

# Antitrust Law: An Economic Perspective

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## BOOK REVIEWS

ANTITRUST LAW: AN ECONOMIC PERSPECTIVE by Richard A. Posner. Chicago: The University of Chicago Press. 1976. Pp. i-262. \$15.00.

*Stephen E. Nagin\**

In what is no doubt destined to become a classic reference in the antitrust lawyer's library on the virtues of economic efficiency, Professor Richard Posner of the University of Chicago Law School has built the foundation of a cogent thesis—a state of the art utilitarian view—for administering the Nation's antitrust laws. It is a laudable effort expressing a postulate to guide enforcement agencies, private practitioners, and courts in determining which sorts of combinations in restraint of trade<sup>1</sup> and which methods of competition<sup>2</sup> are reasonable or fair. Although a slim book, it raises broad economic questions about the limits of competition

Having dipped into the deep pool of his previous writings over the past 8 or 9 years, the author has revised and more fully developed this utilitarian approach to antitrust law. He proposes “fundamental changes in the antitrust principles governing collusion, mergers, exchanges of information among competitors, restrictions on competition in the distribution of products, monopolization, boycotts, and other traditional areas of antitrust doctrine.”<sup>3</sup> While professing not to have written a treatise on the antitrust laws and acknowledging having “ruthlessly ignored the peripheral areas,”<sup>4</sup> Posner's rethinking of the law has such cogency and internal consistency that some practitioners may read the work uncritically, ignoring its flaws.

Yet, there are flaws in Posner's utilitarian theses; they lie not in jargon or polemic but in omission and imbalance. Although his views

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\* Trial Attorney, Bureau of Competition, Federal Trade Commission. The opinions expressed in this Review are the personal views of the author. They are not intended to be, and should not be construed as being representative of the views of any other member of the Federal Trade Commission staff or of any Commissioner.

1. See The Sherman Act, 15 U.S.C. § 1 (1970) which provides: “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . .”

2. See The Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (1970) which states: “Unfair methods of competition in or affecting commerce . . . are hereby declared unlawful.”

3. R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE ix (1976) [hereinafter cited as POSNER].

4. *Id.* at x.

are at places both technical and controversial, a lucid writing style makes even the most complex ideas seem quite logical and easy to understand. Thus, these imperfections are, perhaps, unintentionally insidious.

Posner charts a periodic view of economic theory featuring efficiency as the most weighty element ignoring other elements in competition policy. Yet, efficiency is not the only goal of antitrust, nor should it be.<sup>5</sup> Other political<sup>6</sup> and social<sup>7</sup> goals are woven into the legislative and judicial fabric of antitrust. These goals were recently reaffirmed by the Chairman of the Federal Trade Commission in a major speech in which he unequivocally stated:

"[A]lthough efficiency considerations are important, they alone should not dictate competition policy. Competition policy must sometimes choose between greater efficiency, which may carry with it the promise of lower prices, and other social objectives, such as the dispersal of power, which may result in marginally higher prices."<sup>8</sup>

Professor Posner slights these considerations.<sup>9</sup> Posner's insight is drawn solely from economic thought ignoring ethical values and other societal goals. This singleminded focus on efficiency creates an imbalance and detracts from many otherwise valuable guides.<sup>10</sup>

Inasmuch as the currency of antitrust law would be devalued without a strong backing of economic wisdom, Posner's perspective will,

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5. Compare H. THORELLI, *THE FEDERAL ANTITRUST POLICY* (1955) a thorough review indicating a lack of singular congressional intent, with the lively colloquy between Columbia University professors Blake and Jones and Yale University professors Bork and Bowman in Bork, Bowman, Blake, & Jones, *The Goals of Antitrust: A Dialogue on Policy*, 65 COLUM. L. REV. 363, 377, 401, 417, 422 (1965). For an excellent and recent inquiry, see Flynn, *Antitrust Jurisprudence: A Symposium on the Economic, Political and Social Goals of Antitrust Policy*, 125 U. PA. L. REV. 1182, 1191, 1214, 1244 (1977). But see, Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966).

6. See *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 4, 5 (1958). Justice Black expressed concern for the "preservation of our democratic, political and social institutions." *Id.* at 4.

7. See *United States v. Aluminum Co. of America*, 148 F.2d 416, 427 (2d Cir. 1945) (Judge Hand's discussion of social or moral effect); *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962). Chief Justice Warren recognized that the protection of small businesses through antitrust law is a congressional desire. *Id.* at 344.

8. Remarks of Michael Pertschuk, Chairman, Federal Trade Commission, before the Eleventh New England Antitrust Conference, Boston, Massachusetts (November 18, 1977) reprinted in 840 ANTITRUST & TRADE REG. REP. (BNA) F-1.

