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REVIEWS

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REVIEWS


This is a book of prophecy, clear-eyed, uncompromising, daring. It outdoes the scientists in boldness of prediction. While they have gloomily shown that an atomic armaments race will lead to the destruction of civilization, Mr. Borden proposes methods for enabling us to survive one. He thereby raises two questions in answering one: a) will his methods work? b) will life be worth living under the circumstances attending survival?

Convinced that social and political institutions will remain essentially unchanged under the impact of recent events, and assuming that predictions of the dire potentialities of the atom and the rocket, emanating so profusely from scientific quarters, are to be taken literally, the author presents a conjecture as to the nature of coming wars and surveys our chances of victory. Hope, he thinks, lies solely in being prepared at all times. We must possess more atomic bombs, more rocket projection ramps than other nations, but these are obvious and elementary requirements. More important is to have them properly dispersed throughout our continents and our oceans, and to have them continually manned. Cities and industries, we are told, may have been made obsolete by the atomic bomb, but navies will still be needed. Conscription for military service, while of little practical significance in itself, is nevertheless advantageous in promoting a psychology of preparedness. Espionage must be deprived of all moral stigma, must be taught and recognized as an honorable weapon, and must be practiced on a global scale.

Clearly, the acceptance of such singleminded and forthright extrapolations upon the recent past by the reader is unlikely unless he can be assured of a chance of weathering disaster when it comes. And here he is assured by Mr. Borden that prospects are not wholly black. For he regards the atomic bomb primarily as a tactical, not a strategic weapon. An enemy, he feels, will not waste his bombs on centers of population but will distribute them over chosen targets from which reprisal might issue. The book musters considerable dialectic effort in delivering this conviction, sometimes as though the author were aware of its logical precariousness. Here is indeed a major defect of reasoning. For if the pronouncements of scientists are to be believed without reservation, as everywhere else in the book, why fail to heed their warning that a large number of bombs, dropped anywhere on our Continent, may make life impossible upon it because of radioactive contamination of the atmosphere?

The book bases its impressive discourse on a vast store of factual information, and its literary qualities speak highly of the author's promise. There is no musty sentimentalism to retard or deflect the course of argumentation. Frequently the discussion is so unorthodox as to be fascinating, and at times
one encounters truly revolutionary suggestions. But the reader will dis-
cover its excellence for himself; hence I beg leave to speak of other matters
which must not remain unmentioned in the face of so grave an issue.

It may seem ungracious and pedantic to mention minor infelicities in the
vast theme of this book. But if the errors, however trifling, are predomi-
nantly similar, their occurrence might be telling. The point is that Mr.
Borden's reading, and certainly his understanding, in basic science is not as
wide as it is in political science and military strategy. His technical termi-
nology in matters of chemistry and physics is often faulty ("speed is derived
from momentum"; velocities are usually measured in "knots per hour";
temperatures in "degrees of heat"; "one part of uranium occurs in 140 parts
of the ore"; oxygen is the fuel of rockets!) and he labors under rather serious
misapprehensions about nuclear physics. These are manifest in his recurrent
allusions to the potency of cosmic rays with which we might some day
shower our enemies. Somehow he thinks that the ionosphere protects us
from the impact of these rays, and removal of the ionosphere would spell
disaster to an enemy country. Of all known atoms, he holds that deuterium
might possibly be a substitute for fissionable uranium, a most unfortunate
choice from the point of view of nuclear masses. Less trivial is the uncritical
manner in which Mr. Borden accepts the journalists' verdict on the Bikini
tests: they have shown, he feels, that naval vessels are relatively immune to
atomic blasts. Rumor has it that the waters around Bikini and the test
vessels are still unsafe for navigation!

Such errors are not too numerous, and as errors they are to be excused.
But they are symptomatic of an attitude which is dangerous unless recog-
nized, an attitude which regards political history as the sole criterion for the
possibilities of future achievements of our race. History, in this reviewer's
opinion, guides us safely in avoiding a repetition of past errors, but fails to
encompass the vast unformed potentialities inherent in mankind. While
ready to overlook factual slips, the reader of Borden's book cannot accept
the monstrous consequences of an inquiry reared upon an analytic method
which has never proved itself above suspicion, the method by which history
arrogates to itself the right and the power of prediction. In a sense, Mr.
Borden's book epitomizes the enormous cultural conflict of our time. Nat-
ural science has become creative. When its practitioners said: let there be an
atomic bomb, their fiat came true despite history's ignorance of atomic
bombs. In the opposing camp the student of the social sciences, his face
turned toward the past, pontificates over the depravity of human nature
which, because there always have been wars, insures us that there always
will be. Mr. Borden is a champion of this group. I do not quarrel with his
hypothetical reasoning, but I utterly disagree with his premise.

