Vanderbilt Law Review

Volume 31
Issue 2 *Issue 2 - March 1978*

Article 6

3-1978

Book Reviews

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BOOK REVIEWS

THE ANTITRUST PENALTIES: A STUDY IN LAW AND ECONOMICS. By Kenneth G. Elzinga and William Breit. New Haven and London: Yale University Press, 1976. Pp. xxi, 160. $10.00.

*Reviewed by George A. Hay**

The Antitrust Penalties was published in 1976. Its main message is that the only efficient antitrust penalty is a heavy fine and that incarceration comes out poorly by any benefit-cost standard. Later that year, in a celebrated and possibly unprecedented appearance, newly appointed Assistant Attorney General Donald I. Baker argued before a federal district judge that jail sentences were the appropriate penalty for a group of defendants who had just been convicted in one of the major price-fixing cases of the past twenty years. Fines, he suggested, offered insufficient deterrence for future would-be criminals. Moreover, after that appearance, the call for jail sentences in price-fixing cases became the dominant theme in Baker's brief but active tenure.[1] Thus the evidence is clear that Elzinga and Breit's missionary expedition had failed to convert the chief antitrust enforcement official. Why the attempted conversion thus far has failed is a question this review will address.

Because the book is quite brief (153 pages) and very well written, most readers, including noneconomists, will find it easy reading. Indeed the book is really a single idea expanded to book length by incorporating some interesting historical material. The first chapter introduces the concept of antitrust action as a public good in which the elimination of monopoly pricing by one party provides nonexcludable benefits to many others. Hence, absent some artificially created incentives, private parties have little or no incentive to undertake the task. Governmental provision of the public good is thereby justified or at least explained. There follows a brief section reminding us that, since the elimination of monopoly pricing

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1. *See, e.g.*, To Make the Penalty Fit the Crime: How to Sentence Antitrust Felons, Address by Donald I. Baker before the Tenth New England Antitrust Conference (Boston, Nov. 20, 1976) (on file at the *Vanderbilt Law Review*).

is expensive, efficiency does not require its complete elimination but merely its reduction to the point at which marginal benefits equal marginal costs.

The chapter is not central to the rest of the book, since the remainder is designed to show how to lower the cost of any given level of enforcement or, at best, to eliminate all monopoly pricing at zero cost. Hence, notions concerning the optimal level of enforcement are not subsequently used. In the real world, of course, not all monopoly pricing can be eliminated, so some fascinating and important issues remain regarding the optimal level of antitrust resources and, perhaps more interestingly, the optimal strategy for using any given level of resources. Should investigatory resources be focused on big (or concentrated, or both) industries, on shady areas of the law (*i.e.*, possible precedent-setting cases), or on situations suggested by complaints or tips? These questions are not dealt with in this brief chapter.[2]

The second chapter briefly surveys the penalties considered but not accepted during the drafting of the Sherman Act. Much of the chapter is taken, with appropriate citations, from the classic by Thorelli.[3] The penalties considered ranged from the Draconian—denying "trusts" the use of the mails or the federal courts—to the likely innocuous measure of simply publicizing the fact of an antitrust violation. What is striking about the early statements cited by the authors, and to some extent about their own subsequent discussion, is the rather simple-minded view of the Sherman Act violator as a "trust." Penalties that may have been appropriate for dealing with Standard Oil in 1911 hardly seem realistic when dealing with some of the typical Sherman Act violations of 1978—a restrictive patent license, a vertical territorial restriction, or a tying clause. Closer attention to the wide variety of possible violations and its implications for the appropriate set of penalties would have improved and probably would have altered some of the authors' discussion.

The third chapter examines, primarily from a historical perspective, the public action penalties—incarceration, structural relief, and fines. The authors briefly survey the use of incarceration as a penalty and find, as most are aware, that it is almost never

2. *See also* Statistical Studies of Antitrust Enforcement: A Critique, Address to the American Statistical Association by Rebert T. Masson & Robert J. Reynolds (1977) (on file at the *Vanderbilt Law Review*).

3. H. THORELLI, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION (1955).

imposed in Sherman Act cases and that when it is imposed the length of the actual incarceration rarely exceeds thirty days (in most cases the sentence is suspended). This information is presented nicely in a table showing all cases since 1966 in which jail has been an element of the sentence. From 1966 to 1974 jail *or* probation was an element of the sentence in only eighteen cases, and individuals actually served time in only seven cases.

These grim (from an enforcer's viewpoint) statistics lead the authors to speculate on judicial reluctance to incarcerate individuals found guilty of Sherman Act violations. Their explanation is that in cases involving large corporations courts have difficulty pinpointing guilt above the level of those who overtly carry out the antitrust violations.

> But until judges and juries are convinced beyond a reasonable doubt that the well-dressed, wealthy, articulate pillar of the community facing them is in actuality the real instigator and director of a conspiracy to cut back production, rig prices, and rob consumers and taxpayers just as effectively as a common mugger or bank robber, it is unlikely that prison sentences often will be imposed for violations of the antitrust laws.[4]

The logic of their argument, therefore, is that, because of the difficulty in pinpointing guilt, judges are reluctant to impose jail sentences and, since jail sentences are unlikely to be imposed, the possibility of jail does not serve as an effective deterrent. Speculating on the collective thinking of judges is chancy, and the authors offer no evidence, either statistical or anecdotal, in support of their hypothesis. My own view is that they may have missed the target, in part because I suspect that individual judges differ dramatically in their motivations, even when the sentences imposed are the same. At least some judges, I would speculate, simply do not regard an antitrust violation as a serious offense. Weak evidence for this hypothesis is that even when major figures in the corporation have been convicted—typically, as the authors indicate, in the case of small closely held corporations—the sentences have been mild. Further evidence appears in an article by a federal district judge explaining his decision not to impose jail sentences in a 1974 case.

> Despite the seriousness of antitrust violations, I find a blanket comparison between these crimes and other felonies inappropriate. I believe that crimes of violence are, in general, much more destructive of the fabric of society than are nonviolent commercial crimes. The butcher who routinely charges his customers an extra quarter for the weight of his thumb on the scale surely abuses his position. Over time, his activities may result in an economic loss to his

4. K. ELZINGA & W. BREIT, THE ANTITRUST PENALTIES: A STUDY IN LAW AND ECONOMICS 43 (1976).

> customers far exceeding the "take" of an average bank robbery, and, if discovered, his dishonesty would undoubtedly create mistrust and anger among his customers. Yet, however reprehensive the butcher's conduct may be, I feel certain that it entails a smaller social cost than would result if each of his customers were stopped at gunpoint and robbed of a quarter several times a week for the same period of time. Violent crime massively disrupts and distorts the daily social intercourse among human beings upon which any viable society depends. While the two kinds of crime may have a similar economic impact, and may both instill some apprehension in the public, the psychological effect of violent crime is clearly more pernicious.[5]

Even assuming that the authors are correct, one must recognize that this difficulty would apply to *any* sentence—fine included—directed at individuals. Therefore, by their own reasoning, if fines are to be their preferred penalty, they must intend that fines be directed primarily, if not solely, at the corporation rather than at individuals.

The section of chapter 3 dealing with structural relief would work better if a clearer distinction were made between Clayton Act (antimerger) violations and Sherman Act violations. It is hard to imagine an effective remedy for illegally consummated mergers other than some form of divestiture. (Of course, virtually any form of relief, including capital punishment, in theory could be used to *deter* anticompetitive mergers; the practical problems of attempting to do so are discussed below. The remarks here are directed at remedying an anticompetitive merger that has in fact occurred.)

Section 7 of the Clayton Act is designed to prevent the emergence of an anticompetitive structure by prohibiting relatively small aggregations of market share. As Elzinga has pointed out earlier in an important piece of research, attempts at obtaining structural relief for Clayton Act violations frequently have been less than completely successful. Structural relief nevertheless was clearly Elzinga's preferred solution: "[A] rule against the consummation of anticompetitive mergers is indeed logical. For this rule to be effective, the penalty for its violation must be stringent. The rule of quick, total structural relief needs to be followed if the incentives to consummate anticompetitive mergers is to be minimized."[6] The discussion of structural relief in the present context, however, clearly is aimed, not at mergers, but at monopoly situations. The reader is not well served by the inclusion of material on past efforts in Clayton Act situations, except as it helps to illustrate the practical problems of carrying out the mechanics of divestiture, which are

5. Renfrew, *The Paper Label Sentences: An Evaluation*, 86 YALE L.J. 590, 593 n.8 (1977).

6. Elzinga, *The Antimerger Law: Phyrric Victories?*, 12 J.L. & ECON. 43, 76 (1969).

equally applicable to merger and monopoly situations.

