association] was "king" and hence no "combined . . . market power." . . . On the contrary, in whatever measure any shareholder was concerned in protecting its own narrow market, it was aided by others similarly situated. To this degree we see a wider market and the possibility of an illegal transaction.[11]

In the final analysis, however, the circuit court did not feel that the evidence in the case was strong enough to compel it to disagree with the district court finding that none of the participants in the purchase of the *Gazette* had sufficiently increased its market position to find a violation.[12]

The use of one's monopoly power to secure—or attempt to secure—another monopoly or dominant position is surely not highly regarded

9. United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 342 (D. Mass. 1953), *aff'd*, 347 U.S. 521 (1954); *cf.* United States v. DuPont & Co., 351 U. S. 377, 390-91 (1956). See also ATTORNEY GENERAL'S COMMITTEE TO STUDY THE ANTITRUST LAWS, REPORT 56 (1955).

10. It may be noted that in the instant case, Haverhill and Manchester are but a short distance apart.

11. 284 F.2d at 589.

12. 284 F.2d at 590.

in antitrust law.[13] Nor does a monopolist enjoy the same freedom of economic action that the non-monopolist may enjoy.[14] It would seem unsafe to assume that the "honest" monopolist would be allowed to secure any appreciable number of other similar monopolies before the courts would cry "Halt!"[15] The law may be ready to bar or refuse reinforcement of such use of monopoly power even without finding an antitrust violation; to be followed later—as in patent cases —with a substantial coalescence with the antitrust laws.[16]

Since newspaper monopolies are the rule rather than the exception, it would hardly do to say that no newspaper monopolist could acquire another newspaper monopoly elsewhere. But what might be "reasonable" so far as the public interest is concerned in the case of one such monopolist might be unreasonable in the case of another, even in the absence of any "unfair" tactics.[17] This is a type of situation, however, which, if it is to be dealt with under the antitrust laws, should be applied through the process of a civil suit and not through a criminal action.[18]

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13. Ethyl Gasoline Corp. v. United States, 309 U.S. 436, 459 (1940); F. C. Russell Co. v. Comfort Equip. Corp., 194 F.2d 592 (7th Cir. 1952); Baldwin-Lima Hamilton Corp. v. Tatnall Measuring Sys. Co., 268 F.2d 395 (3d Cir. 1959); *cert. denied,* 361 U.S. 894 (1959).

14. Northern Pac. Ry. v. United States, 356 U.S. 1 (1958); Hershey Chocolate Corp. v. FTC, 121 F.2d 968 (3d Cir. 1941); United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945); Gamco, Inc. v. Providence Fruit & Produce Bldg., 194 F.2d 484 (1st Cir. 1952), *cert. denied,* 344 U.S. 817 (1952); United States v. Klearflax Linen Looms, Inc., 63 F. Supp. 32 (D. Minn. 1945); Greenleaf v. Brunswick-Balke-Collender Co., 79 F. Supp. 362 (D. Pa. 1947); Tallahassee Oil & Fertilizer Co. v. H. S. & J. L. Holloway, 200 Ala. 492, 76 So. 434 (1917); Dunkel v. McDonald, 57 N.Y.S.2d 211 (Sup. ct. 1945) *aff'd in part,* 270 N.Y. App. Div. 757, 59 N.Y.S.2d 921 (1946); James v. Marinship Corp., 25 Cal.2d 721, 737, 155 P.2d 329, 335, 338 (1944); Wilson v. Newspaper and Mail Deliverers' Union, 123 N.J. Eq. 347, 350-51, 197 Atl. 720, 722 (1938). See Sugar Institute v. United States, 297 U.S. 553, 600 (1936). *Cf.* Associated Press v. United States, 326 U.S. 1 (1945).

15. The fewer the entrepreneurs in a field, the more likely an augmentation of their geographic area of competition with other competitors. Under section 7 of the Clayton Act, a tendency toward or a creation of an oligopoly situation is a relevant consideration, even though the oligopoly situation may be legal. United States v. Bethlehem Steel Corp., 168 F. Supp. 576, 607 (S.D.N.Y. 1958); United States v. Brown Shoe Co., TRADE REG. REP. ¶ 69,532 (D. Mo. 1959); S. REP. No. 1775, 81st Cong., 2d Sess. 5 (1950). See Barnes, *Markets, Competition, and Monopolistic Tendencies in Merger Cases,* 40 MARQ. L. REV. 141, 148 (1956). Compare the comment of Judge Barnes, head of the Antitrust Division, with respect to the *RCA* case: "That raises the question . . . . whether a monopoly of monopolies can exist." *Hearings Before Subcommittee of House Committee on Appropriations,* 84th Cong., 1st Sess. 180 (Feb. 25, 1955). The *RCA* case was settled.