The premise, as stated before, is that there will be no change in our politi-
cal institutions, in particular that nations will never yield their sovereignies
in an effort to prevent wars. A chapter entitled "The Certainty of War
Amidst Anarchy," inserted near the book's beginning, is designed to prove
this eternal verity. It abounds with statements like the following: "Among Christian nations alone the possibility that what has failed to occur in two thousand years will somehow occur in the next two or three decades seems negligible." By the same token the chance that atomic energy should be released in 1944 seemed negligible in 1943. Science, too, has had a period in which inertia with respect to innovations was very great, in which truly creative acts appeared impossible; but it succeeded in taking the important step from the bondage of tradition to productive freedom. Mr. Borden's claim that "struggle is as basic an aspect of human life as cooperation" seems as archaic as Aristotle's belief that a stone falls, and fire rises, because each tends toward its natural place.

Mr. Borden's belief in the failure of nations to come to terms may be correct; my criticism of his premise may be invalidated by an atomic catastrophe. In that event, however, I doubt whether he will long enjoy his knowledge of having been right.

HENRY MARGENAU†


Those who are led by the ambitious title of this booklet to expect a discussion of various methods by which the public may better obtain its money's worth in its business dealings are doomed to disappointment. Except for two pages devoted to dismissing the whole subject of direct performance versus performance by contract with the statement that there is much to be said on both sides, it deals only with the problem of how to draft statutes which will reduce opportunities for graft and collusion in the purchase and sale transactions of public bodies.

Starting with the tacit assumption that the general character of our public servants is such that maximum protection against their dishonesty is of paramount importance, the author next assumes that the most rigid possible purchasing procedure in the traditional sealed competitive bidding pattern is the best way to accomplish this result. He therefore sees no need to do more than to examine and catalogue the various statutory controls now in scattered use throughout the country, and to submit, in conclusion, a "model" statute which combines all of these controls—plus a few additions and refinements of his own devising—under one heading.

Admittedly graft and favoritism in the purchase of supplies has long troubled all business organizations, both public and private. Purchasing

† Professor of Physics, Yale University; author of FOUNDATIONS OF PHYSICS (1936) and MATHEMATICS OF PHYSICS AND CHEMISTRY (1943).
agents are inevitably subjected to temptations by over-zealous salesmen. And since the general public is too little informed, too apathetic, or too dis-organized to do the self-initiated checking which profit interested ownership provides in all but the largest of corporations, it may perhaps be conceded that public purchasing systems require more formal safeguards against graft and collusion than private organizations have felt to be necessary. The real question, therefore, is not whether controls are desirable, but what types of controls are most effective and at what point does the law of diminishing returns make further restriction in the interests of graft prevention more costly than it is worth.

Unfortunately the author precludes any real examination of these basic issues by his lawyerlike failure to question the validity of his major premises. Even the fact that during the past six years the bulk of federal purchases for the war effort were made by negotiation rather than by the competitive bidding method failed to create in Mr. James any scepticism whatever as to the value of traditional public purchasing methods. Nor can his complete disregard of this recent experience with negotiated contracts be justified on the basis that these were emergency purchases in “unusual” times. Every peace-time sellers’ market confronts purchasing bodies with sufficiently similar conditions and problems to warrant at least some investigation of the results of this procedure.