The theoretical flaw of structural relief in monopoly situations, the authors assert, is that, if the relief is successful in eliminating the monopoly power and hence the monopoly profits, stockholders—especially those who, buying in late, paid the capitalized value of expected monopoly profits—are penalized. Because the courts understand this problem, they have been reluctant to order effective structural relief. This reluctance ultimately becomes, in the eyes of the authors, an argument for abandoning structural relief in favor of fines as long as the offending structure persists. Stating their position in this way exposes its weakness. If a judge fails to impose any relief that brings an end to monopoly profits, he is no more likely to impose fines than he is to impose structural relief. Since the authors' comparative evaluation of the alternative remedies is largely deferred until a later chapter, however, further remarks on the subject likewise will be deferred.

The brief discussion of fines in the third chapter is largely a reporting of earlier efforts to raise the level of maximum fines that could be imposed in Sherman Act cases, the most recent event being the 1974 Antitrust Procedures and Penalties Act,[7] which raised the maximum corporation fine to one million dollars (from $50,000).[8] The authors regard this as insufficient since the legislation merely fixes the minimum fine and leaves the actual fine to the discretion of the courts, which historically have been reluctant to impose even the nominal pre-1974 maximum of $50,000.

Chapters Four and Five deal with the role of private treble damage actions. Chapter Four consists primarily of historical and background material, including a brief discussion of how the remedy came to be treble damages instead of single or double damages. The authors speculate on the mix between private and public enforcement originally contemplated by Congress and on whether the primary goal of allowing private actions was compensation or deterrence. Apparently, so little legislative debate occurred on those subjects that no strong conclusions can be drawn, and, unlike the earlier section on the penalties considered, no interesting congressional anecdotes spice up the material. The authors do suggest that section 5(a) of the Clayton Act, passed in 1914, which allows private plaintiffs to refer to a guilty verdict in a federal trial as prima facie evidence of liability in private suits, shows a congressional leaning

7. Antitrust Procedures and Penalties Act of 1974, Pub. L. No. 93-528, 88 Stat. 1706 (codified in scattered sections of 15, 47, & 49 U.S.C.).

8. 15 U.S.C. § 2 (1976).

toward compensation rather than deterrence.

This view is unwarranted in my opinion. By making the private plaintiff's burden easier, the provision raises the expected cost to a would-be price fixer and should increase deterrence at the same time that it improves the plaintiff's chances of being compensated. In fact, the main effect of the provision is to make a defendant very unwilling to go to trial in a federal case. Consequently, the overwhelming proportion of government price-fixing cases results in pleas of *nolo contendere,* a plea that is equivalent to a guilty plea or verdict for the purpose of sentencing but that cannot be used to establish liability in private cases. Interestingly, in the congressional deliberation over the 1976 Antitrust Improvements Act,[9] the Antitrust Division testified against a provision that would make *nolo* pleas prima facie evidence in private cases on the ground that the main victim would be the federal courts, which would have to conduct a full trial in every price-fixing case since few defendants would elect to plead *nolo* because of the treble damage exposure that would result.[10]

Most of the authors' brief discussion of the issues involved in standing and in passing-on defenses has been rendered obsolete by subsequent developments, although the passing-on issue has not been resolved as of this writing.[11] Chapter Four also includes a brief and inconclusive section on the legal fees associated with private actions.

Chapter Five, which also deals with private treble damage actions, is actually the first chapter in Part II of the book, entitled "The Analysis." The authors claim that three aspects of private actions tend to produce inefficient results. The "perverse incentives effect," or moral hazard, arises when firms continue to buy from an antitrust violator even though less expensive alternatives exist, because the overcharges will be trebled when damages are awarded. The "misinformation effect" refers to nuisance lawsuits filed without substantive merit that seek to capitalize on the risk aversion of the defendant to induce a settlement offer. "Reparations costs" are simply the resources used in the determination and allocation of damages.

9. Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (amending and enacting scattered sections of 15, 18, & 28 U.S.C.).

10. *Antitrust Improvements Act of 1975: Hearings on S.1284 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, Pt. 1,* 94th Cong., 2d Sess. 78 (1975).

11. The Supreme Court made recovery all but impossible for indirect purchasers in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), but Congress has shown strong inclinations to overrule that verdict.

Although one would expect a discussion of the possible benefits of private actions to follow, none occurs until chapter Eight. This makes for difficult reading and seems unnecessary. In any event, the discussion of the evils of private enforcement is flawed in several aspects. First, the primary examples of the perverse incentives effect come from Robinson-Patman Act cases. For reasons discussed below, I think it unwise to generalize from one type of antitrust violation, such as Robinson-Patman, and apply the generalizations to other types, such as price fixing. This is a particular problem with the Robinson-Patman Act, which economists (including Elzinga, who has testified in favor of its amendment or repeal) have described as perverse for many years.

Second, even accepting Robinson-Patman cases as evidence, the authors' anecdotal evidence might be describing as a perverse incentives effect what is in fact a remediable procedural problem—specifically, the difficulty in collecting damages for price discrimination unless the plaintiff actually purchases the product from the perpetrator at the discriminatory price. Avoiding a small percentage of the economic harm by turning to an alternative that is only slightly better, given the discriminatory price, in most situations renders the victim ineligible to collect any damages at all since he has made no purchases from the guilty party. In economic terms, one can recover only the monopolist's profit rectangle, not the deadweight loss. My point is that, although this quirk may create perverse incentives, it is not an inherent flaw in private actions.

Third, although a more straightforward perverse incentives effect might exist (*i.e.*, deliberate buying at an inflated price despite the existence of cheaper alternatives), I am inclined not to take it seriously because of the lack of evidence on its quantitative significance. The non-Robinson-Patman evidence involves a survey of the utilities in the wake of the electrical equipment conspiracies of the 1950's. The survey showed that many utilities felt reasonably sure that prices were being rigged. This perception, however, is just as compatible with an inability of the utilities to get any hard evidence absent grand jury power as with the perverse incentives effect. It is also compatible with the no-care attitude among utility executives that results simply from their regulated status in which profits largely are unaffected by the price paid for equipment (or worse, in which profits might be increased as higher cost capital enters the rate base). Hence, the behavior of utilities does not make for very convincing evidence one way or the other. Finally, since the economic misallocation resulting from monopoly pricing is that too little of the monopolized (or price-fixed) product is purchased, does

not the perverse incentives effect tend to reduce the misallocation by increasing the amount of purchases?

These remarks should not be read as critical of the authors' conclusions about the disadvantages of private actions. I merely would put more weight upon the misinformation effect, especially in cases alleging monopolization or attempt to monopolize, in which the Antitrust Division—correctly in my view—has been far less aggressive than private plaintiffs.

Chapter Six deals with dissolution. The authors' concern is that the costs of dissolution may swamp any of its benefits. The benefits are the captured welfare triangles[12] that might accrue from the actual remedying of monopolistic market structures. The costs are the transaction costs involved in the mechanics of divestiture plus the loss of any economies of scale or other efficiencies that may have contributed to the original market structure. This long-recognized dilemma goes beyond simply the relief issue to the question of the basis for the alleged violation. Put succinctly, if a firm with long-standing market power has not achieved or maintained its position by so-called "bad acts," then how else is its position to be explained other than through economies of scale or superior efficiency?[13] Dissolution sacrifices these economic benefits and, since no anticompetitive behavior has occurred, what injunctive relief could possibly be sought? With respect to liability, the issue is an equitable one. Judges feel compelled to identify conduct about which they can say "you should not have done that" before attaching liability. Taken together, these two components raise serious questions about the feasibility and desirability of applying dissolution to situations in which no anticompetitive conduct has occurred.

The argument is not entirely symmetric, however, when anticompetitive behavior is found to be the key to the attainment or maintenance of a firm's monopoly position. Here structural relief might be defended as designed to bring about within a reasonable time what would have occurred naturally absent the anticompeti-

12. Losses due to monopoly generally have been characterized as having two components: a transfer from consumers to producers as higher prices paid by consumers translate into greater profits for the monopolist and a "deadweight loss" that results from an inefficient allocation of resources. The latter is what the authors mean by the welfare triangle. All of this is explained in their first chapter. Well before the publication date of the book, however, serious debate emerged over whether the so-called "profit rectangle" also represents a full-fledged social cost as real sources would be spent by would-be monopolists in an effort to capture these excess profits. *See* Posner, *The Social Costs of Monopoly and Regulation*, 83 J. POL. ECON. 807 (1975).

13. *See generally* Williamson, *Dominant Firms and the Monopoly Problem: Market Failure Considerations*, 85 HARV. L. REV. 1512 (1972).

tive conduct. Alternatively, when structure makes the anticompetitive conduct possible (and profitable), injunctive relief aimed at specific past practices arguably might fail to prevent the monopolist from concocting new means to the same end.