16. See Marcus, *Patents, Antitrust Laws and Antitrust Judgments Through Hartford-Empire,* 34 GEO. L. J. 1, 25 (1945).

17. Significant differences might be in size of the monopolists, extent of their power, location of other newspapers which are part of the monopoly, attempts at, or possibility of, selling to a non-monopolist, etc. A court may regard one monopoly less favorably than another. Clairborne Elec. Co-op, Inc. v. Louisiana Power & Light Co., 155 F. Supp. 644 (D. La. 1957).

18. Even where unfair tactics have been used by one to attain a newspaper monopoly, the government may have a difficult choice in deciding whether

Having raised these questions in regard to the use of monopoly profits in general, it seems appropriate to inquire whether there should be any difference in the law's treatment where the profits so used come from an illegal monopoly. It is arguable that the legality of what one does with money is not to be judged by the legality of its source. Thus, antitrust judgments almost uniformly are barren of any attempt to reach monopoly profits.[19] On the other hand, the Supreme Court has admonished against leaving the fruits of a monopolistic conspiracy untouched.[20] In antitrust cases, moreover, the courts have shown little concern with loss of future profits.[21] The law contains many instances where the taint which attaches to something illegally obtained carries over to a subsequent transaction

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to bring a civil or criminal case, if it is confronted with a one-newspaper city. A criminal suit, if won, is likely to result in a fine which the defendant may regard as a cheap price to pay for a monopoly. It is also more difficult to win than a civil suit. See United States v. Hart-Hanks Newspapers, Inc., 170 F. Supp. 227 (N.D. Tex. 1959). To gain divestiture in a civil suit, the government may have to argue a "fruits of monopoly" theory or restoration of the status quo (rather than as in the ordinary case, restoration of competition) against a defendant's contention of "penalty." *Query*, if divestiture is secured whether the defendant could later use "fair" means to acquire it.

19. *But cf.* Hartford-Empire Co. v. United States, 324 U.S. 570, 571-72, 580 (1945) wherein ultimately, the lessee recovered part of the royalties paid in to the receiver. On the other hand, the writer knows of no case where a defendant required to divest some property was able to insist upon receiving its value as part of a monopoly situation where the monopoly had been or was being dissipated and its market value reflected that fact. In some instances, where defendants have delayed obeying a court order for divestiture, court orders granting additional time have been conditioned upon a loss of the right to receive full market value. Antitrust judgments have been entered barring recovery for past violations of patent rights where the patents were involved in antitrust violations. And the courts have left the misused patent holder holding a bag of unredressible "wrongs" which have hurt his pocketbook. Morton Salt Co. v. Suppiger Co., 314 U.S. 488 (1942); B. B. Chem. Co. v. Ellis, 314 U.S. 495 (1942); Mercoid Corp. v. Honeywell Co., 320 U.S. 680 (1944).

Of course, the indirect effect of many antitrust judgments will destroy or dissipate monopoly profits which have been reinvested in an enterprise which is the subject of the judgment. Most of the cases cited in the succeeding footnotes have this element. The law expressly provides for forfeiture in certain types of antitrust situations. 26 Stat. 210 (1890), 15 U.S.C. § 6 (1958).

20. Schine Theatres v. United States, 334 U.S. 110, 128 (1948).

21. *E.g.*, Continental Ins. Co. v. United States, 259 U.S. 156 (1922); United States v. Crescent Amusement Co., 323 U.S. 173, 189 (1944); United States v. Schine Theatres, 334 U.S. 110, (1948); International Boxing Club v. United States, 358 U.S. 242 (1959); and see *In re* Consolidated Elec. & Gas Co., 55 F. Supp. 211, 216 (D. Del. 1944). *But cf.* United States v. E. I. DuPont de Nemours and Co., 177 F. Supp. 1 (N.D. Ill. 1959), now on appeal in the Supreme Court.