The real function of any purchasing system is to obtain for the purchaser—be it private industry or public body—the best value for the money expended. Too much concern with hampering dishonest officials has blinded the author—as it has many legislators—to the fact that a complicated competitive bidding system does not necessarily insure this net result. Frequently, in fact, it may have the opposite effect. The mass of red tape entangling some public purchasing systems is so formidable that it often either completely discourages potential low bidders or causes them to add enough to their bids to cover the additional cost and nuisance involved in handling a public contract. Public bodies, in other words, are not “favored” customers in many areas. The result is that the very foundation of the whole theory of secret competitive bids—that there is real competition for public business—crumbles. The “this is more trouble than it’s worth” reaction is not conducive to low bids. Yet, except in a very strong buyers’ market, too many businessmen tend to take that attitude when confronted with such requirements as affidavits, deposits of 5% of the bid amount, bids in quadruplicate, complicated specifications, et cetera. Another discouraging factor is the possibility that even after a contract has been won it may be invalidated because some technicality in bidding has been overlooked somewhere along the line. This loss of real competition for public business is a possible serious hidden cost of cumbersome competitive bidding systems. It should be carefully weighed against the savings such systems may effect in reducing graft.

But there is even room for doubt as to the validity of the assumption that competitive bidding is an important graft deterrent. The author himself
underscores this doubt by his somewhat grudging admissions that loop-holes are inevitable in even the most carefully constructed procedures and hence the only real protection against dishonesty in purchasing departments is the integrity of officials; that far more opportunities for graft exist at the inspection than at the contract letting level; and that such existing devices for policing regulations as suits by taxpayers and losing competitors require more interested, informed and aggressive individuals than exist. Yet there is not even a suggestion that there might be value in a study of how effectively the existing comprehensive competitive bidding statutes have eliminated the evils at which they are aimed.

The foregoing are only a few of the questions which can and should be raised. Sound recommendations for effective public purchasing policy and procedure can be made only after all such aspects of the problem have been carefully considered and checked by field work. The author, therefore, by beginning with what might well never be reached as a conclusion, has mis-spent much valuable time. Appendix II, for example, contains a digest of the statutes of each of the forty-eight states dealing with the letting of public contracts. In view of the difficulty involved in collecting all such statutes in even one state—scattered as they are under a variety of headings—this appendix alone represents a painstaking piece of research. It is indeed regrettable that the product of so much labor leaves the real questions not only unanswered but unasked.

ADDISON A. MUELLER†


The remarkable feature of this book, which outlines the Austrian civil law, is that it contains no apparent trace of the effects of the Nazi occupation. Yet this is its second edition since the liberation of Austria. It could as well have been written in 1938 as in 1946. Perhaps the author would like to forget and have others forget the ordeal of seven years of foreign occupation. The impact of Nazi rule on Austrian law has been considerable, however, and should hardly go unnoticed. It is impossible to teach or practice law in a liberated country without taking into account the deep impression made by the conquerors upon the former legal system.

Professor Wolff's silence in this textbook is certainly free from suspicious motives and cannot be imputed to shame or any desire to conceal his own wartime record. He is one of three prominent men remaining in Austrian civil law who are above any suspicion of even mental collaboration. Judge Klang's amazing brain idled away in the concentration camp of Theresien-

† Assistant Professor of Law, Yale Law School.
In the chapters of the book concerning Property and Title the legality of transfers either during the Nazi rule or while the Allied armies of occupation are in Austria should be discussed. The Austrian Supreme Court has already had to decide cases involving transfers of property by members of the occupying forces. It has held that the sale or gift of a chattel by an individual member of the Russian army to an Austrian has no legal effect, and that title cannot be acquired where the property was lost by looting soldiers. Nowhere does Professor Wolff touch on these problems.

When dealing with Matrimonial Law it seems imperative to mention that the law presently in force is a modified version of the law introduced by the Germans on August 1, 1938. The religious differences in the former Austrian law, which the Nazis abolished, have not been revived, but the Nazi features of racial discrimination and intrusion of the State in family matters—e.g., through enforced divorces—have been eliminated. Professor Wolff offers no opinion as to the validity of divorces enforced by the Nazis or decreed by them at the request of Aryans threatened with persecution by the Nazis because of their marital ties with non-Aryan or anti-Nazi.

The Austrian Code contains a provision for the suspension of statutes of limitation when there is a complete stoppage of justice. It is suggested that the chapter on Limitations should have answered the question whether the "justice" provided in Austria during the occupation was anything more than a cloak for complete lawlessness. If not, should the occupation not have stopped the running of the statute of limitations?