9. POSNER 4, 19, 20, 35, 130 & 158.

10. By way of example, Posner's two-step economic approach that (1) identifies twelve conditions in markets predisposed to collusive behavior, and (2) suggests the twelve types of evidence that are relevant to demonstrating such collusion absent detectable acts of agreement or communication, is praiseworthy. See note 21 *infra*.

nevertheless, have both practical and scholarly impact despite its singleminded efficiency thesis. Accordingly, with this general caveat in mind, the reader can glean a perspective that might profitably guide enforcement or litigation strategy.

A linchpin of Posner's view is that "the economic theory of monopoly provides the only suitable basis for antitrust policy."<sup>11</sup> He questions traditional antitrust analysis of monopoly costs because it underestimates the true social costs of monopoly. Only the transfer payment from consumers to producers of a monopolized product (monopoly profits) and the reduction in output at the higher price (dead weight loss triangle) are considered.<sup>12</sup>

Proceeding to a discussion of the evolution of antitrust policy, the author analyzes early decisions using his economic theory of monopoly, and notes that several analytical errors of the Supreme Court have had a profound effect upon the law.<sup>13</sup> Posner traces today's confusion in substantive doctrine to these analytical errors and to a failure of the courts to adequately distinguish between collusive practices and exclusionary practices.<sup>14</sup> Distinguishing between these two types of practices is important, in his view, because the economic theory of monopoly was not developed to explain the latter ones. Thus, on strict economic grounds, there is less basis for concern over some exclusionary practices. He concludes his overview by suggesting that problems of remedy and enforcement may be a result of overexpansion of the antitrust laws.<sup>15</sup>

Having expressed displeasure over the unsatisfactory state of antitrust doctrines in the first part of the book, Professor Posner develops in the second section a new perspective on practices that result in or facilitate collusive pricing. Here, he expresses his conviction that collusion poses the most serious threat to maintaining a competitive economy.

Adopting Professor Stigler's approach to oligopoly pricing,<sup>16</sup> through a continuum in which price-fixing methods range from a for-

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11. POSNER at 8.

12. *Id.* at 11. For a more exhaustive consideration of welfare losses due to resource misallocation, see F. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 400-11, (1970).

13. POSNER at 26-31.

14. *Id.* at 28. Collusive practices might include cooperative anticompetitive arrangements such as price fixing or mergers to monopoly, whereas exclusionary practices involve intimidation, coercion, destruction or exclusion of a seller or sellers outside of a collusive group, through practices such as predatory price cutting, and at times exclusive dealing or boycotts.

15. *Id.* at 35.

16. See *A Theory of Oligopoly*, in G. STIGLER, *THE ORGANIZATION OF INDUSTRY* 38 (1968).

mal cartel to a purely tacit meeting of the minds,<sup>17</sup> Professor Posner suggests that the popular conscious parallelism theory is deficient because it fails to appreciate the time lag between a price cut and the matching response. Further, in his opinion, this theory overstates the impact of the oligopolist's price reduction, and assumes that there may be oligopoly price leadership without an effective remedy under Section 1 of the Sherman Act.<sup>18</sup> With this he takes issue, and departs from the concept of oligopolistic interdependence or conscious parallelism as espoused by the eminent former Assistant Attorney General in charge of the Antitrust Division, now Professor, Donald Turner.<sup>19</sup>

Posner agrees with Turner that a collusive scheme may not necessarily generate evidence of actual contacts or communication between the participants. However, he suggests that in a market that exhibits predisposing characteristics of collusion<sup>20</sup> but no hard evidence of actual conspiracy, it may be possible to proceed under Section 1 of the Sherman Act on the basis of purely economic evidence of collusion. Posner does not accept the analytical leap "from the proposition that concentration is probably a necessary condition of clandestine collusion to the proposition that it is a sufficient condition," a view he ascribes to some proponents of the "interdependence" theory of oligopoly. To avoid this analytical leap, Posner describes eleven additional criteria that should be considered besides concentration.<sup>21</sup>

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17. POSNER at 47. This meeting of the minds notion is analogous to the term "mutual forbearance" used in contract law.

18. *Id.* at 42-46.