Such loss will almost always follow termination of tie-in arrangements. Royalty fee licensing provisions in judgments, as well as those providing for compulsory licensing at reasonable royalties, may have an adverse effect on the profit picture. Divestiture decrees will generally have a similar effect. As to dividends, see Standard Oil Co. v. United States, 221 U.S. 1, 79-80 (1911); United States v. Union Pac. R.R., 226 U.S. 61, 96-97 (1912).

involving that thing.[22] There is a practical difficulty in taking away and knowing what to do with moneys improperly secured through antitrust violations—private treble damage suits and fines notwithstanding—but such difficulties do not obtain where the moneys have been used to achieve a monopoly which can be more readily dissipated without appreciable loss to the antitrust violator.

III. Economic Impossibility—The Offers To Purchase

The second key finding of the court with which we are concerned was that the Haverhill market could not support two high grade dailies. The court noted the city's population of 47,000, and the combined circulation of the papers, which was 20,000, and on the basis of these figures and expert opinion stated that it was "possible to run at a profit in Haverhill two or more daily newspapers of limited coverage and of inferior general quality" but that a newspaper of the high standards of either the *Journal* or the *Gazette* "could not succeed financially as a *wholly independent* enterprise unless either it had no rivals or had in the face of rivalry a circulation of over 15,000."[23] Judge Wyzanski also found that both papers had been operating for some time at a loss.[24]

With this background, the court approached the problem of the offer of the *Journal* to buy out the *Gazette*, stating:

> If this were a city in which at least two newspapers could economically survive, the offer to purchase would be an attempt to monopolize. . . . It would not be a victory won by skill, foresight, and industry. But the situation is different where a city can accomodate only one successful newspaper, and two roughly equally able companies are competing for the single prize that is available.[25]

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22. *E.g.*, Diedrich v. Northwestern Union Ry., 42 Wis. 248 (1877); Department of Pub. Works & Bldgs. v. Hubbard, 363 Ill. 99, 1 N.E.2d 383 (1936); Kingsland v. Mayor, 110 N.Y. 569, 18 N.E. 435 (1888); Joly v. City of Salem, 276 Mass. 297, 177 N.E. 121 (1931) (enhanced value from illegal use not compensable).

23. 180 F. Supp. at 129. The conclusion is accepted by the circuit court with little comment. 284 F.2d at 583-84.

24. 180 F. Supp. at 129.

25. 180 F. Supp. at 142. Seemingly, the court makes a distinction between the situation where one comes into an area with the intent to put someone else out of business, but not to remain there oneself, and the situation where one comes in with the intent to put someone out of business in order to remain there. Actually, it would seem that it is the first of these situations where the intent or attempt to monopolize is the more difficult to ascertain.

In determining whether there is an attempt to monopolize, is there a distinction between action designed to eliminate the competition of another by forcing him to abandon his business and thus gain a monopoly, and action designed to eliminate a competitor by buying him out and thus to achieve a monopoly? It stretches one's imagination to believe that when the plaintiff tried to buy the *Gazette*, it had any idea that, if successful, it would operate both the *Journal* and the *Gazette*.

Therefore, since in the court's view survival of but one paper was inevitable, it would have been permissible for the *Journal* to have paid a reasonable price for the *Gazette,* since "though it would have appeared to lessen competition it would have not done so substantially; it merely would have somewhat shortened the time within which competition could continue."[26]

By applying much the same reasoning, the circuit court found that the association which incorporated and purchased the *Gazette* had not violated section 7 of the Clayton Act which makes certain stock acquisitions illegal if the effect would be to substantially lessen competition. Said Judge Aldrich: "If competition is doomed by market conditions, it cannot be 'lessened' by a change of ownership."[27]

The writer finds much that is disturbing in the foregoing analysis. It is particularly difficult to accept Judge Wyzanski's analysis of the attempt to purchase in isolation from the rest of the case. The judge had found a number of activities of the plaintiff designed to bring the *Gazette* to its knees to be attempts to monopolize. It is in the context of such illegal activities that the validity of the attempted purchase might have been—and, it is submitted, should have been—adjudged.[28]

Is a sale to be condoned even though compelled by illegal activities of one competitor because the area has not enough economic room for two competitors? Could not the purchase be held illegal because the *Gazette* was entitled to have its success or failure determined by economic forces other than those tainted with "unfairness"? It is not believed that because one of the two competitors must sell out the law can be unconcerned with how the predisposition of one of them to sell is brought about. The courts should be concerned with the effect of the means used as well as with the means themselves.