The point of these comments is not only to reinforce the authors' notion that structural relief can in some circumstances come up short in a benefit-cost analysis, but also to link the relief problem more closely to the theory of the violation than they do. When no anticompetitive conduct is found, not only is structural relief likely to sacrifice some efficiencies, it is also somewhat unlikely that liability can be successfully achieved in the first place. On the other hand, when "bad acts" are discovered, structural relief can be both efficient and equitable.

The final section of the dissolution chapter sets out and critically analyzes benchmarks that have been proposed to select candidates for structural relief. They include the firm's market share, the joint market shares of the leading firms, and the firm's profits, absolute size, and/or price behavior. The section contains some interesting material, but the material is more appropriate for a discussion of proposed antitrust legislation (*e.g.*, the late Senator Hart's deconcentration bill) than for a discussion of relief under the existing antimonopoly laws when such criteria either need to be satisfied to establish liability in the first place or are irrelevant once liability has been established. Since the authors in their introduction claim to accept "the general structure of present legal arrangements" and to study "whether or not the methods and instruments of their implementation are efficient,"[14] this section represents a departure from the advertised itinerary.

Chapter Seven deals with fines, the authors' preferred means of punishing and deterring antitrust violators. The difference between fines and private damage actions, as seen by the authors, is that, although each provides the right incentives so far as would-be violators are concerned, the latter have the disadvantage of stimulating perverse incentives and misinformation effects. Hence, public action via fines is similar to, but also preferred to, the private action remedy. As indicated above, although I do not concur in the authors' entire chain of reasoning, I accept their conclusion about the comparison.

In the next section of chapter Seven, the authors compare the efficacy of increasing the fine for a convicted antitrust violator with increasing the resources devoted to finding and convicting those who

14. ELZINGA & BREIT, *supra* note 4, at x.

violate the antitrust laws. They use the concept of the would-be violator's "expected costs" of punishment (*i.e.*, the probability of being caught and punished times the amount of punishment). Holding expected costs constant, they argue that a scheme involving high fines with low probability of being caught would be a more effective deterrent than its mirror image as long as would-be violators are risk averse. The authors speculate that corporate managers are on balance risk averse and, moreover, more risk averse than in the good old days of Carnegie and Firestone. They conclude that the most desirable policy, even independent of the costs of the two alternatives, clearly is to increase fines. Moreover, the costliness of detection and conviction when compared to the costlessness (as seen by the authors) of increasing fines further reinforces this conclusion. (The *reductio ad absurdum* that infinite fines coupled with a very small probability of being caught is the optimal solution is dealt with by an admission that there is some level above which fines should not go.)

The authors do consider, but reject, several obvious objections to their results. The possibility that high fines would make judges and juries reluctant to find parties guilty, thereby leading to an unanticipated reduction in the probability of conviction, is given short shrift: the pairing of increased fines with elimination of private actions would demonstrate Congress' intention so clearly that judges and juries would go along. The possibility that the sense of inequity might be increased if fewer convicted violators get higher fines is dismissed with the argument that as long as anyone has the same chance of being caught (*ex ante* equity), the *ex post* equity is irrelevant. Although I think that many lawyers will quarrel with the authors' handling of these possible objections, I shall decline comment except to say that a more extensive inquiry into the substance of the possible objections, including perhaps a more thorough review of the literature that surely must exist on the subject and some discussions with lawyers or judges who hold different views on the matter, would have removed some of the ivory-tower flavor their treatment now has. If the authors did undertake such an inquiry, it is not indicated in the text.

My own objections to the risk analysis as it affects the superiority of fines over enforcement resources (and, by the authors' extension, over incarceration) involve the identity of the object of the penalty. The authors clearly intend the fines to fall upon the corporation, not upon the management. This follows from their earlier objection to prison sentences based on the unwillingness of the courts to require incarceration when the truly responsible party can-

not be identified with precision, an objection that is stated explicitly by the authors in the present chapter. In addition, they think that fines on management salaries would induce the corporation to bribe management to go ahead with an antitrust violation since the fine would be small relative to the gains to the corporation. This problem is developed further below.

Accepting for the moment, however, the argument that corporations display the risk preference articulated by the authors, the actions of the corporation insofar as potential price fixing is concerned are carried out at the various levels of management of the corporation. With the fine falling upon the corporation, the most serious liability for the actors is the loss of job and other associated benefits. Although these losses may be severe, the important point is that the upper limit of the individual's liability is more or less invariant to the level of fine imposed upon the corporation. A policy of increasing fines and simultaneously reducing the probability of detection and conviction thus reduces the expected loss to the individual. Hence, no matter how significant the degree of risk aversion, the policy would be counterproductive.

As an aside, I am even prepared to question the role of risk aversion in determining the corporation's preference for high fines and low probability of detection or vice versa. It seems to me that the damage caused a corporation by conviction of an antitrust violation might be far greater than the fine if the corporation's public image is at all important in affecting consumer attitudes and, ultimately, consumer demand for the company's product. This public image factor, which would be triggered only by actual detection and conviction and which would be largely independent of the amount of fine, may render attractive from the corporation's viewpoint (as well as the individual manager's) a policy of increased fines and reduced enforcement resources.

From my perspective, therefore, efficiency requires that the individual actor, such as management, ought to stand some risk of public sanction, either a fine or incarceration, in addition to the private sanction of loss of job and job-related benefits.[15] This is not to say that corporations ought to go unpunished. For one thing, the offending managers are not likely to appropriate all the excess profits from their illegal behavior—the stockholders get most of it. These profits, therefore, are recovered by inflicting financial punish-

15. I might add that there is also an equitable question whether stockholders should suffer from the overly aggressive behavior of one of its employees.

ment upon the corporation.[16] Moreover, as the authors indicate, the corporations have some, albeit not perfect, control over the atmosphere in which an individual's decision to violate the antitrust laws takes place. They can take some low-cost but effective measures to discourage violations and may do so if they stand to bear some of the costs of being caught. Clearly, however, the free-rider problem is too severe to allow individuals to escape public sanction. Assuming, therefore, that efficiency requires that individuals as well as corporations be penalized publicly for antitrust violations, the question becomes whether the authors' risk analysis can be used to support the policy recommendation of shifting the balance between fines and enforcement resources. The answer, I think, is suggested by the authors' earlier comments. Specifically, if there is an upper limit to the maximum fine that reasonably can be extracted from individual wrongdoers and beyond which individual bankruptcy occurs, then increasing the nominal fine beyond that level while simultaneously reducing the enforcement level reduces the expected cost to the individual and encourages rather than discourages criminal activity. It is not certain that the current level of fines is close to the ceiling of what can practicably be collected, although I suspect that for most individuals it is. Two additional factors should be mentioned. Increasing corporate fines, while not increasing the individual's expected cost, may induce the corporation to increase its internal efforts to discourage violations. On the other hand, higher fines induce the corporation, if a violation has occurred, to increase the resources spent in concealment or, if indicted, in defending itself. Thus there possibly is still room to implement the authors' policy recommendations. Clearly, however, there are limits.[17]

The same is true for the use of fines in lieu of incarceration. Although fines may be a rather "costless" method of punishment and deterrence when compared to incarceration, the upper limit of what reasonably can be collected may be too low to deter some individuals from committing a crime that might substantially benefit their careers. When this is so, the only available method of increasing deterrence may be incarceration. It might also be the case that a major burden of a substantial fine may fall not upon the individual, but upon his family. Although incarceration may not be entirely painless for those left behind, this factor may increase the

16. I am grateful to James Broadus and Gerald Childs for this point.

17. For a similar treatment, see R. POSNER, ECONOMIC ANALYSIS OF LAW, 234-37 (2d ed. 1977).

attractiveness of incarceration. Many other factors are said by others to weigh in favor of incarceration, but these are discussed adequately elsewhere.[18] Included is the notion that, whatever the factual reduction in the antitrust violator's utility as a result of a substantial fine, an undesirable and presumably unalterable public perception may ensue that white-collar criminals are treated more favorably than so-called "ordinary" criminals.

In the last part of chapter Seven the authors discuss the level of fines that would be directed against the corporation. After considering sales and assets as possible criteria, the authors settle on twenty-five percent of the firm's pretax profits for every year of anticompetitive activity. Particularly surprising is that the profits to be used as the base are not the profits resulting from the conspiracy nor (what may be the same thing) the profits in the line of business affected by the conspiracy. Rather the authors use the profits for *the entire corporation!* Part of the reason for this remarkable conclusion is the difficulty of determining profits specifically attributable to a single line of business because of the arbitrariness in standard accounting practice. The solution chosen by the authors, however, is not necessarily the next best alternative. The Antitrust Division, facing a somewhat similar problem,[19] elected to recommend a fine of ten percent of the corporation's sales in the affected line of commerce during the conspiracy with adjustments for mitigating or exacerbating circumstances.[20]

Chapter Eight discusses probable objections to the authors' proposal for eliminating private antitrust actions. Reflecting some confidence in the ability of the private sector to find and prosecute violations in an efficient manner, most of the objections involve doubts about the ability or energy of the federal agencies, the Antitrust Division and the Federal Trade Commission, to do so. The authors, who criticized the perverse incentives and misinformation effect of private actions in earlier chapters, display considerable confidence in the federal agencies.