19. See Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655 (1962).

20. POSNER at 76-77.

21. *Id.* at 54-71. Posner's twelve identification criterion of conditions favorable to collusion do consider the state of concentration as one variable. Given different presumptions by different economists as to the interactive effect of that variable, he would examine many other factors. His twelve factors are: (1) Market concentrated on the selling side, (2) No fringe of small sellers, (3) Inelastic demand at competitive price, (4) Entry takes a long time, (5) Many customers, (6) Standard product, (7) The principal firms sell at the same level in the chain of distribution, (8) Price competition more important than other forms of competition, (9) High ratio of fixed to variable costs, (10) Demand static or declining over time, (11) Sealed bidding, and (12) The industry's antitrust "record." *Id.* at 55-62. As a second step in his economic approach, after identifying whether or not a market is collusion prone, Posner would permit a demonstration of the existence of interdependent pricing—where overt acts of collusive behavior are undetected—by inferences from the following twelve forms of economic evidence of cartelization: (1) Fixed relative market shares, (2) Price discrimination, (3) Exchanges of price information, (4) Regional price variations, (5) Identical bids, (6) Price, output, and capacity changes at the formation of the cartel, (7) Industry-wide resale price maintenance, (8) Declining market shares of leaders, (9) Amplitude and fluctuation of price changes, (10) Demand elasticity at market price, (11) Level and pattern of profits, and (12) Basing-point pricing. *Id.* at 62-71.

However, the author's twelve identification criteria for conditions favorable to collusion, are not the only ones that might be considered, nor are they necessarily mutually exclusive. Several courts,<sup>22</sup> practitioners, and commentators<sup>23</sup> have suggested a different mix or emphasis while generally agreeing with the gist of Posner's thesis. Additionally, it should be noted that the book's two-step thesis<sup>24</sup> would not scrap the *per se* treatment of price-fixing where that approach is appropriate. The contribution of this two-step approach would be to permit a court to proceed on the basis of sufficiently convincing economic evidence, thus dispensing with evidence of actual communication between the colluders.

As a corollary to this view, the author states that deconcentration legislative enactments "should be unnecessary to break up the major sellers in highly concentrated markets in order to prevent them from engaging in tacit collusion; they can be deterred from engaging in such collusion by the same punishments that are used to deter express collusion."<sup>25</sup> This represents a major departure from most of the serious legislative proposals to date.<sup>26</sup> Under his view the costs of a deconcentration policy would outweigh the conjectural benefits. In addition, such a plan "would be enormously complicated and time consuming," and might lead to higher costs in some concentrated industries.<sup>27</sup>

While generally recommending a substantial retrenchment in antimerger policy, Posner would forbid mergers that create high levels

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22. *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434 (3d Cir. 1977); *Estate of LeBaron v. Rohm and Haas Co.*, 441 F.2d 575 (9th Cir. 1971); *Wall Products Co. v. National Gypsum Co.*, 326 F. Supp. 295 (N.D. Calif. 1971); *Regina v. Armco Canada Ltd.*, 6 Ont.2d 521 (1974).

23. See Funderburk, *Price Fixing in the Liquid-Asphalt Industry: Economic Analysis Versus the "Hot Document"*, 7 ANTITRUST L. & ECON. REV. 61 (1964); Hay & Kelley, *An Empirical Survey of Price Fixing Conspiracies*, 17 J.L. & ECON. 13 (1974); Kuhlman, *Nature and Significance of Price Fixing Rings*, 2 ANTITRUST L. & ECON. REV. 69 (1969). See generally L. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* 355-67 (1977).

24. See note 21 *supra*.

25. POSNER at 78.

26. See *Small Businesses and the Robinson-Patman Act: Hearings before the Special Subcommittee on Small Business and the Robinson-Patman Act of the House Select Committee on Small Business* (the "Neal Report"), 91st Cong., 1st Sess. 291 (1969); *Industrial Reorganization Act*, S.3832, 92d Cong., 2d Sess. (1972) (a much discussed piece of legislation introduced by the late Senator Philip A. Hart); *Competition Review Act*, S.2071, 95th Cong., 1st Sess. (1977) (a bill introduced by Senator Gary Hart that would establish a commission to study the laws and policies affecting major industries); S.1586, reported in 851 ANTITRUST & TRADE REG. REP. (BNA) A-12 (the bill introduced by Senator Jacob Javits to create a bipartisan commission to study, *inter alia*, concentration of economic power and financial control); See also PRESIDENT'S COMMISSION TO STUDY THE ANTITRUST LAWS, 830 ANTITRUST & TRADE REG. REP. A-21; 840 ANTITRUST & TRADE REG. A-23.