Many such examples could be quoted. A textbook which bypasses these problems is incomplete, irrespective of the high scholarly standing of its author. The influence of seven years of legal concepts directly contrary to those of civilized states cannot be ignored. Although discussion of these issues may not be welcome to some students of Austrian law, they must be faced. Austrian lawyers will have to grapple with the problem of making the excellent concepts of old Austrian law work in a society deeply impregnated with Nazi doctrines. They cannot participate in the moral revival of their country, as lawyers, judges and government employees, unless their eyes are open to the incompatibility of Nazi law and civilized law. Prior to the occupation Professor Wolff had the courage to lecture on these principles.

2. Os. 151/46 (Austrian Supreme Court, July 5, 1946).
3. Austrian Civil Code § 1496.
of law to students who were making every effort to become good Nazis. It certainly seems that he should have the frankness to expound to the present students of Vienna, who are making every effort to convince the world that they never were Nazis, the influence of Nazi law upon the Austrian code.

This book also makes an instructive comparison between the European and American teaching methods. The principles of law are explained in a thorough and scholarly manner. One who studies the 328 pages of this book acquires a complete knowledge of Austrian civil law. But the volume contains hardly a single case to which the principles of that law have been applied. Constantly the student must rack his brain to invent examples of how the principles would work in reality. The American method is more realistic, as well as less strenuous upon one's memory.

DR. EMILIO VON HOFMANNSTHAL†


David Lynch's book is an incisive, melancholy epitaph upon the Temporary National Economic Committee (TNEC)—the late New Deal's most important attempt to evaluate the manner in which the technological revolutions of the twentieth century have transmuted our economy. Most of the hearings and the final report of the TNEC were driven from the headlines by the beginnings of World War II. In consequence, the Committee's activities suffered from an undeserved underdose of public attention. So far as I know, the present book is the first reasonably impartial attempt to summarize and evaluate TNEC's work.† Despite serious shortcomings, it should not be missed by citizens concerned with the century-old problem of Wealth Against the Commonwealth. But its greatest value lies not in the solutions it presents, but in the questions it asks and, equally, in the unasked questions which it suggests to the reader.

The flood of recent political memoirs has confirmed the offhand impression

† Member of the Council of the International Law Association, Corresponding Member of the Argentine Institute of International Law, Adhering Member of the Académie Diplomatique Internationale; Seton Hall College.

1. Fact and Fancy in the TNEC Monographs by John Scoville and Noel Sargent, published under the auspices of the National Association of Manufacturers in 1942, makes interesting and sometimes valuable criticisms of the statistical assumptions underlying certain of the TNEC studies. Its criticism, however, is molecular in nature, and the work as a whole has the tone of an advocate's brief. There are also a series of valuable analyses of particular TNEC studies in several issues of the American Economic Review. See, e.g., Stigler, Extent and Basis of Monopoly Studies by the TNEC (1942) 32 Am. Econ. Rev. Supp. 1; Book Reviews (1941) 839–55.
that in its early years the New Deal operated by hunch rather than by plan, that it was the multi-colored offspring of Franklin D. Roosevelt's gift for improvisation and experiment and not the product of carefully conceived and coordinated blueprints. Contrary to a popular impression, "the Chief" was not at first impressed by the challenge to orthodox economics launched during the thirties. After visiting Roosevelt in 1934, John Maynard Keynes is reported to have said that he "supposed the President was more literate, economically speaking." 2 After the initial shock of the 1937–38 recession had worn off, however, it became clear that unplanned reform was as unsuccessful in maintaining full employment as his predecessor's policy of planned inactivity. President Roosevelt then sought advice from two apparently contradictory groups of advisers. He was led by Harry Hopkins and Leon Henderson to accept the Keynes-Alvin Hansen program of planned deficit financing to offset declines in private investment spending, complemented by legislation to divert income to the poorer groups in the community through social security and welfare payments, as well as more progressive taxation. At the same time, and under the influence of Robert Jackson, the President was preparing to resuscitate the drive against "the gentleman crook, monopoly," here appearing as the father of depression.

In April 1938, after a meeting at Warm Springs attended by both groups of advisers, the President delivered to Congress his famous "monopoly message," calling for the creation of a special committee to investigate "the growing concentration of economic power," stated to be a progenitor of idle factories and idle men. The Committee established in response to this message eventually came under the control of two men—Senator O'Mahoney of Wyoming and Leon Henderson.