A number of other questions suggest themselves. Can the court be sure it is not economically feasible for two such newspapers[29] to survive in Haverhill, even on the basis of expert testimony? Is that a proper inquiry for the court? Should a judge become involved in

26. *Ibid.*
27. 284 F.2d at 489.
28. For illustrations of this type of reasoning, see Swift & Co. v. United States, 196 U.S. 375 (1905); Ethyl Gasoline Corp. v. United States, 309 U.S. 436, 461 (1940); United States v. Bausch & Lomb Optical Co., 321 U.S. 707 (1944); Ballard Oil Terminal Corp. v. Mexican Petroleum Corporation, 28 F.2d 91 (1st Cir. 1928); United States v. Logan Co., 130 F. Supp. 550 (W.D. Pa. 1954).
29. As has been noted, the court at one point in its opinion uses the term "wholly" independent to describe the papers. The writer assumes that the court means that neither newspaper would be operationally connected with other newspapers. If it means not having outside support, this does not seem relevant. The resources of a wealthy owner may be as strong a prop as those of a third party.

the kind of absolute prophecies and determinations which to the writer appear in Judge Wyzanski's findings? Moreover, is it more important to the people of Haverhill that there be only one paper of the "quality" of the *Gazette* or *Journal,* rather than two papers of perhaps "lesser" quality, but with some divergence of news coverage, news emphasis, and editorial viewpoint? Does "quality" mean such things as the size of its comic strip, affiliation with more than one news association, national columnists, the type face used? Is it quality of content, or is it perhaps quality of style to which the court refers? Is economic feasibility a relevant test in this connection? The fact of survival and the ability to survive should be more relevant considerations even though economic feasibility "proves" they cannot exist.[30] After all, even though few localities can boast of more than one daily, there are at least some such areas exclusive of large metropolitan centers.[31]

The Sherman Act does not guarantee business success to anyone. It does guarantee the right of a person to enter into or carry on a commercial endeavor free from artificial restraints, even though it is widely believed that he is a fool to engage in such endeavor. And, sometimes, the "fool" is successful. The exercise of the free forces of competition is supposed to determine whether one, two, or three of which one of two or three establishments will succeed; this is not purely a task for expert opinion. This writer is continually amazed how myriads of dry cleaning shops clustered in a particular area survive. Some do not. But many do even though I, in my "expert omniscience," am certain that they cannot. The same is true of some of the weekly newspapers in the county where I live which have survived for more than ten years. In the *Union Leader* case, the court, in commenting on the questions of intent of the defendants in acquiring the *Gazette,* said as to the latter; "[I]f it secured new funds and new management and if it was not faced with unfair competition it was of December 1958 reasonable to believe that within a year . . . [the *Gazette*] would reach a break-even point and that ultimately it would regain its earlier profitability."[32] Unless the court meant that within a year the *Journal* would be out of business, it would seem that this is a recognition or an intimation that a newspaper could operate in this competitive atmosphere without losing money. There is at least an intimation in the district court's findings that, expert opinion

30. Thus in Scott Publishing Co. v. Columbia Basin Publishers, Inc., 180 F. Supp. 754 (W.D. Wash. 1959), it appeared that two newspapers in the situation of those in Haverhill had existed for some ten years.

31. The writer understands that in Sarasota, Florida, since 1954 there have been three newspapers, two of which have been in single ownership. They are now involved in antitrust litigation.

32. 180 F. Supp. at 138.

to the contrary notwithstanding, there were third parties interested in purchasing the *Gazette* despite the competitive battle in which it was engaged.[33]

Is it not possible that a person with other profitable financial interests might be found willing to operate a newspaper with little or no profit, or even with a slight loss, either because he is able to indulge himself by doing what many of us would like to do—run a newspaper—or because of some benefit he or his other business enterprises would receive from such an operation?[34] Moreover, a new factory, government installation, or shopping center for Haverhill might change the economic situation substantially and rapidly.