An enforcement agency can commit two types of errors. The first, a Type I error in statistical jargon, is to fail to prosecute true violations, either through incompetence or malevolence. On the first score, although many cut-and-dried violations—largely price fix-

18. *See* Renfrew, *supra* note 5.

19. Except that the situation included corporate fines in addition to prison sentences for individuals.

20. United States Department of Justice, Antitrust Division, Memorandum on Guidelines for Sentencing Recommendations in Felony Cases Under the Sherman Act (Feb. 24, 1977), *excerpted in* 45 U.S.L.W. 2419 (Mar. 8, 1977).

ing—no doubt do go undetected, the record of private plaintiffs in leading the way in these situations does not raise great fears in my mind that many more valid cases will fail to see the light of day in a world without private action. Indeed, as the authors indicate, the incentive for knowledgeable private parties to provide "hot tips" in such a world is undiminished and perhaps increased. A Type II error occurs when a case is brought and perhaps even won even though no anticompetitive conduct has, in fact, occurred. Although for most economists the federal record is hardly unblemished in this respect, the record of private actions is a disaster. Moreover, I suspect that this judgment would be supported by at least some of those who believe that economists' views on what is anticompetitive are not determinative or perhaps not even relevant.

The only objection considered (and rejected) by the authors that strikes me as having some merit involves the equity of denying the injured parties the ability to receive compensation. Many thoughtful persons, of course, have considered the question in the light of the Supreme Court's decision in *Illinois Brick Co. v. Illinois,*[21] which can be characterized crudely as having scuttled equity in favor of efficiency. There is hardly unanimity on the issue, although at this writing equity appears favored to win out through congressional reversal of the decision.[22]

In a brief final chapter Elzinga and Breit report the "bottom line":

> The discussion of the instruments of antitrust policy in part II leads ineluctably to a rather sweeping recommendation for the streamlining of the antitrust tool kit. A severe monetary exaction paid to the state by violators [read corporate violators] should be the sole instrument of antitrust enforcement.[23]

In the opinion of the authors there is some fine that would be as effective as any other instrument of deterrence, and a fine consumes no scarce resources once detection and conviction have occurred. In addition, the inefficiencies of private enforcement are avoided.

Moreover, the authors would use the fine to obtain any antitrust results that are desired. For example, they recommend that advocates of deconcentration simply impose fines until a firm's market share reached the desired level. Companies that have engaged in anticompetitive mergers would be subject to fines until the

21. 431 U.S. 720 (1977).

22. *See, e.g.,* ANTITRUST & TRADE REG. REP. (BNA), Aug. 28, 1977, at A-10 to -13; *id.,* Oct. 27, 1977, at A-1 to -4; *id.* Nov. 11, 1977, at A-5 to -8. *See also id.* Sept. 15, 1977, A-6 to -10; *id.* Sept. 22, 1977, A-4 to -7. To be fair, part of the sentiment in favor of legislative reversal involves doubts about the willingness of direct purchasers to prosecute vigorously.

23. ELZINGA & BREIT, *supra* note 4, at 150.

merger was undone. Fines could be levied to induce oligopolists to avoid tacit collusion. Finally, even practices such as tying contracts would be subject to the financial bite.

Many of the objections to this sweeping recommendation are discussed above. Rather than reiterate all my criticisms, I shall instead set out what I regard as the crucial analytical steps that one might take in developing *de novo* an ideal policy for antitrust penalties.

1. *Distinguishing between deterrence and punishment.* The first step is to make clear the distinction between deterrence and punishment. Any penalty is costless as long as it is never imposed. In theory, then, perfect deterrence could be efficiently attained by any sanction—fine, incarceration, torture—as long as the level of the sanction is set sufficiently high. Perfect deterrence is not desired, however, even though it could be achieved "costlessly" in the sense that Elzinga and Breit use the term. The reason is that the "crime" for which the sanction might be imposed is sufficiently vague at the margin, as I shall explain below, that a sanction high enough to deter all "crime" would deter a substantial amount of neutral and even procompetitive behavior as decision makers seek to reduce to zero the possibility of being (even wrongfully) convicted. Thus the optimal level of deterrence is a more complicated problem than the authors indicate.[24]

2. *Isolating situations in which sanctions could actually be imposed.* Given, for the reasons just discussed, that the optimal level of deterrence is not that of zero crime, the efficiency calculation regarding the choice of a sanction clearly involves the costs of imposing the sanction only in those instances when detection and conviction occur.

3. *Isolating activity for which sanctions are inappropriate.* In the case of some activities covered by the antitrust laws, the anticompetitive status of that activity is determined *ad hoc;* the activity is not clearly ruled out by the wording of the statute or by the body of judicial opinion existing on the date at which it occurs. The vast bulk of activities potentially covered by the antitrust laws—mergers, monopolization, vertical restraints, tying contracts, and restrictive patent licenses—for the most part are public events, such that the probability that they will be reported or can be discovered is quite close to one. Hence, such activities occur in the first

24. At least nothing in their introductory discussion suggestions that their concept of the costs of enforcement includes this kind of Type II error, although it certainly is not inconsistent with their analytical framework.

place only when the decision makers, probably on the advice of experienced antitrust counsel, think that there is at least reasonable doubt whether the proposed activity is covered by the antitrust laws. Thus for such activities, by the very definition of the process, almost every case is borderline; the answer to the question of what is and what is not anticompetitive behavior is constantly being redefined as new merger situations, new forms of behavior, or old behavior in new circumstances come to the attention of the prosecuting agency whose views of the degree of anticompetitive effect are bound to differ in at least some instances from those who give the private antitrust advice that permitted the activity in the first place. This is one reason why the Antitrust Division should not be expected to win a vast majority of its cases.

Clearly, punitive sanctions are inappropriate in such instances. Although the agency likely would prefer that corporations not walk precisely on the edge of the law, no good effect is served by making firms in their caution stay so clearly inside the line that many efficient actions are avoided. I suspect that the court costs alone are probably sufficient to induce the correct level of caution.

The only aim of the prosecuting agency is to obtain relief against the firm in question and, implicitly, to define the limits of the law regarding the activity in question for other firms that might contemplate such action in the future. For most forms of restrictive contracts or behavior, simple injunctive relief will suffice; for most mergers and some monopolization, some form of structural relief may be required to permit the return to the competitive situation that would have prevailed but for the offending conduct.

The third analytical step, therefore, sorts out those categories of antitrust violations in which sanctions other than mere court costs are required to promote effective deterrence. Because they are public in nature, most antitrust-related anticompetitive activities are deterred simply because the probability of detection is quite high and because court costs or divestiture costs, if detected, are not trivial. For most of the remaining activity, deterrence is not desirable because it cannot be achieved without simultaneously deterring perfectly legitimate activity.

4. *Identifying activity for which sanctions are appropriate.* There is nonetheless a class of cases for which sanctions are required on the one hand because the activities are clearly anticompetitive and, on the other hand, because they are sufficiently covert that detection is not automatic. Price fixing is the most obvious of these activities (other than the kind of price fixing, such as fixed commission rates on the stock exchanges, that has been carried on publicly

for years in the belief that it was legal), although certain kinds of predatory activities in a monopolization context might qualify in some circumstances. The analysis in the Elzinga-Breit book is relevant to these types of cases and to these alone.

5. *Determining the appropriate party to receive the sanction.* For that category of activities in which sanctions are appropriate, a distinction first must be made between the individual actor and the corporation on whose behalf he presumably acts. Should both be subject to sanction or only one, and if only one, which one? Questions of equity toward stockholders are relevant—on the one hand, they are not directly responsible for the crime, but on the other, they likely receive most of the benefits to the extent that the crime was at all successful in attaining profits greater than those that otherwise would have been earned. In addition to questions of equity, questions of efficiency are important. Is the corporation able to monitor and suppress anticompetitive activity at a relatively low cost? What are the motives of the individual manager when only the corporation is to be responsible? For reasons discussed above, I think that sanctions probably need to be imposed on both parties.