Chairman O'Mahoney was a member of the school of American progressives, chiefly Westerners, who regarded free competition as the nostrum for all economic evils. Although conducting the hearings with conspicuous fairness, he conceived one of TNEC's main uses to be the publicization of his bill requiring federal incorporation of large corporations.3 The Senator found an ally in Thurman Arnold of the Department of Justice to whom TNEC was, at least in part, a town meeting to advertise and secure larger appropriations for the Anti-Trust Division.

Leon Henderson, the first Executive Secretary and Research Director of TNEC, was a man of different mold. He saw little gain in dramatic public hearings and sought to direct the Committee into careful investigation of the operations of our economy, carried out by scholars, in the manner of a British Royal Commission.

In consequence, the Committee from its inception was plagued by divided

3. See chapter 2 for discussion of events leading to the creation of the TNEC and also for an evaluation of the motives of the leading members of the Committee. Chapter 3 contains an interesting and valuable group of personality sketches of all the Committee members.
control. But an acceptable pattern of compromise was soon found. For the most part, TNEC public hearings were the progeny of O'Mahoney and Thurman Arnold. A parade of witnesses from Government and industry testified as to the variegated forms assumed in the masquerade of monopoly. Simultaneously, but unfortunately in dimmer spotlight, a group of economists was employed to conduct surveys of less sensational and more difficult problems: the savings-investment dilemma, the effects of our tax structure, the consequences of a high tariff policy. The research staff also probed deeply into aspects of the "monopoly problem," scarcely touched upon at the public hearings.

Lynch's book is limited in coverage to the hearings of the Committee and its final report. In one sense, the limitation scarcely seems unreasonable, since the author had to cope with a "three-foot shelf containing 37 volumes (of hearings) and 17,000 pages." In another sense, it is the author's self-limiting approach which is responsible for the elegiac and futilitarian tone of his book. As Lynch himself points out, there is "relatively little that is new" in the hearings. "The recurring impression which the reader receives is, 'Why, this is not new; this is merely a labored and unnecessary catalog of the obvious.'"

Essentially, the new and constructive work of TNEC was done by the research staff. Such monographs as Walton Hamilton's analysis of the operations and limitations of the Anti-Trust Division; the FTC report on the relative efficiency of large, middle-sized and small businesses; and the path-breaking inquests by Nelson and Keim into the consequences of inflexible, business-fixed prices, and by Dimock and Hyde into the bureaucracy of large corporations are required reading for those interested in evolving a rational policy for control of business. *Who Pays the Taxes?* by Colm and Tarasov analyzed with unprecedented care the over-all impact of our tax structure, revealing that it operates regressively, so as to take away the largest percentage of income from those in the lower income brackets. These are only a few sheaves from a rich harvest. Thus in failing to include

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the monographs in the scope of his book, Lynch has committed an error of omission, the more grievous because many of his readers will not be aware of it.

I do not mean to pass off too lightly the importance of the TNEC hearings. To start with immediate results, the TNEC gave aid and comfort to the Anti-Trust Division, newly entrusted to the imaginative Thurman Arnold, in the first serious attempt ever made to enforce the Sherman Act. It helped secure minor, but desirable reforms in patent laws. It forced down a half score of prices in less competitive industries. Moreover, the Committee hearings cut a wide swath through the fields of American business, illuminating many trade practices. Complete with names, dates and figures they furnished evidence of restraints of competition at work in innumerable industries—through the media of the holding company, price leadership, patent pools and trade associations. There were other brief but illuminating forays into the plight of consumers in a world of high-powered hucksters, the inequality of income distribution, the increasing volume of long-continued technological unemployment.

To the economically uninitiated, still living in the textbook world of twenty years ago, the Committee hearings furnished a useful introduction to the realities of modern business life. For the more worldly, they documented what previously was guessed at or incompletely known. True, much of the material came from other government reports; but it was surely desirable to concentrate such information, pigeon-holed after a score of obscure investigations. Moreover, at points the TNEC hearings explored relatively unknown terrain. One of the best examples was the investigation of life insurance companies and practices—which highlighted the extreme costs of industrial insurance, the expense and inadequacy of regulation by 48 state commissions, and the key position which the insurance companies have secured in the capital market because of the huge investment funds at their command.