It may be doubted that at the time the *Journal* sought to buy the *Gazette,* the experts who testified before the court would have thought it likely that any third party would be interested in buying the *Gazette.* But that is exactly what happened. The purchase, indeed, saved the dual newspaper service for Haverhill, for one would surely have to stretch his imagination to believe that when the plaintiff tried to buy the *Gazette* it had any idea that, if successful, it would operate both the *Journal* and the *Gazette.*

Does not the court have an obligation to preserve temporary competition as well as "permanent" competition? If it were known that at the end of three years a commodity would be supplanted by another commodity, would an attempt to monopolize the first commodity at the beginning of the period be permissible? Is it, in any event, a proper inquiry of a court to attempt to determine how long a competitor can exist and on the basis determine whether to find an attempt to monopolize? The Sherman Act applies to "any part" of our commerce.[35] It applies to protect a newly organized business.[36] And it applies to condemn a monopolization which is temporary as well as one which is permanent.[37]

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33. 180 F. Supp. at 134.

34. Thus, in Scott Publishing Co. v. Columbia Basin Publishers, Inc., *supra* note 30, it appeared that the International Typographical Union, through a corporation known as Unitypo, Inc., had, on a number of occasions where a newspaper had been unwilling to come to terms with the union, created a competitive newspaper. In the instant case, one of the reasons for defendants' purchase of the *Gazette* may well have been to use it as a training ground for some of their employees. 180 F. Supp. at 135, 138.

35. Standard Oil Co. v. United States, 221 U.S. 1, 61 (1911); Farmer's Guide Co. v. Prairie Co., 293 U.S. 268, 279 (1934); United States v. Yellow Cab Co., 332 U.S. 218, 226 (1947).

36. Forgett v. Scharf, 181 F.2d 754 (3d Cir. 1950), *cert. denied,* 340 U.S. 825 (1951).

37. Peto v. Howell, 101 F.2d 353 (7th Cir. 1939) (corner on July corn). In that case the court said: "'Any part' of commerce may cover commerce in a vast district, or that in a small district, that occurring over a long period of time or over a short period of time, but it is not to be considered that a monopoly of all that part of interstate commerce in the City of Chicago for any one day is any less of a violation of the law than a monopoly

There does seem to be added significance in the fact that this case dealt with newspaper competition.[38] As Judge Learned Hand has pointed out:

> However, neither exclusively, nor even primarily, are the interests of the newspaper industry conclusive; for that industry serves one of the most vital of all general interests; the dissemination of news from as many different sources, and with as many different facets and colors as is possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it pre-supposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it for our all.[39]

In a time when the dearth of newspaper competition is a matter of general concern, is not the preservation of temporary competition highly worthwhile even if permanent competition does not seem likely? The benefits of competition accrue not only to advertisers, but also to readers and to those who have issues they desire to bring to public attention. Most industries are concerned with commodities or physical services as to which the buyer can find alternative satisfactory suppliers, but this is much less likely to be true in the case of ideas, news and space availabilities which different newspapers furnish.

It is apparent from Judge Wyzanski's findings that, despite the opinion of experts that two papers could not exist in Haverhill, they had existed for at least two years at the time of judgment, and there is nothing in the findings to indicate that either was on the verge of quitting. Was the public to be deprived of their good and exceptional fortune in having two newspapers because experts believed in the future the hard facts of economic life would overtake one of these papers? The underlying basis of the test of the effect or possible effect on competition is the public interest. It would seem in the public interest to preserve newspaper competition as long as possible.

IV. Unfairness—The Effect of a Natural Monopoly Situation

The third group of findings by the court relate to the problem of unfairness, especially with regard to the use of unfair means in a

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over the same product and the same market for thirty days or for a year." *Id.* at 356.

38. In Associated Press v. United States, 326 U.S. 1, 28 (1945), Justice Frankfurter, in a concurring opinion, said: "But the freedom of enterprise protected by the Sherman Law necessarily has different aspects in relation to the press than in the case of ordinary commercial pursuits."

39. United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945).

natural monopoly situation. The district court introduced this problem by stating the two-phase approach used by judges to determine whether a section 2 violation has occurred—"that interpretation of § 2 which prohibits a person (a) who has an intent to exclude competition (b) from using not merely technical restraints of trade, but even predatory practices . . . what may loosely be called unfair means."[40] The court found that the plaintiff had violated section 1 of the Sherman Act by various types of unfair activity; and that by secret advertising discriminations, both plaintiff and defendant had also violated section 2. While Judge Wyzanski felt that the "pot" was considerably blacker than the "kettle," he determined this was not sufficient to bar the former from succeeding in the action. On this point the circuit court reversed his holding.

