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Economic Analysis and Antitrust Law

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BOOK REVIEW

ECONOMIC ANALYSIS AND ANTITRUST LAW. By Terry Calvani and John Siegfried. Boston and Toronto: Little, Brown and Company, 1979. Pp. xi, 353. $6.95.

*Reviewed by Thomas D. Morgan**

The United States antitrust laws[1] have most of the vices and none of the virtues of the United States Constitution. Like the Constitution, the antitrust laws purport to be far reaching: "Every contract . . . in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[2] Both documents are vague: "Every person who shall monopolize"[3] is a potential wrongdoer, states the Sherman Act, but nowhere is it made clear whether "monopolize" refers to the state of being a monopolist or to some kind of improper course of conduct. In addition, the political backgrounds surrounding the adoption of both the Constitution and the antitrust laws are fascinating but somewhat obscured by the personal preferences of historians.[4]

Unlike the Constitution, however, substantial questions exist about the current relevance and continuing vitality of the antitrust laws. Whom are these laws designed to protect? What undesirable consequences are they designed to avoid? Are the laws being overenforced or not enforced vigorously enough?

There are several ways that one could seek the answers to these questions. One might turn to sociology and ask what roles are appropriate for organizations to play in social life and what the impacts are of large organizations on the social fabric. Alterna-

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1. The statutes traditionally called the antitrust laws are the Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (1976)); the Clayton Act, ch. 323, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12-27 (1976)); and the Federal Trade Commission Act, ch. 311, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§ 41-51, (1976)).

2. Sherman Act § 1, 15 U.S.C. § 1 (1976).

3. *Id.* § 2.

4. *See, e.g.*, R. BORK, THE ANTITRUST PARADOX (1978); G. KOLKO, THE TRIUMPH OF CONSERVATISM (1963); W. LETWIN, LAW AND ECONOMIC POLICY IN AMERICA (1965); H. THORELLI, THE FEDERAL ANTITRUST POLICY (1954).

tively, one might turn to psychology and ask what the sources are of the fear of big business or the extent of psychic injury from a lack of, or an excess of, competition. Indeed, looking at the existing legislation, one suspects that sociology, psychology, and political self-interest were the intellectual wellsprings that have nurtured most legislators.[5]

On the other hand, many scholars have found that economic analysis provides the most consistently useful tool for analyzing antitrust issues. The antitrust laws, after all, purport to regulate the behavior of economic units, presumably to achieve some economic purpose and to have some effect that an economist can describe and evaluate. The work of Aaron Director (followed by that of Turner, Schwartz, Areeda, and Posner, to name but a few) has generated a large body of sophisticated economic literature relating to antitrust. The work of Henry Manne[6] in equipping federal judges to understand, evaluate, and apply that literature has made its study an integral part of any sophisticated, responsible antitrust course.

Professors Terry Calvani and John Siegfried have prepared their book of readings[7] to help professors, students, lawyers, and judges become familiar with the economic issues surrounding the antitrust laws. There is, of course, room for substantial controversy on many economic issues, but the authors here have chosen to emphasize those areas in which there is basic consensus. The authors' technique is largely to provide one article that develops basic insights on a particular issue and then surround that article with papers taking issue with or further refining some of its points. The result is a rich collection of highly useful materials for almost any introductory purpose.

Chapter One explores the economic consequences of monopoly—the necessary beginning for almost any antitrust study. Without a sense of the costs that monopolies are thought to impose on society, it is almost impossible to evaluate the legal rules that purport to regulate monopolies. The chapter begins with the portion

5. For a description and defense of some of the "broader" antitrust concerns, see C. KAYSEN & D. TURNER, ANTITRUST POLICY 11-20 (1959), and L. SULLIVAN, ANTITRUST 10-13 (1977).

6. Dr. Manne's Economics Institutes for Federal Judges have been conducted through the Law and Economics Center of which he is director. Beginning in 1981, that Center will become a permanent part of Emory University.

7. T. CALVANI & J. SIEGFRIED, ECONOMIC ANALYSIS AND ANTITRUST LAW (1979). Hereinafter the text will refer directly to this book under review.

of Richard Posner's *Economic Analysis of Law*[8] that deals with the theory of monopoly. As befits a hornbook treatment of such a topic, the discussion is straightforward and lucid. A substantially longer discussion by David Kamerschen[9] then follows and develops many of the same points with more sophisticated diagrams and more careful qualifications.

After an excerpt from Posner's introductory antitrust text,[10] the chapter closes with Oliver Williamson's important insights into the tradeoffs between gains and losses to society from organizations that increase production efficiencies, but simultaneously increase concentration in the economy.[11] In such cases, society may indeed bear a cost because a given industry is monopolized, but may risk an even greater cost if the companies in that industry are not permitted to combine or rationalize their behavior in ways that lower their production costs.

Chapter One is seventy-six pages long, making up almost one quarter of the entire book. It would take several class sessions to discuss this chapter well, but substantial material is provided by which to develop a good understanding of the basic issue of whether the antitrust laws are in fact dealing with a real problem.