The author has condensed 17,000 pages of testimony into a 200-page section of his book. I know of no other work which provides as quick, accurate, and painless a summary of the operations of big business. Nor does Lynch restrict himself to summarization. He carefully points out the inconsistencies between the high pretensions of the Committee and its limited

7. In the great trust busting campaign of Theodore Roosevelt, the Anti-Trust Division had a staff of seven lawyers and four stenographers. In 1933 it had a professional staff of only 26 persons. The effect was once described in the following language: "Practically under the Harding, Coolidge and Hoover administrations, industry enjoyed, to all intents and purposes, a moratorium from the Sherman Act..." Stevenson, Price Control and Allotment of Business, Address Before the Annual Convention of the Nat. Ass'n of Cost Accountants, Cleveland, Ohio, June 26, 1934. Even in 1940, the Division had a professional staff one-quarter of the size of that possessed by the Securities and Exchange Commission, totaling only 190 lawyers and 17 experts. See Edwards, Can the Antitrust Laws Preserve Competition? (1940) 30 Am. Econ. Rev. Supp. 164.
achievements. It would be amusing, if it were not appalling, to read of the manner in which Senator O'Mahoney barred an investigation into the effect of our tariff policy and of expensive advertising campaigns in robbing the consumers' pocketbook. In his concluding chapter, frankly based in part upon the minority report of Henderson and Lubin, the author points out the "element of escapism" entailed "in the almost exclusively monopoly approach" of TNEC. "There is a tacit assumption running through both the hearings and the final report that the depression was in large part the fruit of economic concentration and monopoly. Nowhere, however, was a case developed to show this causal relationship." 9

In his original "monopoly message," President Roosevelt had at least intimated that the concentration of economic power and the prevalence of sticky price and other business policies impeding full employment did not comprise a single problem susceptible to simple or even unified government action. In Lynch's pages, the unfortunate demise of the President's acute insight is clearly revealed.

As climactic futility, the Committee seems to have treated the persistence of large scale unemployment as being solely the result of monopoly. One can only echo the Cassandraish words with which Charles Beard had greeted the origin of TNEC: "If all we can do is to snap at the heels of business, while the economic machine runs at 50% of efficiency, then we might as well give it up and go whistling, not in the wind, but in the graveyards." 10

I have not intended in the preceding paragraphs to criticize anti-trust activities as such. But it seems high time that an uncritical clamor against "monopolies" was replaced by an attempt to devise standards of business performance and to design new tools for securing such performance. Certain dominant considerations are apparent.

First of all, it is necessary to distinguish between the problem of bigness and the problem of business arteriosclerosis. The problem of bigness poses the question of whether a democratic society can survive in the face of concentrated wealth. Obviously, this is a question of political and social, rather than economic values. The problem of business arteriosclerosis is an economic quagmire, created by certain types of uncompetitive practices which make it difficult for our economy to operate efficiently and at high levels of productivity. The tendency toward bigness and the tendency toward rigidity are both highly objectionable, but they are different diseases, requiring separate treatments. There are situations where the big enterprise, such as the chain store, is more efficient than its small competitor and brings the consumer lower prices. Therefore, some legislation allegedly adopted in an attempt to protect the small retailer against his bigger competitor, such

as anti-chain store taxes, the Miller-Tydings Act, the state unfair competition laws, may act as a government bulwark for small scale inefficiency and local monopolies.

In the second place, it seems time that statesmen and even professors of economics discarded the Rousseauean dream that a "return to free competition" would solve all our economic ills. The control of Big Business has very little to do with the problem of maintaining full employment. Monopoly is neither a new condition, nor one that is of demonstrably increasing importance. The bald fact is that sticky prices were as common in 1890 and perhaps 1820 as they are today. The Standard Oil Company was a more successful ogre in the heyday of John D. Rockefeller, Sr. than in that of John D. Rockefeller, III. In the face of persistent concentration of ownership and continued monopolistic practices, it is a verifiable fact that production and income increased steadily in the United States in the period 1870-1930. As a matter of simple logic I think this leads to the conclusion that "monopoly" has little to do with business stagnation. The analyses of Keynes, Hansen, Beveridge, and their disciples lead to the same conclusion, particularly in indicating that monopolistic practices cannot be charged with any great responsibility for the severity of the post-1929 slump.