6. *Determining the appropriate kind of sanction.* Once a clear distinction is made regarding the party to receive the sanction, intelligent discussion can ensue about the appropriate type of sanction. For obvious reasons, incarceration is inappropriate for corporations, although some have argued that higher officials who did not participate in the activity but had knowledge of it should be criminally liable.[25]

With respect to individuals, one clearly must choose between fines and incarceration. This choice would have to be based on the relative cost of the two sanctions, the ability of the individual to pay a financial penalty high enough to achieve the optimal level of deterrence, and possibly, considerations of equity vis-á-vis other types of crime (or other types of criminals). Before making this choice, I would want to talk with judges, prosecutors, and defense lawyers to gain some insight into the noneconomic aspects of the problem.

7. *Balancing the severity of the sanction against the costs of detection and conviction.* The kind of penalty having been decided, one still must consider the trade-off between the level of the penalty and the amount of resources devoted to detection and conviction. Both contribute to the individual's—and the corporation's—expected cost of crime, but each has its own administrative costs

25. ELZINGA & BREIT, *supra* note 4, at 40-42.

and conceivably its own impact upon the degree of risk perceived by the would-be criminal. Again, practical limitations on the amount of any penalty that can be extracted may contribute to the advantage of detection resources on the margin.

Having set up this analytical framework for the problem of antitrust penalties, I am not prepared in this essay to solve it. For me, the problem is particularly complex and not amenable to the authors' rather simple and sweeping conclusion to rely entirely upon a fine directed at corporations. Hence, I give the book a poor mark for its success in coming to grips with the problem. As a seminal work, however, I can recommend it. It is exceptionally well written and easy to read and raises many interesting questions. Although the volume might not deserve the legendary place on everyone's bookshelf, most will benefit by borrowing it from the library for a day or so.

ANTITRUST LAW: AN ECONOMIC PERSPECTIVE. By Richard A. Posner. Chicago: University of Chicago Press, 1976. Pp. x, 262. $15.00.

Reviewed by H. Michael Mann and Teresa Amott***

Professor Posner offers an articulation of a viewpoint derived from research and writing in the law and economics of antitrust. His position is that the promotion of vigorous competition can be accomplished by one statute (section 1 of the Sherman Act) that prohibits collusive action designed to restrict output below and concurrently raise prices above the competitive level and that imposes severe fines for violations. We are unconvinced, although we acknowledge that we agree with much of Posner's criticism about the application of antitrust law.

The case law on mergers, vertical restrictions, and various exclusionary practices all too frequently is confused and contradictory. Economists cannot escape some responsibility for this state of affairs, for as one of our distinguished colleagues has stated:

> [I]f an economist finds something—a business practice of one sort or another—that he does not understand, he looks for a monopoly explanation. And as in this field we are very ignorant, the number of ununderstandable practices tends to be very large, and the reliance on a monopoly explanation frequent.[1]

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1. Coase, *Industrial Organization: A Proposal for Research,* in POLICY ISSUES AND RE-

Absent certain market characteristics that might result in anticompetitive potency, many business practices subject to antitrust litigation are innocent of undesirable impact on the competitive process. The necessary characteristic for Posner is oligopoly, a condition in which the market contains only a few sellers. He stresses explicitly and implicitly[2] the presence of oligopoly as the *sine qua non* for any serious antitrust inquiry into the likelihood of anticompetitive behavior and its associated consequences on price and output.

An important additional condition, however, is whether the oligopoly is associated with significant entry barriers. Posner's failure to analyze the latter undermines the credibility of his argument regarding liability and remedy.[3]

I. Barriers to Entry

That persistent departures from a competitive price level require collusion, explicit or tacit, among sellers within the market and protection from potential entrants is a well-established proposition of economic theory. Empirical evidence indicates that the combination of oligopoly and high entry barriers produces supracompetitive prices and profitability, an indication of monopolistic output restriction.[4] The trouble from the standpoint of Posner's credibility is that he does not believe in barriers to entry. Without entry bar-

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SEARCH OPPORTUNITIES IN INDUSTRIAL ORGANIZATION 67 (V. Fuchs ed. 1972).

2. Posner states, "It seems doubtful, therefore, whether vertical mergers should be forbidden save in the unusual case where actually made with an exclusionary or otherwise improper (e.g., to shore up a cartel) intent." R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 200 (1976). An effective cartel or a strong probability of successful exclusion depends, in Posner's view, upon cooperation among firms, the necessary condition for which is oligopoly. *Id.* at 52, 54-56.

3. Unfortunately, despite Posner's belief in the importance of economics as a vehicle for constructing a rational antitrust policy, he makes numerous theoretical mistakes. His description of the "second best" theory (*id.* at 13-14) is wrong. Second best is concerned with resource allocation in the production of alternative products, not with the respective levels of marginal cost. As long as product prices depart from their marginal costs by the same factor of proportionality, regardless of the levels of marginal costs, resources are appropriately allocated.

Posner's handling of short-run equilibrium in a competitive market (*id.* at 136-37) and of the relationship between short-run and long-run marginal cost curves (*id.* at 191-93) is also incorrect. This was pointed out in F.M. Scherer's review of Posner's book in 86 YALE L.J. 974, 979-80, 991 (1977) [hereinafter cited as Scherer Review]. There is another instance in which more careful editing would have helped to avoid error. To say that transportation costs are not important in the beer industry is a factual error. POSNER, *supra* note 2, at 130; *see* Scherer, *Economies of Scale and Industrial Concentration*, in INDUSTRIAL CONCENTRATION: THE NEW LEARNING 30 (table 4) (H. Goldschmid, H. Mann, J. Weston eds. 1974).

4. F. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 231-34 (1970).

riers, however, no serious, long-run departures from the competitive price and output can occur even with an oligopolistic market. If a few sellers set prices higher than the competitive level, entry will occur, thus expanding output and attaining the competitive result.[5]

Posner adopts George Stigler's definition of a barrier to entry as "a condition that imposes higher long-run costs of production on a new entrant than are borne by the firms already in the market." He concludes that "barriers to entry in this sense appear to be rare,"[6] the only case deserving recognition being close control of an essential factor of production.[7]

If barriers to entry are rare, how can monopolistic pricing ever be more than a short-run phenomenon, correctable by market forces without the necessity for any antitrust laws? Why, for instance, set any standard concerning concentration ratios for horizontal mergers[8] if no barriers to entry are present? The answer must be that cooperating oligopolists might engage in exclusionary practices that block entry. The author suggests, however, that "the number and severity of the exclusionary practices have been greatly exaggerated."[9] In Posner's view, only predatory pricing, vertical restrictions, exclusive dealing, and boycotts give rise to antitrust concern and then only under special circumstances (*e.g.*, the presence of oligopoly *plus* a clearly anticompetitive motive).[10] There is appar-

5. At one point Posner states, "At prices substantially above cost—the sorts of prices with which the antitrust laws are properly concerned—the number of potential competitors will normally be very large." POSNER, *supra* note 2, at 117. If so, then such prices can only obtain in the short run since all those potential entrants will enter, expand supply, and reduce price to cost. Therefore, there seems to be little reason for antitrust concern since the market will correct any tendency for price to depart from cost. One wonders why Posner does not call for an abolition of the antitrust laws.

6. *Id.* at 59.

7. It is difficult to be sure what Posner is claiming about barriers to entry. He asserts confidently, "Economies of scale do not create a barrier to entry . . . ." *Id.* at 92. Because the presence of economies of scale in distribution increases the scale necessary for entry, however, it can make exclusive dealing contracts anticompetitive, *i.e.*, enhance "the opportunity for monopoly pricing." *Id.* at 202. That is the point! Barriers provide such an opportunity for persistent monopolistic pricing.

8. *Id.* at 112.

9. *Id.* at 171.

10. Posner's analysis of Telex Corp. v. International Business Mach. Corp., 367 F. Supp. 258 (N.D. Okla. 1973), *rev'd*, 510 F.2d 894 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975), and United States v. United Shoe Mach. Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954), both of which involved charges of single firm anticompetitive behavior, leaves him skeptical that any exclusionary conduct occurred. His skepticism may reflect the view that "[t]he only truly unilateral acts by which firms can get or keep monopoly power are practices like committing fraud on the Patent Office or blowing up a competitor's plant . . . ." *Id.* at 212. It is nowhere made clear why a dominant firm cannot, even in Posner's limited circumstances, do what he concedes an oligopoly might do to exclude.

ently little for antitrust to do.

This circumscribed role for antitrust rests upon the view that barriers to entry are unimportant except in the rare instances in which one of the above-mentioned practices might exclude potential entrants or are legitimate (*e.g.*, legal patents). Why is it, then, that the phenomenon of oligopolists earning rates of return persistently above the opportunity cost of capital occurs in certain kinds of consumer goods industries, those characterized by substantial advertising outlays?[11] It is because entry can be made difficult by intense advertising. In addition, the number of entry-inhibiting strategies, few of which have been the subject of antitrust purview, are not limited to ones that promote product differentiation.[12] The range of behavioral choices that act upon and interact with the market environment to erect entry barriers are myriad, and our understanding of the mechanisms is far from complete.[13]

If the social costs of monopolistic pricing are of an order that Posner alleges, then it is time for antitrust authorities to address dominance by the few when entry appears to be difficult. The task will not be easy, particularly because it requires an ability to separate those strategies that contrive protection against entry from those that are a genuine outcome of the struggle to provide consumers with superior products and services.[14] Even when separation is possible and a reasonable determination is made that entry barriers

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A counterview that *IBM* and *United Shoe* are plausible examples of the use of exclusionary conduct is provided in Scherer Review, *supra* note 3, at 992-93.