27. POSNER at 81, 94, 95.

of concentration which facilitate collusive pricing,<sup>28</sup> reduce the costs of collusion, and make cheating or chiseling easier to detect by other members of an oligopoly. His approach would raise the threshold concentration consideration to make mergers presumptively illegal where the top four-firm combined market share exceeds 60% and the market exhibits characteristics favorable to collusive pricing.<sup>29</sup> Further, under his test or in an analysis under Section 7 of the Clayton Act, Posner would define markets more carefully by developing a calculus that "treats products as different if they are substantially different in design, physical composition, and other technical characteristics."<sup>30</sup> His view is that the Department of Justice Merger Guidelines<sup>31</sup> are faulty in both their product-market standard<sup>32</sup> and their geographical-market criteria.<sup>33</sup>

Given Posner's pervasive debunking of many traditional analytical constructs it should come as no surprise that he finds the potential-competition doctrine unsatisfactory due to the impossibility of developing "workable rules of illegality in this area."<sup>34</sup> His point is that "[t]here is no theory or evidence that tells us that if the number of equally potential competitors in a market falls from ten to nine or four to three or two to one the pricing decisions of the firms in the market will be affected."<sup>35</sup> Finding no hard and fast workable rule, he would simply scrap the doctrine altogether.<sup>36</sup> However, there are alternative approaches that might be viable and would not necessitate junking the doctrine. Posner ignores these.

One potentially viable approach, proffered by Professor William James Adams, is to broaden the meaning of competition beyond a single market framework.<sup>37</sup> According to this dynamic view of "multimarket linkages and the power usage process," all major firms operate in multiple markets and may have structural overlap with interdependent influences upon corporate power. Professor Adams suggests that:

- (1) "multimarket activity might enhance the degree to which sellers in any one market perceive their interdepen-

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28. *Id.* at 96-134.

29. *Id.* at 112. *See* note 21 *supra*.

30. *Id.* at 132.

31. 1 TRADE REG. REP. (CCH)¶ 4510 (1968).

32. POSNER at 132.

33. *Id.* at 133.

34. *Id.* at 122.

35. *Id.* at 123.

36. *Id.* at 124.

37. *See* Adams, *Market Structure and Corporate Power: The Horizontal Dominance Hypothesis Reconsidered*, 74 COLUM. L. REV. 1276 (1974).

dence. . . [and that] parallel integration patterns heighten the likelihood of collusion";<sup>38</sup>

(2) multimarket activity augments "the desirability of collusion to each party. . . [since] [i]f. . . all firms operate in a parallel set of markets, they can negotiate agreements according each firm the leadership position in some market";<sup>39</sup>

(3) the likelihood of collusion is increased "by simplifying the coordination machinery required to maintain collusive agreements<sup>40</sup>. . . [because] more mechanisms to equalize opportunities in an undetectable fashion may exist in multiple than in the single market situations";<sup>41</sup> and, finally,

(4) "multimarket activity heightens the probability of enduring collusion by reducing the likelihood of cheating on established agreements." Professor Adams advises that "this phenomenon is especially relevant where multimarket activity takes the form of oligopolists heavily and similarly integrated in the vertical sense."<sup>42</sup>

Another potentially viable approach is to place greater reliance on those aspects of the conglomerate-merger theory that do not depend upon a showing of *loss* of potential competition.<sup>43</sup> Professor Joseph Bauer suggests that improperly high evidentiary standards imposed by some courts to establish the reasonable probability of a substantial lessening of competition is inherently speculative and a difficult burden to meet. Assuming that courts are unwilling to lower their standards for challenge under the potential-competition doctrine, then consideration of present direct injury to competition via substitution/entrenchment doctrine and reciprocity effects holds greater promise for law enforcement agencies. He also believes that over-concentration of sales and assets that occurs in some large-firm mergers should

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38. *Id.* at 1282. Professor Posner's criterion for industry predisposition to collusive behavior does not encompass this consideration. See note 21 *supra*.

39. *Id.* at 1283.

40. *Id.*

41. *Id.* at 1284.

42. *Id.* at 1284-85.

43. Soon to be published in an article in the Boston University Law Review on theories and alternatives for challenging conglomerate mergers, by Notre Dame Law School Assistant Professor Joseph P. Bauer, and presented in private discussion and correspondence to this Reviewer (cited, herein, with approval of Mr. Bauer).



be successfully challenged on social and political grounds. This would be anathema to Professor Posner.