Chapter Two focuses on the problem of defining "market," which is crucial to an understanding of monopoly and merger cases.[12] Both kinds of cases require the court and the parties to describe a product and an area of the country, the boundaries of which have some economic significance. Once the market is defined, the parties then try to describe the proportion of the "market" that is controlled by the company or companies in question. The first articles here, by James Needham[13] and Richard Posner,[14] respectively, are short and straightforward in describing the extremely difficult task of satisfactorily resolving the problem of

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8. R. POSNER, ECONOMIC ANALYSIS OF LAW (2d ed. 1977).

9. The excerpt is taken from Kamerschen, *The Economic Effects of Monopoly: A Lawyer's Guide to Antitrust Economics*, 27 MERCER L. REV. 1061 (1976).

10. R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 8-18 (1976).

11. Williamson, *Economies as an Antitrust Defense Revisited*, 125 U. PA. L. REV. 699 (1977). Williamson's original article on the subject was *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18 (1968).

12. There are countless definition-of-market cases, but the classics are United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945), and United States v. E.I. DuPont DeNemours and Co., 351 U.S. 377 (1956). *See also* United States v. Grinnell Corp., 384 U.S. 563 (1966); United States v. Corn Products Ref. Co., 234 F. 964 (S.D.N.Y. 1916).

13. The excerpt is taken from D. NEEDHAM, ECONOMIC ANALYSIS AND INDUSTRIAL STRUCTURE (1969).

14. The excerpt is from R. POSNER, *supra* note 10, at 125-34.

market definition. Kenneth Boyer takes the analysis substantially farther in a much more sophisticated article dealing with the problems of defining industry boundaries and measuring cross-elasticity of supply and demand.[15] Finally, F.M. Scherer describes various statistical measures of industry concentration and the practical problems of their use in developing data.[16] This question of market definition is one that most observers conclude is almost impossible to address satisfactorily, but address it an attorney must, and the readings in Chapter Two again provide a very useful introduction to the issues involved.

Chapter Three, entitled "Cartels," is less satisfactory. Two of the articles deal with what are thought to be overt price-fixing conspiracies. The first, by George Hay and Daniel Kelley,[17] asks under what circumstances the antitrust division has chosen to proceed against conspiracies. The answer is that concentrated industries have most often been chosen for attack. Frankly, this fact does not seem surprising, partly because of the relatively lower costs of litigating against fewer companies. The second article, by Asch and Seneca, on the other hand, arrives at the counter-intuitive conclusion that companies that conspire in cartels tend to make lower profits than companies in industries that have not relied on such collusion.[18] The alternative hypothesis, of course, is that the industries studied were ones in which the companies were making low returns *before* the conspiracy, and that they chose collusion as a way to try to increase their returns.

The more interesting issue with respect to cartels is whether a concentrated industry is more likely to charge a higher price *without agreement* than is a less concentrated one. The lead article in the chapter is George Stigler's well-known speculation as to the reasons one might expect the prices and profits in a concentrated industry naturally to be higher.[19] Professors Calvani and Siegfried leave the matter there, however, and fail to develop any of the later rich debate as to whether the data on this point does or does not show that companies in highly concentrated industries make

15. The article, entitled "Industry Boundaries," appears to be original with this collection.

16. This excerpt is from F. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE (1970).

17. Hay & Kelley, *An Empirical Survey of Price Fixing Conspiracies*, 17 J. LAW & ECON. 13 (1974).

18. The article is taken from Asch & Seneca, *Is Collusion Profitable?*, 58 REV. ECON. & STAT. 1, 1-8, 11-12 (1976).

19. Stigler, *A Theory of Oligopoly*, 72 J. POL. ECON. 44 (1964).

higher profits than those in less concentrated ones, and what the legal consequences might be if they do.[20]

Chapter Four is entitled "Exclusionary Practices" and is the longest chapter in the book, comprising almost one-third of the book's total length. The chapter could have been broken down profitably into three separate units. The first, comprising a full seventy-seven pages, is the debate between Professors Areeda and Turner, on the one hand, and Professor Oliver Williamson on the other, as to predatory pricing.[21] This debate has been extraordinarily lively and important, and the Areeda-Turner predatory pricing test has been relied on by several courts.[22] Clearly, the issues here are well worth the extensive space and attention that the editors have devoted to them.

While the other two problems confronted under the exclusionary practices heading are almost as interesting as the first, they, in effect, have received a "once-over-lightly." Ward Bowman's article on tying arrangements is a classic,[23] but it is not enough. There are other sophisticated treatments of this issue[24] that most law teachers and practitioners trying to develop an understanding of the area might want to have before them in more than the bibliographic form provided here.[25] Likewise, the article by David Kaserman on "Theories of Vertical Integration"[26] is at best a general overview of what today is an extraordinarily lively debate.[27] Professors Calvani and Siegfried, like any editors, were faced with difficult choices, but developments such as the Supreme Court's

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20. Of course, the fact that the problem is the subject of a lively debate means that others have collected much of the relevant material. *E.g.*, INDUSTRIAL CONCENTRATION: THE NEW LEARNING (H. Goldschmid, H. Mann & J. Weston, eds. 1974).