11. *See* M. PORTER, INTERBRAND CHOICE, STRATEGY, AND BILATERAL MARKET POWER (1976). Some claim that this occurrence reflects an accounting bias, the treatment of advertising expenditures as a current expense rather than as an investment outlay. The case for and evidence in behalf of this view are not persuasive. W. Comanor & T. Wilson, Advertising, Consumer Behavior, and Market Imperfections: A Review 24-32 (Department of Economics, University of California, Santa Barbara, Sept. 21, 1977, Working Paper No. 88) (on file with the *Vanderbilt Law Review*).

12. For example, see Caves & Porter, *From Entry Barriers to Mobility Barriers: Conjectural Decisions and Contrived Deterrence to New Competition*, 91 Q.J. ECON. 241 (1977); Williamson, *Wage Rates as a Barrier to Entry: The Pennington Case in Perspective*, 82 Q.J. ECON. 85 (1968).

13. Posner believes that Procter & Gamble's (P&G) merger with Clorox could not be anticompetitive because entry is so easy into the liquid bleach market. POSNER, *supra* note 2, at 119. He might wonder, then, why P&G was willing to pay $30,300,000 for assets having a book value of $12,600,000. P&G was capitalizing something. It is plausible that it was a projected future stream of monopoly returns, given Clorox's commanding market share and its ability to maintain a substantial price premium with respect to private label alternatives. Unfortunately, and here we agree with Posner, too little economic analysis typically is undertaken in antitrust matters to identify the sources of monopoly power.

14. The litigation currently in trial involving the Federal Trade Commission and the four leading ready-to-eat cereal makers joins this issue.

were contrived, the difficult matter of remedies remains, a subject to which we now turn.

II. REMEDIES

Posner believes that the punishing of cooperative behavior, tacit or explicit, with severe fines will be sufficient to maintain competitive vigor in the economy. We doubt it. Oligopolists have an incentive to coordinate their price behavior, and experience has taught that the cessation of an explicit agreement does not prevent the recurrence of the coordination of prices.[15] Substantial fines might prevent corporate recidivism in the use of explicit agreements, but the incentive to use tacit arrangements would be that much stronger.

Posner would deal with the problem by prosecuting tacit arrangements. This would be accomplished by an inference of coordinated pricing whenever certain structural features (*e.g.*, high seller concentration, many buyers, inelasticity of demand, slow entry, standardized product, and static demand) combine with market characteristics such as a stable pattern of market shares, persistent price discrimination, exchanges of information about prices, the nature of changes in price, price variations among regions not explainable by cost differences, and identical bids.

The problem with Posner's approach is that facts upon which he would rely are often difficult to interpret and may even point in opposite directions regarding the presence of collusion. He cites such an instance in his discussion of *United States v. Container Corp. of America.*[16] What, then, are the weights to be placed upon the facts so that the correct inference can be made? Unfortunately, economists' powers of analysis and observation are not so sure that we can presume that we would know whether collusion was present. Posner recognizes this when he states that his necessary condition, oligopoly or high seller concentration, is linked with collusion in complicated and poorly understood ways.[17] This means that eco-

15. The Antitrust Division found in 1976, fifteen years after the famous electrical equipment price-fixing conspiracies, that "identical pricing policies adopted and made public by the companies [GE and Westinghouse] beginning in 1963 had the effect of eliminating price competition in the turbine generator industry." *U.S. Won't File Suit Naming GE, Westinghouse,* Wall St. J., Dec. 13, 1976, at 2, col. 2. *See also* Nicholls, *The Tobacco Case of 1946,* in READINGS IN INDUSTRIAL ORGANIZATION AND PUBLIC POLICY 105 (R. Heflebower & G. Stocking eds. 1958). Posner recognizes the tendency for recidivism among firms found in violation of the antitrust laws, the offense being "usually price fixing." Posner, *A Statistical Study of Antitrust Enforcement,* 13 J.L. & ECON. 365, 395 (1970).

16. 393 U.S. 333 (1969). Posner's discussion begins at page 143.

17. POSNER, *supra* note 2, at 96.

nomic analysis cannot easily uncover tacit collusion among oligopolists, a realty that strengthens the likelihood of implicit understandings. It is simply naive to believe that even substantial fines will "force a group of oligopolists to behave as if they were not aware of their individual influence on each other's policies."[18]

Even if the facts of a particular case permitted a finding of collusion, the actual fines levied are not likely to be substantial. As Posner points out in earlier research, judges on the average have been unwilling to impose fines anywhere near the maximum called for in Sherman Act violations.[19] Posner proposes that the fines be based upon monetary estimates of social damage divided by the probability of apprehension and conviction, the effect of which would be more severe than at present. Since it is dubious that, except in rare circumstances, either the social damage or the probability of punishment could be estimated with any precision, there is every reason to expect judges to be conservative, minimizing the social cost of the violation and maximizing the probability of punishment so that, as now, fines would turn out to be modest.

If antitrust policy is to reduce the incidence of monopoly power in our economy, remedies beyond an assessment of fines must be part of the arsenal. For example, when a well-established brand image confers the power to set supracompetitive prices across a large number of local markets and to eliminate entry by selectively cutting price in some of the markets in which entry has begun—a price cut that is not predatory by any accepted definition—then the monopoly power, rather than the price behavior arising from it, should be dealt with directly. This is exactly the conclusion of the administrative law judge in the initial decision involving the ReaLemon division of the Borden Company.[20] He recommended the licensing of the trademark "ReaLemon," the source of Borden's monopoly power, to interested entrants.[21] A fine in this type of situation, if sufficiently stiff, presumably would deter price cutting in the face of entry, hardly an outcome that Posner or we, for that matter, would find desirable.

III. CONCLUSION

If barriers to entry are as important as they must be for some firms and groups of firms persistently to earn rates of return above

18. W. FELLNER, COMPETITION AMONG THE FEW 310 (1949).
19. Posner, *supra* note 15, at 388-95.
20. Borden, Inc., 3 TRADE REG. REP. (CCH) ¶21,194 (1976).
21. *Id.* at 21,107.

the opportunity cost of capital, then antitrust has a major responsibility. It is, despite our incomplete and imperfect understanding of market processes, to make the effort to identify those strategies that contrive entry barriers and to stop them effectively by uncovering and curtailing the circumstances from which they derive potency. This is no easy undertaking, but one that promises a more competitive economy in the future than one that limits its objective to ferreting out cooperative price behavior and imposing a fine.

TAKING RIGHTS SERIOUSLY. By Ronald Dworkin. Cambridge, Mass.: Harvard University Press, 1977. Pp. xv, 293. $12.00.

*Reviewed by John D. Hodson**

The work of Ronald Dworkin covers a broad range of topics in political and legal philosophy. His *Taking Rights Seriously* brings together essays on such matters as the nature of law and judicial decision, constitutional theory, justice, civil disobedience, reverse discrimination, and the enforcement of morality. His positions on these issues are closely reasoned, challenging, and often highly plausible. Unifying and underlying these positions is a notion of legal and moral rights. For Dworkin *moral* rights are fundamental and provide the basis for his views on the normative issues addressed. Moral rights also have an important place in Dworkin's theory of the nature of law and judicial decision, for they, in combination with facts about the particular institution of law in question, form the basis of the judge's interpretation of legal rights.

In this review, I shall focus primarily upon Dworkin's theory of moral rights, both because of the way in which the theory affects every aspect of his thinking and because the theory receives more new development in *Taking Rights Seriously* than any other of his ideas. Although Dworkin's theory of moral rights covers a broad range of issues, it can best be tested by reference to its consequences for some relatively restricted problems. I shall give special attention to Dworkin's discussion of the enforcement of morality, because it reveals critical features of his theory of moral rights. I shall consider first some issues useful in determining the exact nature of the theories that oppose the enforcement of morality and then turn to Dworkin's reasons for opposing the enforcement of morality and to the

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theory of rights upon which these reasons are based.