Moving from an economic analysis of antimerger law to deformities in the characterization of collusion, Professor Posner concludes the second section of his book by using his economic analysis as a framework to recharacterize both the nature and proper enforcement scope of (1) price and information exchanges between competitors, and (2) restrictions in products distribution. He drops a bombshell on current antitrust philosophy by suggesting that resale price maintenance, sometimes termed vertical price-fixing, should be considered presumptively lawful<sup>44</sup> rather than *per se* unlawful.<sup>45</sup> Posner would assume that the restriction does not affect the economic aim of the Sherman Act unless the challenged restriction has the objective of generating monopoly profits as opposed to merely increasing presale services, in a relevant market where "the firms whose competition is restricted is not of monopoly proportions."<sup>46</sup> He would also permit competitors to exchange price information unless it can be proved that they are expressly or tacitly fixing prices.<sup>47</sup>

Although Posner ignores Professor Adams' suggestion for dealing with restrictive practices that facilitate power investments<sup>48</sup> he does acknowledge a serious challenge by Professor Comanor to his economic view of resale price maintenance.<sup>49</sup> Professor Comanor suggests that all customer and territorial restraints should be *per se* violations of Section 1 of the Sherman Act, since *intra-brand* competition is suppressed or eliminated and such restrictions obstruct *inter-brand* competition by fostering product differentiation which in turn leads to higher consumer prices and monopoly returns. Posner dismisses this view as unsubstantiated.<sup>50</sup> However, this phenomenon is no less unsubstantiated than are many of Posner's views; it cannot be dismissed so perfunctorily.

The reader might be left with the false impression that Posner's views may be so skewed toward efficiency considerations that they are out of line with current Supreme Court pronouncements. How-

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44. POSNER at 166.

45. See *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

46. POSNER at 164-66.

47. *Id.* at 146.

48. Adams suggested a procedure whereby a rebuttable presumption would appertain precluding "any of the leading 200 firms in the country either acquiring another corporation or adopting one of the restrictive practices identified in the Clayton Act (such as requirements contracts or exclusive dealing)." Adams note 36 *supra*, at 1292.

49. See Comanor, *Vertical Territorial and Customer Restrictions: White Motor and Its Affirmation*, 81 HARV. L. REV. 1419 (1968).

50. POSNER at 150.

ever, the author's consideration of non-price vertically imposed restraints<sup>51</sup> may provide some tangible guidance to both courts and enforcement agencies following abandonment of the much criticized *per se* rule of *United States v. Arnold Schwinn & Co.*<sup>52</sup> in favor of a rule-of-reason test announced in *Continental T.V., Inc. v. GTE Sylvania*.<sup>53</sup>

In the third part of his book, Professor Posner moves from a concern over collusive pricing to focus on two other forms of potentially anticompetitive practices: (1) those that are truly exclusionary and (2) those that may increase incentives for monopoly pricing but don't fall into either the collusion or the exclusion category. These he terms "unilateral noncoercive monopolizing."<sup>54</sup> Five practices traditionally

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51. *Id.* at 165-66.

52. 388 U.S. 365 (1967). In *Schwinn* the defendants were charged under Section 1 of the Sherman Act with fixing prices, allocating exclusive territories, and confining merchandise to franchised dealers. The district court rejected the price fixing charge, and on appeal the government abandoned its *per se* approach. Instead the government asked that the limitations on distribution, which had been imposed by the district court, be considered unreasonable restraints under a "rule of reason" test so that all the territorial restrictions would be declared unlawful regardless of the technical form through which products are transferred from manufacturer to retailer or consumer. In refusing to review the case under the test urged by the government, the Court noted:

The promotion of self-interest alone does not invoke the rule of reason to immunize otherwise illegal conduct. It is only if the conduct is not unlawful in its impact in the marketplace or if the self-interest coincides with . . . the preservation and promotion of competition that protection is achieved.

*Id.* at 375. The Supreme Court rejected the government's contention that the district court's decree should not be confined to *sale* transactions but should also reach restrictions incident to sale or consignment relationships. It concluded its consideration by creating an artificial distinction that "the proper application of § 1 of the Sherman Act to this problem requires differentiation between the situation where the manufacturer parts with title, dominion, or risk with respect to the article, and where he completely retains ownership and risk of loss." *Id.* at 378-79.

53. 433 U.S. 36 (1977). In *Continental*, the Court was faced with a fact situation analogous to *Schwinn*. See note 52 *supra*. The Court reconsidered and rejected a *per se* rule approach. Rather, the rule of reason test should be used because "departure from the rule of reason standard must be based upon demonstrable economic effect rather than—as in *Schwinn*—upon formalistic line drawing." 433 U.S. 58, 59. Further, the Court clarified when each of the tests should be used:

Since the early years of this century a judicial gloss . . . has established the "rule of reason" as the prevailing standard of analysis. [citation omitted]. Under this rule, the fact finder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition. *Per se* rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive.

*Id.* at 49-50. For a more thorough exchange of views, including further considerations by Professor Posner, see 838 ANTITRUST & TRADE REG. REP. (BNA) A-1. See also Nagin, *Vertical Restraints Limiting Intra-brand Competition, After GTE Sylvania*, 51 FLA. B.J. 439 (1977).