The notable feature of the opinion is the way in which unfair activity in violation of section 1 becomes a double weapon in the hands of an able judge so that it also serves as *prima facie* evidence of an exclusionary intent. The reasoning by which this transmutation takes place was stated by Judge Wyzanski with his usual clarity:

> Contrary to what a layman might suppose, a person does not necessarily have an exclusionary intent merely because he foresees that a market is only large enough to permit one successful enterprise, and intends that his enterprise shall be that one and that all other enterprises shall fail. If the evidence shows that in laying his plans and executing them he contemplates and utilizes only superior skill, foresight, and industry, he has not an intent which is contrary to law. To prove that a person has that type of exclusionary intent which is condemned in anti-trust cases there must be evidence that the person who foresees a fight to the death intends to use or actually does use unfair weapons. Putting the same idea in another way, we may say that there is no sharp distinction between (a) the existence of an intent to exclude and (b) the use of unfair means. In a situation where it is inevitable that only one competitor can survive, the evidence which shows the use, or contemplated use, of unfair means is the very same evidence which shows the existence of an exclusionary intent.[41]

Applied to the present case, this reasoning means that where it is economically not feasible that two competing newspapers of high caliber can survive, the use of secret rate discriminations and the like establishes not only a violation of section 1, but also serves as evidence of an intent to exclude a competitor by objectionable methods, so that section 2 is likewise violated. In this manner the same finding of economic impossibility which the court held prevented the plaintiff's offer to purchase the *Gazette* from being a

40. 180 F. Supp. at 140. The same approach is indicated in the circuit court opinion. 284 F.2d at 584-85.
41. 180 F. Supp. at 140.

section 2 violation served simultaneously as the factor which enabled the court to find that exclusionary intent necessary to finding a section 2 violation on another basis.

Judge Wyzanski felt that the reasoning we have quoted was equally applicable to the *Gazette*'s advertising rate discrimination, and that for this reason the plaintiff should be allowed to recover.[42] Thus he stated:

> [H]aving about fifty per cent of the market, and knowing that the market would not permit two contestants to survive . . . [the *Gazette's*] resort to any unfair practice, and its failure to confine itself to exercise of skill, foresight and industry, compels a conclusion that . . . [the *Gazette*] had an exclusionary intent and had attempted to monopolize the market in violation of § 2 of the Sherman Act.[43]

The circuit court, on the other hand, felt that this unduly emphasized the factor of the "natural monopoly" situation, as indicative of an exclusionary intent, without giving sufficient weight to the fact that the *Gazette* was acting in self-defense. Judge Aldrich felt that by terming the *Gazette's* activities "an 'unfair practice' the court assumed the point." He went on to say:

> For, as we conceive the issue, the practice was "unfair" if conducted with an intent to monopolize, but it was fair if it was intended only to resist deterioration of its own position brought about by Union Leader's unlawful activities.
>
> It is now clear that a plaintiff's own antitrust violations do not bar its successful maintenance of a private antitrust action. . . . However, it does not necessarily follow that a competitor's violations cannot constitute a circumstance to be considered in determining whether the defendant's conduct was in fact a violation. . . . We do not think that the fact that competition is in a natural monopoly climate can limit a defendant's right to defend itself.[44]

This modification by the circuit court neutralizes to some extent at least the effect of the finding of a natural monopoly which was criticized in the preceding section of this article.

V. Conclusion

As the foregoing discussions have indicated, Judge Wyzanski's decision in the *Union Leader* case is filled with acute and discerning observations on the nature of our antitrust laws. At the same time, it is hoped that this article has pointed out certain unresolved difficulties with the opinion—problems which remain largely unresolved in the circuit court opinion. The thrust of this criticism is that in

42. 180 F. Supp. at 142-43.
43. 180 F. Supp. at 143.
44. 284 F.2d at 586-87.

general these opinions apply the concepts of the anti-trust laws too much in isolation, without giving sufficient consideration to the interrelationships between the parties, and between their activities and certain public policies.

One must agree with the district court's observation that the mere fact that one opens a business in an area with the idea that he will succeed and an existing—perhaps poorly run—business will have to withdraw and leave him alone in the field is hardly a situation which the Sherman Act is intended to reach. The Sherman Act does not protect one from competition, least of all a monopolist, which the *Gazette* admittedly was. And this is true even though the competition is likely to result in a monopoly.[45] But there are limits upon the methods which one can use to compete, and it seems to the writer that these limitations cannot be stated wholly in terms of "unfair means" to the exclusion of such considerations as the use of monopoly profits.