21. The first article was Areeda & Turner, *Predatory Pricing and Related Practices Under Section Two of the Sherman Act*, 88 HARV. L. REV. 697 (1975). The response was Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 YALE L.J. 284 (1977). The further responses and rebuttals are Areeda & Turner, *Williamson on Predatory Pricing*, 87 YALE L.J. 1337 (1978); Williamson, *A Preliminary Response*, 87 YALE L.J. 1353 (1978); Williamson, *Williamson on Predatory Pricing II*, 88 YALE L.J. 1183 (1979); and Areeda & Turner, *Predatory Pricing: A Rejoinder*, 88 YALE L.J. 1641 (1979).

22. *E.g.*, Buffalo Courier-Express, Inc. v. Buffalo Evening News, Inc., 601 F.2d 48, 55 (2d Cir. 1979); Hanson v. Shell Oil Co., 541 F.2d 1352, 1358 (9th Cir. 1976). *But see* American Tel. & Tel. Co. v. F.C.C., 602 F.2d 401, 410 (D.C. Cir. 1979).

23. Bowman, *Tying Arrangements and the Leverage Problem*, 67 YALE L.J. 19 (1957).

24. *E.g.*, Burstein, *A Theory of Full-Line Forcing*, 55 NW. U.L. REV. 62 (1960).

25. The bibliography to Chapter Four is unusually extensive and helpful, but for a classroom text, the bibliography is not the most important feature.

26. The article is taken from 23 ANTITRUST BULL. 483 (1978).

27. *See, e.g.*, Klein, Crawford & Alchian, *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J. LAW & ECON. 297 (1978).

decisions in *GTE Sylvania*[28] and *Fortner II*[29] have made it particularly important for anyone in the antitrust field to have a better knowledge of the issues surrounding vertical integration and supplier-customer relationships than what this book now provides.

Chapter Five, for example, could well have been deleted to make room for an expansion of the Chapter Four issues. Chapter Five addresses potential competition, a fascinating theoretical issue that is well discussed here in a Steiner article[30] and one by Reynolds and Reeves.[31] Potential competition is the influence on a particular industry of companies that might join that industry or move into that geographic area. Since 1974, however, potential competition has declined significantly in importance as an issue in merger cases.[32] While it is useful for students and practitioners to be aware of the issues of the past, one might have hoped for a choice of topics that would yield a greater return in light of the limited number of pages available.[33]

The book closes with two excellent articles on the problems of antitrust enforcement. It might have been tempting for the editors to leave out issues of enforcement policy in favor of more substantive antitrust issues; however, Professors Calvani and Siegfried properly avoided that course. Given the potential reach of antitrust prohibitions, it is probably fortunate that the public enforcement authorities have had to make choices as to where their efforts can have the most positive economic effects. The article by Mann and Meehan on policy planning in both the FTC and Justice De-

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28. Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977). The court held that a rule of reason standard should apply to vertical territorial restrictions.

29. United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610 (1977). The court held that the defendant's practice of providing financing only for houses purchased from it did not constitute an illegal tying arrangement.

30. The excerpt is from P. STEINER, MERGERS 257-87 (1975).

31. The article is from ESSAYS ON INDUSTRIAL ORGANIZATION IN HONOR OF JOE S. BAIN (R. Masson & P. Qualls, eds. 1976).

32. Probably the key case was United States v. Marine Bancorporation, Inc., 418 U.S. 602 (1974). An interesting discussion, however, of the continued viability of the doctrine in the thinking of the Justice Department and the Federal Trade Commission is Yoerg, *Foreign Entry and the Potential Competition Doctrine Under Section Seven of the Clayton Act*, 46 ANTITRUST L.J. 973 (1978).

33. Further, the issue might have been more logically presented after Chapter Two on definition of market. Traditionally, it is common to distinguish competition within a defined market from the effects of companies "outside" that market. In practice, however, the effects are really part of an extended continuum in which the influence of others making similar products or in close geographic proximity to a company are felt most strongly, and the effects from companies that might move into a given industry or area, while not necessarily insiguificant, are likewise not as strong.

partment is thus very helpful.[34] Finally, the article by Breit and Elzinga has become a near-classic, iconoclastic essay questioning the rationale and effects of the private treble-damage action.[35] Any self-respecting course in antitrust law must deal responsibly with these issues, and certainly any sophisticated practitioner should try to understand them.

In brief, Professors Calvani and Siegfried have collected, in less than four hundred pages, an extraordinarily useful set of articles providing general information about antitrust economic issues. Some of the articles are classics in the field, while some challenge the existing wisdom. One might have wished for somewhat greater coverage of issues involving vertical relationships, and indeed a separate volume might even have been appropriate on those subjects. The choices made, however, were basically sound, and the editing is both intelligent and useful. This collection could be profitably assigned and used by virtually anyone wanting to know more about the extremely important insights that economic analysis can bring to antitrust issues.

34. The excerpt is from THE ANTITRUST DILEMMA (J. Dalton & S. Levin, eds. 1974).

35. Breit & Elzinga, *Antitrust Enforcement and Economic Efficiency: The Uneasy Case for Treble Damages*, 17 J. LAW & ECON. 329 (1974).