Dworkin discusses the problem of the enforcement of morality most extensively in his critique of Patrick Devlin. In his chapter entitled "Liberty and Moralism," Dworkin criticizes Devlin's *The Enforcement of Morals* (London: Oxford University Press, 1965). He attributes to Devlin two arguments for the enforcement of morality. Dworkin rejects the first, based upon both the idea that a society has the right to protect itself and the claim that a society cannot exist without prohibiting at least some behavior it considers immoral, on the ground that it involves an unjustified shift between classifying immorality as a necessary condition to justified prohibition and classifying it as a sufficient condition. The second of Devlin's arguments is based upon the idea that a society has the right to follow its own lights, that is, "to protect its central and valued social institutions against conduct which the vast bulk of its members disapproves on moral principle."[1] Dworkin's objection to this argument is that Devlin fails to make a distinction crucial to the argument's validity, namely, the distinction between the "anthropological" sense and the "discriminatory" sense of what constitutes a moral position.[2] In the anthropological sense, whatever attitudes a group displays about the rightness or wrongness of various forms of behavior constitute a moral position, while in the discriminatory sense only attitudes based upon reasons—not upon prejudices, matters of personal taste, arbitrary stands, and so on—may constitute a moral position. Dworkin's point is that, although Devlin's claim that society has the right to prohibit behavior of which it disapproves on the basis of a discriminatory moral position is plausible, the claim that society has such a right on the basis of an anthropological moral position is not. Because Devlin's position involves reliance on the latter kind of moral position, Dworkin finds it objectionable.

In thus attacking Devlin, Dworkin defends a version of what may be called the limits thesis, according to which the law is significantly limited in what it justifiably may prohibit or regulate. The classical limits thesis is expressed in Mill's *On Liberty,* but the idea of a limits thesis is not restricted to the specific dimensions of his position, as is shown by the way in which Dworkin's attack on Devlin imposes a limit on the methods that may be used to decide what to prohibit, but not on the kinds of conduct that may be prohibited. Devlin, on the other hand, rejects the very idea of a

1. R. DWORKIN, TAKING RIGHTS SERIOUSLY 247 (1977).
2. *Id.* at 248.

limits thesis, claiming that "it is not possible to set theoretical limits" to the law.[3] Thus Dworkin can be interpreted as a defender of a limits thesis, and his criticism of Devlin can be viewed as a defense of the limits thesis against Devlin's attack.

The exact role of a limits thesis is not made clear by either Devlin or Dworkin. A limits thesis might be advocated or attacked from two importantly different perspectives. One is the voter-legislator perspective of one who must decide what policies and laws should be enacted and on the basis of that decision contribute to the enactment of the chosen legislation. From this perspective, the limits thesis provides guidance to the voter-legislator by asserting that certain kinds of laws are unjustifiable and should not be enacted. The voter-legislator who follows a limits thesis thus will vote against the enactment of laws violating the demands of the limits thesis. The group-decision perspective is suggested by appeals to such things as the "rights of the majority" or the "rights of society" to enact such laws as the group sees fit. From this perspective, the question is that of determining the best way of reaching *group decisions,* given that each member of the group has reached his or her own decision as an individual. The problem from this perspective is not what the *content* of the law should be; rather, it is *how* the content should be determined, given the existence of disagreements. From this perspective, a limits thesis apparently dictates that the group decision be reached by methods that guarantee that certain kinds of laws will not be enacted. A limits thesis thus can be interpreted as either a guide to the voter-legislator or a theory of group decisionmaking.

Neither Devlin nor Dworkin gives this distinction the recognition it deserves. Devlin's claim that acceptance of democracy requires rejection of the idea of a limits thesis is plausible only from the group-decision perspective. If we accept democracy in some form as our group-decision procedure, then indeed we have no guarantee that the content of the law will not violate the restrictions of a limits thesis. Acceptance of democracy as a group-decision procedure, however, in no way requires that each individual voter-legislator decide what to vote for on the basis of what the group prefers. Thus, if a limits thesis is intended to address the voter-legislator perspective, any commitment to democracy as a group-decision procedure is fundamentally irrelevant to the correctness of the limits thesis. The limits thesis provides the voter-legislator a

3. P. DEVLIN, THE ENFORCEMENT OF MORALS 12 (1965).

guide to the kinds of laws that should and should not be enacted. If it fails to persuade, and laws that violate the limits thesis are enacted, the defender of the limits thesis is not committed to the view that the group decision should have been made in some other way. He is only committed to the view that a law was enacted that should not have been. Devlin's failure to attend to these different perspectives allows him to attack limits theses on irrelevant grounds.

In his attack on Devlin's claim that a society has the right to prohibit that which it disapproves on moral principle, Dworkin also fails to distinguish between the voter-legislator perspective and the group-decision perspective. He denies that Devlin's argument is plausible when the moral position involved is merely an anthropological one. When one distinguishes the two perspectives, however, the soundness of Dworkin's criticism is much less clear. If Devlin is taken as addressing the group-decision problem, adherence to Dworkin's restrictions on moral positions seems to deny that democracy is the best solution to that problem. The votes of individuals would count only if based upon a discriminatory moral position, and the decision of when that requirement is satisfied could not be determined democratically without abandoning the essence of the requirement itself. Ultimate power would lie in hands other than those of the people exercising their own possibly nondiscriminatory judgment. In other words, Devlin may well be right if his claim is that commitment to democracy as a group-decision procedure means allowing individuals to exercise their own judgment even if it is nondiscriminatory. Thus Dworkin's restrictions look too strong when applied to the group-decision perspective.

Is Dworkin, however, committed to democracy as a group-decision procedure? He does subject majority rule to attack in his chapter entitled "Constitutional Cases." In that chapter Dworkin claims, in part, that American democracy is based upon constitutionalism, "the theory that the majority must be restrained to protect individual rights."[4] Dworkin makes this claim in the context of a defense of judicial activism, the making of controversial decisions by the courts rather than by other allegedly more democratic institutions. Even if Dworkin is right on this point, however, the argument does not show that we do or should abandon democracy as the best group-decision procedure at the ultimate level. In fact, of course, the Constitution allows the people to overrule the courts through changes in the Constitution, so although the courts may

4. DWORKIN, *supra* note 1, at 142.

restrain a simple majority, a larger majority still retains ultimate authority. Furthermore, Devlin's position, when viewed as addressing the group-decision problem, still seems quite plausible despite his failure to require that voters act on the basis of a discriminatory moral position. Even if a simple majority may properly be restrained, to deny that even a larger majority should prevail in the making of group decisions does seem to abandon an essential element of democracy. Dworkin's restrictions, taken as a solution to the group-decision problem, still seem too restrictive of democracy.

When these matters are examined from the voter-legislator perspective, Dworkin's view still seems unacceptable except that in this instance, rather than being too restrictive, it is not restrictive enough. Applied to the voter-legislator problem, Dworkin's position, as implied by his critique of Devlin, is that the voter-legislator should vote only on the basis of a discriminatory moral position and not on the basis of a merely anthropological one. The rejection of the merely anthropological moral position is strongly plausible, for there is surely no reason to think that a merely anthropological moral position is likely to provide sound guidance to the voter-legislator. Any view that a voter-legislator takes as providing guidance should include at least the restrictions of Dworkin's discriminatory morality. There is no reason, however, to stop with merely those restrictions. Ideally, a voter-legislator should be guided by the most defensible moral position available rather than by just any position that satisfies the requirements of discriminatory morality. To allow the voter-legislator to use anything less than the best available moral position would be to abandon the point of having guidance for the voter-legislator. To set the goal any lower would be to fail to expect the voter-legislator to avoid supporting morally unsound legislation. Thus the voter-legislator should look for guidance to a theory that meets standards higher than those of Dworkin's discriminatory morality. The most defensible moral position should be sought. The standards of discriminatory morality are not restrictive enough.

As they apply to the group-decision perspective, then, Devlin's arguments retain considerable plausibility even in the face of Dworkin's criticism. Viewed from the voter-legislator perspective, however, both Devlin and Dworkin fail to provide fully satisfactory positions. Devlin's claims about the requirements of democracy have little relevance to the problem faced by the voter-legislator, while Dworkin's restrictions on moral positions do not set a sufficiently high standard. This means that, although Devlin fails to demonstrate that the idea of a limits thesis directed at the voter-legislator

is unsound, neither does Dworkin demonstrate in his critique of Devlin that such a thesis is sound. From this examination of Dworkin's discussion of Devlin one can conclude that a limits thesis should be directed at the problem faced by the voter-legislator and that it should identify certain kinds of legislation that should not be supported but opposed. Furthermore, a limits thesis should provide insight into the moral theory upon which it is based and clarify how the moral theory limits the proper uses of law. With this, the voter-legislator would be in a position not only to vote correctly, but also to explain why his or her vote is correct.