54. POSNER at 171.

considered to be anticompetitive are considered: tying arrangements, predatory pricing, vertical integration, exclusive dealing, and boycotts.

Terming tie-ins a species of unilateral noncoercive monopolizing, rejecting traditional leverage theories, and determining that it really is not an exclusionary practice after all, the author would radically curtail prohibitions against the practice absent evidence of persistent or systematic price discrimination in a collusion case.<sup>55</sup>

Due to the difficulty of distinguishing between predatory and efficient pricing in oligopolistic industries, and a fundamental disagreement over what should determine "cost," Posner suggests a new approach: "Proof of sales below average balance sheet cost with intent to exclude might be enough to establish a *prima facie* case of predatory pricing."<sup>56</sup> Despite his charge of judicial ineptitude against some courts that applied incorrect tests<sup>57</sup> no court has yet adopted the Posnerian view. Whether or not it will stand the test of time, and of jury understanding, is yet to be determined.

With respect to vertical integration, Posner recommends that such mergers should not be prohibited unless one of the parties to the merger has a monopoly or there is evidence of "exclusionary or otherwise improper. . . intent."<sup>58</sup> It is not possible to reconcile this view with the "power usage" view of Professor Adams.<sup>59</sup>

The next potentially exclusionary practice considered, exclusive dealing, is not condemned outright; Professor Posner has mixed views here. The detrimental effect of such arrangements may depend on their duration.<sup>60</sup> He feels that exclusive dealing may in some circumstances have "the advantage of avoiding possible diseconomies of vertical integration. . . [although the practice might] increase the scale necessary for new entry."<sup>61</sup>

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55. *Id.* at 171-84.

56. The author prefers as his definition of predatory pricing, "*pricing at a level calculated to exclude from the market an equally or more efficient competitor,*" and would determine this by a showing of "selling below short-run marginal cost" or "selling below long-run marginal cost with the intent to exclude a competitor" POSNER at 188-89. A prevalent view, however, is that espoused by Harvard University professors Phillip Areeda and Donald F. Turner. *See* Areeda & Turner, *Predatory Pricing and Related Practices under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975). They reject determining short-run marginal cost as impractical and would use variable costs as a proxy of predation.

57. POSNER at 193-94.

58. *Id.* at 200.

59. *See* Adams, *supra* note 37.

60. POSNER at 201.

61. *Id.* at 202. It should be noted that by frequently omitting critical factors in his analysis of case precedents, Posner sometimes reaches questionable conclusions. For a highlight of this

Finally, the author suggests that boycotts or group refusals to deal may be merely vigilante, or as he terms it, self-help enforcement.<sup>62</sup> They ought not to be proscribed, he feels, except when used to enforce a truly anticompetitive practice, that is, something "objectionable on the basis of substantive antitrust policy."<sup>63</sup>

Examining these five practices as an identifiable grouping may signify another flaw in Posner's rethinking. His attempt to rationalize potentially malignant market aberrations reflects both the tunnelized approach of allocative efficiency analysis that excludes considerations from other disciplines and the effect of pigeonholing anticompetitive practices as being species of only collusion, exclusion, or unilateral noncoercive monopolizing. Outside the economist's model-building, ivory-tower environment, violations of law may not be so neatly packaged. Posner's discussion would make it appear that only these five practices are worthy of concern and discussion. However, unhealthy market mutations do not necessarily fall into a traditional catalogued format.

Resort to equity considerations embodied in Section 5 of the FTC Act might be necessary to deter harmful activity in its incipiency. This view has received judicial acceptance<sup>64</sup> if not Posnerian imprimatur. Nevertheless, the author would apparently consider non-traditional market processes that are competitively "alive" in a decidedly detrimental way, as inconsequential if they do not fit into the pigeonhole of substantive antitrust policy.<sup>65</sup> The limits of Posner's perspective would undermine the FTC's role in articulating standards of social and commercial fairness.

It is possible that some aberrant competitive behavior provides economic efficiencies despite the nascent anticompetitive character of the underlying acts or practices. However, if the social, environmental, or otherwise inequitable impact of the activity impinges on competition, it may be appropriate for the FTC to act. This FTC inter-

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problem, see Scherer, *The Posnerian Harvest: Separating Wheat from Chaff*, 86 YALE L.J. 974, 992, 993 (1977). Professor Scherer's review will be appreciated by readers seeking a thorough economic analysis with insights that this former Director of the FTC's Bureau of Economics is uniquely capable of providing.

62. POSNER at 207.

63. *Id.* at 210.