Clearly, certain monopolistic practices do make maintenance of full employment difficult. The Keynes-Hansen school (although not President Roosevelt) has probably, in its turn, made a one-sided analysis in failing to give this question appropriate attention. But the point is that if we con-

11. Although all existing markets are, correctly speaking, characterized as being in a state of "monopolistic competition," businessmen and regulators have realistically continued to describe some as "monopolistic" and others as "competitive." From the buyer's point of view, a state of practical competition exists when there are available alternative sources of supply, not subject to common control or influence in determining price or other basic policy, and where the industry is capable of being entered by new competitors. This, of course, is a short summary of a complex problem. For more complete discussion, see Edwards, supra note 7; Clark, Toward a Concept of Workable Competition (1940) 30 AM. ECON. REV. 241; Mason, Monopoly in Law and Economics (1937) 47 YALE L. J. 34.

In Edwards' words: "In their reaction from the highly artificial antithesis between pure competition and pure monopoly, economic theorists have recently been emphasizing the fact that elements of competition and monopoly appear in all markets; and in their enthusiasm for this limited truth they have provided not much theoretical basis for distinguishing differences in degree." Edwards supra note 7, at 170.

12. Humphrey, The Nature and Meaning of Rigid Prices, 1890-1933 (1937) 45 J. POL. ECON. 651; Mason, Price Inflexibility (1938) 20 REV. ECON. STAT. 53; Mills, Economic Tendencies in the United States (1932) 105 et seq. Recent analysis has shaken the old assumption that under conditions of perfect competition, the economic system would allocate resources in such a manner as to maximize production. See, e.g., Kahn, Some Notes on Ideal Output (1935) 45 ECON. J. 1.

13. See the material collected in Schumpeter, Capitalism, Socialism and Democracy (1942) 63-72; National Industrial Conference Board Studies, No. 241, pp. 6-7. (My citation of Schumpeter for this particular point is not to be interpreted as a general acceptance of the point of view expressed in his book).

continue firing blunderbusses at "monopoly" in general, we may miss the opportunity to touch off T.N.T. under those particular practices which impede attainment of full employment. In the construction industry, for example, a whole series of managerial and labor practices combine to keep many of us ill-housed, and to clog desirable investment outlets. In innumerable other fields, patent pools and other devices restricting introduction of technological improvements or the entrance of new firms into the industry, directly and obviously promote stagnation.

Thirdly, adventurous statesmanship should surely be able to devise a quicker and more effective mode for curbing socially dangerous business practices than trial in the district court. In too many instances such proceedings have ceased "to be cases and become for all practical purposes careers for those involved." Some of the available alternatives deserve mention. When the technology of an industry, or the capital investment of the existing firm or firms, make something akin to complete monopoly ineradicable, government purchase and operation of the existing private units may be an effective way out. In other fields, the construction of government yardstick plants may be a useful means to bring prices down as efficiency mounts. The record of TVA in leading the power industry to higher sales and profits through lower rates suggests emulation in other fields.

Where restrictive practices are raised on the fulcrum of patents, a requirement of compulsory licensing at reasonable prices may be the easiest way to open the door for new firms.

It is to be hoped that a belated beginning of the debate which should have been generated by TNEC will force such questions as these into the arena of

15. One of the great achievements of the Anti-Trust Division under Thurman Arnold was to investigate and prosecute simultaneously restraints of trade running throughout the construction industry. Lack of funds unfortunately precluded similar investigations and prosecutions in other industries.

16. Cahill, Recent Trends in the Anti-Trust Laws (1946) 1 The Record of the Ass'n of the Bar of the City of N. Y. 201, 204.

17. The alternative possibility of regulation by the techniques applied in the public utility industry would, it is believed, be both cumbersome and ineffective. See testimony of Jerome Frank, Hearings Before the Temporary National Economic Committee Pursuant to Pub. Res. 113 (75th Cong.), 76th Cong., 1st Sess. (1939) Pt. 5, pp. 1954–9, 1975.

18. A similar record resulted from the price policies adopted during the 1920s by Henry Ford and Harvey Firestone, in the automobile and tire industries, respectively.

both public and scholarly discussion. From such process there will surely emerge a sharper analysis of economic problems, and this in turn should help our statesmen to develop less blunted programs of action.20

ASHER LANS †


† Member of the New York Bar; former lecturer in Economics at Hunter College and Brooklyn College.