To equate the reach of the anti-trust laws to the use of "unfair means" seems much too narrow. It is one thing to find an attempt to monopolize where "unfair means" are used; it is another thing to generalize that "unfair means" is the test.[46] Is not the dominant or lack of dominant position of one in the industry to be taken into

45. This does not mean that the public has no interest in the competition for a natural monopoly. See 284 F.2d at 584 n.4.

To the effect that a so-called "natural monopoly" newspaper is not protected from competition, see Scott Publishing Co. v. Columbia Basin Publishers, Inc., 180 F. Supp. 754 (W.D. Wash. 1959). This case is a coincidental counterpart of the *Union Leader* suit. In the Scott case, the *Tri-City Herald*, a daily newspaper, began publishing in a tri-city area in the state of Washington. The area had a population of about 50,000. It was not a flourishing success, but by 1949 had a circulation of over 12,000 and was, except for lack of capital, not in bad shape. Parish, a man with experience in the newspaper business but who in 1949 was not publishing a newspaper, decided that the Tri-City area was a promising area for a newspaper. He first tried to purchase the *Tri-City Herald*, but negotiations fell through because of lack of agreement as to price. By late 1949, Parish was publishing a weekly in the area, and by 1950 was publishing a daily, the *Columbia Basin News*. There were indications that Parish thought he could eliminate the competition of the *Tri-City Herald*.

The *Herald* was beset by labor troubles starting in December 1949. Over the years, there was a bitter competitive struggle between the papers which the Court found rough, but not "dirty." The *News* lost money steadily and heavily. It made an attempt to sell out to the *Herald* which was not successful. It was succored by the printers' union with which the *Herald* had never made its peace. The union gradually became the dominant voice in the ownership and management of the *News*. The publisher of the *Tri-City Herald* brought suit under sections 1 and 2 of the Sherman Act, section 3 of the Clayton Act, and under the Robinson-Patman Act against the publisher of the *News*. The court gave judgment to the defendant.

46. See United States v. Griffith, 334 U.S. 100, 106-07 (1948): "[T]hose things which are condemned by § 2 are in large measure merely the end products of conduct which violates § 1. . . . But that is not always true. . . . [M]onopoly power, whether lawfully or unlawfully acquired, may itself constitute an evil and stand condemned under § 2 even though it remains unexercised."

consideration? If one can do this, depending upon superior financial resources, access to suppliers, and the like, how does this square with the statement of Judge Learned Hand, speaking of the Aluminum Company of America:

> [The company] insists that it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connection, and the elite of personnel.[47]

The situation is not, after all, the same when one deals with newspapers as it is when he deals with cabbages. The anti-trust laws are not economic postulates, divorced from social considerations and social values.[48] It seems to this writer an egregious error to apply even the most penetrating and exacting logical analysis to cases like *Union Leader* without paying great heed to the powerful forces of society and the unique position of the newspaper in the American way of life.[49]

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47. United States v. Aluminum Co. of America, 148 F.2d 416, 431 (2d Cir. 1945), *cited with approval* in American Tobacco Co. v. United States, 328 U.S. 781, 814 (1946). It will hardly do to say that this admonition is concerned only with a single identifiable monopoly. On this theory, a local monopoly might be parlayed into a national or regional monopoly by acquisition of a sufficient number of local monopolies. Contiguity or absence of geographical barriers cannot be an indispensable text. If the Aluminum Company had a monopoly east of the Rockies, it may be doubted that Judge Hand would have condoned the acquisition or attempted acquisition of a monopoly of aluminum west of the Rockies. Each monopoly in the same field adds to the holder's market power.

48. See Marcus, *Antitrust Laws and the Right to Know*, 24 IND. L.J. 513 (1949); Marcus, *Civil Rights and the Anti-Trust Laws*, 18 U. CHI. L. REV. 171 (1951).

49. To the effect that Loeb, the publisher of the *Journal*, was likely to give Haverhill a type of newspaper different from most newspapers, see LINDSTROM, THE FADING AMERICAN NEWSPAPERS 125 (1960). Said Loeb: "We run more letters to the editor, I am sure, than any other newspaper in the nation."