64. See *F.T.C. v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972); *F.T.C. v. Texaco Inc.*, 393 U.S. 223 (1968); *F.T.C. v. Brown Shoe Co., Inc.*, 384 U.S. 316 (1966); *Atlantic Refining Co. v. F.T.C.*, 381 U.S. 357 (1965).

65. POSNER at 210.

vention would be appropriate even though the commercial behavior might be subject to another federal regulatory agency's sanctions.<sup>66</sup>

By way of example, it may very well be appropriate for the FTC to bring an action establishing the principle that it is *per se* unlawful as an unfair method of competition for a firm in or affecting interstate commerce to consciously violate any substantive statute.<sup>67</sup> This type of action would straddle both economics and ethics, reflecting this reviewer's conviction that just as perceptions of fair competition and competitive relationships within industry change, and are shaped by that change, so too must law enforcement develop and be shaped by that development over time. The concept of unfairness that exists today represents over sixty years of administrative and judicial construction of the FTC Act. Yet, the development of antitrust law has proceeded without much consideration of the impact of competition policy in other substantive legal areas.<sup>68</sup> Innovative antitrust enforcement can reinforce the underlying policy considerations of other substantive laws and enhance enforcement efforts to promote their parallel legal concerns.

If a manufacturer employs illegal aliens or leaves off a scrubber from a smokestack, there is a substantial cost savings.<sup>69</sup> This enables reduction in the price of its products, which is unfair to competitors who do not violate the law. Alternatively, it may result in an unfair cost advantage being used to finance expansion or to enhance monopoly profits with effects upon competition that are no less serious than would be the effect from a more traditional antitrust violation such as predatory pricing. Despite the inherently dysfunctional resource misallocation and the unfair strain on competition,<sup>70</sup> Posner's

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66. See Remarks of Michael Pertschuck, Chairman, Federal Trade Commission, before the annual meeting of the section of Antitrust & Economic Regulation of the American Association of Law Schools (December 27, 1977).

67. The same principle could apply wherever it can be shown that a firm would have, could have, or should have known that its acts or practices are in contravention of federal law or regulation. For more egregious violations, constructive knowledge may even be sufficient to sustain this form of collateral attack.

68. Laws designed to protect the environment, occupational safety and health, immigration and naturalization, and fair trading in securities markets, are a few of the substantive areas where this principle might be applied.

69. *But see* M. COHEN & F. COHEN, READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY 829 (1951). Therein Morris R. Cohen states:

The desire for economy, like the desire for increased production, is normal in private business. But it becomes an irrational obsession when businessmen press it to the neglect of larger social interests which in the routine of private business seem sentimental.

70. There is a misallocation in that United States citizens are denied jobs given to illegal aliens and manufacturers of smokestack scrubbers will incur a sales opportunity loss. When opportunity cost is considered, all such violations will result in some type of misallocation elsewhere in the market.

efficiency channel may be too narrow to float through these types of potential FTC challenges. His simplified characterizations of exclusion and unilateral noncoercive monopolizing do not appear to encompass such newly perceived species of law violations.

In concluding the third section of his book, the author recommends simplification of antitrust doctrine. He discusses the consequences of statutory redundancy and suggests that "there is no place in a rational system of antitrust law for a separate doctrine of monopolization."<sup>71</sup> If he were to begin anew to create a law of antitrust, he would incorporate merely "a simple prohibition against agreements, explicit or tacit, that unreasonably restrict competition."<sup>72</sup>

In the final section of the book, Professor Posner focuses on the problem of enforcement through a discussion of remedies, enforcers, and procedures of enforcement.<sup>73</sup> With respect to remedies, when calculating the fine for the violator having committed collusive practices, he suggests that the appropriate amount can be ascertained "by *dividing* the social cost of the violation by the probability of apprehension and punishment."<sup>74</sup> It is an interesting approach, albeit one of limited utility given the speculativeness of social cost and the evidentiary concerns that surround any analysis of probability. Moreover, the degree of uncertainty and unpredictability this approach injects into the risk assumption calculus of business decision-making may serve as less of a deterrent than existing sanctions. In this respect the concern is not unlike that of some of the policy arguments against capital punishment—the extreme nature of the sanction denies its deterrence value.

If, however, the violation involved an exclusionary practice, Posner would impose as the appropriate measure of damages "the cost of the practice to the intended victims."<sup>75</sup> Not only is the consequence of this unclear, but the potential for abuse looms quite large. It may be that some proximate cause type of tort standard needs to be grafted on to preclude unintended income transfers of a massive order. In any event, the author's approach would generally eliminate treble damage awards and criminal sanctions.<sup>76</sup>

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71. POSNER at 216.

72. *Id.*

73. POSNER at 221.

74. *Id.* at 224.

75. *Id.* at 225.

76. *Id.* at 225-27. He would, however, allow such awards in suits by a defendant's customer or supplier, but not in competitor suits. *Id.* at 231. For a more thorough consideration of antitrust remedies, see K. ELZINGA & W. BREIT, *THE ANTITRUST PENALTIES: A STUDY IN LAW AND ECONOMICS* (1976).

As to enforcers, Professor Posner believes that the overexpansion of antitrust liability has resulted from the pernicious influences of private actions on the development of antitrust doctrines.<sup>77</sup> He further proffers, as a cause of the overexpansion, sweeping Supreme Court decisions and decisions by inexperienced lower federal court judges who have insufficient guidance as a result of these sweeping Supreme Court decisions.<sup>78</sup> Despite these excesses and the judicial undereducation in antitrust law, Posner concedes that in the area of collusive pricing, the "private actions have made an enormous contribution to . . . effective enforcement."<sup>79</sup>

His most severe criticism appears to be reserved for the government litigation supervisors who "exercise little in the way of supervision, review, control, or direction."<sup>80</sup> Perhaps, as a result of the government's ineffective management:

[t]rial lawyers tend to be combative rather than reflective, and the [antitrust] division's trial lawyers, because they are relatively poorly paid, tend to be young or mediocre, or to be zealots. They are not the right people to be the custodians of the government's antitrust policy, but that is what they are.<sup>81</sup>

Professor Posner's extrapolation from his previous enforcement tenure is most unfortunate. Management dysfunctions of the past are not prologue, although there are still very vexing challenges to effective administration in the government bureaucracy. It is, however, appropriate for Posner to suggest by implication that behavioral management skills—including effective use of feedback, reinforcements, and incentives—may need reemphasis or refinement.<sup>82</sup> However, it is folly to assume blithely that these are intractable challenges. Professor Posner has fallen into an experience trap. As Judge Wyzanski has eloquently observed: "One of the dangers of extraordinary experience is that those who have it may fall into grooves created by their own expertness. They refuse to believe that hurdles which they have learned from experience are insurmountable, can in fact be overcome by fresh, independent minds."<sup>83</sup>

In his final consideration in the book, the author turns to procedures, suggesting that "the traditional sequence and format of the

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77. POSNER at 228.

78. *Id.* at 229.

79. *Id.* at 230.

80. *Id.*

81. *Id.* at 231.

82. *Id.* at 230-31.

83. *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 346 (D. Mass. 1954).

Anglo-American court trial are ill-adapted to the litigation of complex economic issues"<sup>84</sup> and that the procedure is "inefficient, and ineffective."<sup>85</sup> Brushing aside, without consideration, potential concerns over constitutional due process and legislative or evidentiary prerogative, the author suggests an approach whereby the parties would "sit down together. . . [and] hammer out an agreed upon narrative . . . [to] be presented to the trier of the facts in a writing that would constitute the basic trial record," except where there is a good faith disagreement for which a live trial would commence to supplement the narrative.<sup>86</sup> For uncooperative attorneys, Posner would resort to negative incentives.<sup>87</sup>

Although Posner's goal is lofty,<sup>88</sup> his discussion evidences a general lack of understanding about the pernicious effect of negative sanctions<sup>89</sup> and fails to recognize that less drastic curtailment of the judicial process may suffice to alleviate his concerns.<sup>90</sup>

Professor Posner's process of rethinking antitrust with the aid of economics<sup>91</sup> is a valuable exercise with many scholarly insights. Its limited perspective, however, is its Achilles' heel. The conflict of social forces from which the antitrust laws evolved were extensions of both rational concerns and irrational fears. Economic reasoning can explain the rationale or relationship of only some of these phenomena. We must call upon equity notions to understand the rest.

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84. POSNER at 232.

85. *Id.* at 233.

86. *Id.*

87. *Id.* at 234. Such incentives could include a \$1,000 payment plus the costs of a trial to resolve a fact in dispute.

88. The author stated: "The presentation of documents and testimony should be confined to the few issues that are genuinely in dispute." *Id.*

89. For an excellent treatise on application of behavioral management theories with a discussion of the effects of negative reinforcements, see W. ZANGWILL, *SUCCESS WITH PEOPLE* (1976).

90. While some federal judges may deplore the drain on their time and patience caused by unwieldy antitrust litigation, Judge Charles R. Richey of the United States District Court for the District of Columbia has done something about it through rigorous pre-trial orders. See Richey, *A Federal Trial Judge's Reflections on the Preparation for and Trial of Civil Cases*, 52 *IND. L.J.* 111 (1976).

91. POSNER at 236.