The theory of moral rights that Dworkin develops in various parts of his book entails a limits thesis that both goes beyond the position he takes in his discussion of Devlin and potentially provides the kind of guidance to the voter-legislator that a limits thesis should supply. Dworkin's outline of the implications of his theory for the enforcement of morality also outlines his limits thesis. Since, as I have said, I believe that the difficulties with the theory of moral rights can be seen most clearly in the context of the enforcement of morality, I shall examine Dworkin's theory in terms of the limits thesis it entails. Thus in accordance with our examination of Dworkin's discussion of Devlin, we must assess his theory of moral rights in terms of the guidance it offers to the voter-legislator about the kinds of legislation that should be supported.

Dworkin's conclusions about the enforcement of morality can be gathered from throughout his book. In his discussion of Devlin, he cites approvingly "the belief that prejudices, personal aversions and rationalizations do not justify restricting another's freedom"[5] and suggests that any existing consensus involving disapproval of such things as homosexuality and pornography might be based upon no more than such views.[6] Later, and more explicitly, Dworkin asserts that government "must not constrain liberty on the ground that one citizen's conception of the good life of one group is nobler or superior to another's."[7] He goes on to claim that his theory of moral rights can be used to support the idea "that we have distinct rights to certain liberties like the liberty of free expression and of free choice in personal and sexual relations."[8] Clearly, then, Dworkin does advocate a limits thesis. What now must be made clear is how his theory of rights justifies the limits advocated.

5. *Id.* at 254.
6. *Id.* at 257-58.
7. *Id.* at 273.
8. *Id.* at 277.

The general basis of restrictions upon government, even government by majority rule, is the set of rights held by individuals. These rights provide that certain kinds of actions taken against the holder of the rights are unjustifiable even when they are taken through the law.[9] Dworkin interprets this concept of rights as grounding the constitutional restrictions on majority rule, including, but not necessarily restricted to, the rights explicitly incorporated in the Constitution.[10] This notion of rights advocates that claiming someone has a right to do something is to claim more than "that it is the 'right' thing for him to do, or that he does no 'wrong' in doing it."[11] Rather, it is to claim that "it would be wrong to interfere with his doing it, or at least that some special grounds are needed for justifying any interference."[12] Consequently, a "right against the Government must be a right to do something even when the majority thinks it would be wrong to do it, and even when the majority would be worse off for having it done,"[13] and if someone has such a right, "then it is wrong for the government to deny it to him even though it would be in the general interest to do so."[14] Dworkin's limits thesis, then, asserts that certain kinds of legislation are unjustifiable because they violate the rights of individuals.

That Dworkin conceives of rights in this way, of course, does not tell us what particular rights individuals have or why they have them. The notion of individual rights must be given content before it can do the work Dworkin assigns to it. One way in which Dworkin's notion of rights could be given content likely to support the limits on law he advocates is through recognition of a general right to liberty. This general right would create a presumption against the justifiability of all interferences with liberty and thus, when coupled with a denial that the majority's disapproval of some kind of behavior is sufficient reason to overcome the presumption, would serve as the basis for opposing the enforcement of positive morality. This, however, is not the move Dworkin makes. Indeed, he explicitly rejects the idea of a general right to liberty.

According to Dworkin, "it seems to me absurd to suppose that men and women have any general right to liberty at all, at least as liberty has traditionally been conceived by its champions."[15] Dwor-

9. *Id.* at 133.
10. *See id.* at 133-34.
11. *Id.* at 188.
12. *Id.*
13. *Id.* at 194.
14. *Id.* at 269.
15. *Id.* at 267.

kin rejects the concept of "liberty as license" or "the absence of constraints placed by a government upon what a man might do if he wants to."[16] Among his reasons for rejecting the concept are that, in the "all embracing sense of liberty as license, liberty and equality are plainly in competition"[17] and that a right to liberty in the strong sense of right necessary to do the work assigned to it in political debate would have unacceptable consequences. The latter point uses the concept that when "someone has a right to something, then it is wrong for the government to deny it to him even though it would be in the general interest to do so."[18] Dworkin finds that a right to liberty in this sense does not exist because it would mean that most laws, including noncontroversial ones, violate individual rights, since the "vast bulk of the laws which diminish my liberty are justified on utilitarian grounds, as being in the general interest or for the general welfare."[19] For instance, laws that designate particular streets as one-way do not violate individual rights, but are justified merely on the ground that they are in the general interest. Since this justification would be impossible were there a general right to liberty in the strong sense, such a right must be rejected.

Having taken this position on the general right to liberty, Dworkin is left with the problem of explaining why he defends rights to special kinds of liberty such as freedom of speech. The idea of a right to liberty, he asserts, "provides too easy an answer to the question of why we regard certain kinds of restraints, like the restraint on free speech or the exercise of religion, as especially unjust."[20] Dworkin's alternative answer is to defend specific forms of liberty by showing their relationship to fundamental postulates of political morality. The specific liberties that are required by fundamental moral principles are those to which individuals have rights.

In defending specific liberties, Dworkin's basic appeal is to the concept of equality:

> Government must treat those whom it governs with concern, that is, as human beings who are capable of suffering and frustration, and with respect, that is, as human beings who are capable of forming and acting on intelligent conceptions of how their lives should be lived. Government must not only treat people with concern and respect, but with equal concern and respect. It must not distribute goods or opportunities unequally on the ground that some citizens are entitled to more because they are worthy of more concern. It must not

16. *Id.*
17. *Id.*
18. *Id.* at 269.
19. *Id.*
20. *Id.* at 271.

> constrain liberty on the ground that one citizen's conception of the good life of one group is nobler or superior to another's. These postulates, taken together, state what might be called the liberal conception of equality; but it is a conception of equality, not of liberty as license, that they state.[21]

Characterizing these postulates of political morality as "presum[ptions] that we all accept,"[22] Dworkin argues that "individual rights to distinct liberties must be recognized only when the fundamental right to treatment as an equal can be shown to require these rights."[23]

This approach suggests that particular liberties can be defended only by a showing that the fundamental right to treatment as an equal requires them. Curiously, Dworkin does not do this. He argues instead that restrictions on liberty are permissible only when they can be justified in terms of certain limited types of argnments, arguments of principle and arguments of policy. When the accepted types of arguments do not apply, constraints on liberty are not proper. Now a certain methodological advantage results from this shift of emphasis on Dworkin's part. Had he followed through with his attempt to show that the right to treatment as an equal requires the various specific liberties that he defends, he might well have had a difficult time. Plausibly an argument might be available that such liberties as freedom of speech are essential to treatment as an equal. Far less clear is the possibility of showing that treatment as an equal requires protection of all the idiosyncratic forms of pleasure that popularly might be thought of as immoral, but that would be protected under a view like Dworkin's that opposes the enforcement of popular morality. Thus the shift of method contains an advantage for Dworkin, but he buys it at the price of an unacknowledged reliance on the importance of liberty as license. If constraints on liberty are acceptable only when they are supported by certain kinds of arguments of principle or policy, then clearly a presumption arises against the permissiblity of all interferences with liberty. Dworkin's argument assumes that all interferences with persons' doing what they want require justification. Otherwise, he could not claim that a "government that respects the liberal conception of equality may properly constrain liberty only on certain very limited types of justification."[24] Hence, Dworkin relies on a general right to liberty as license in at least some sense, and it is not entirely clear that traditional political theory has relied on anything stronger.

21. *Id.* at 272-73.
22. *Id.* at 272.
23. *Id.* at 273-74.
24. *Id.* at 274.

Dworkin's presumption that interferences with liberty are unjustifiable potentially contradicts his rejection of the idea of a right to liberty. The matter is not so clear-cut as this, however, for the sorts of justifications that Dworkin allows as establishing the propriety of constraints on liberty include utilitarian justifications. Hence, the presumption might not depend on a right to liberty in Dworkin's strong sense, a right in this sense being something not defeasible on merely utilitarian grounds, but it does depend on a right to liberty that is stronger than Dworkin's weak sense of right, which is a mere permission.[25] Nevertheless, Dworkin avoids the contradiction if the presumption he uses is not a right in his strong sense.

Dworkin, however, has not avoided the contradiction. The restraints he places on the use of utilitarian justifications for interferences with liberty reveal the contradiction between his presumption against interferences with liberty and his rejection of a right to liberty. He argues, for reasons that will be outlined shortly, that *some* utilitarian justifications are unacceptable because they violate the right to treatment as an equal. Although utilitarian arguments do not necessarily conflict with this right, they might do so, and when they do, the policies they are intended to defend are left without validity. This step in Dworkin's argument means, in fact, that a demonstration that an interference with liberty has utilitarian support is not enough to override the presumption against its justifiability. The presumption is overridden when the interference is defensible on utilitarian grounds *provided that the interference does not violate the right to treatment as an equal.* In other words, to show that an interference with liberty is justifiable, one must supplement a utilitarian argument with a demonstration that the right to treatment as an equal is respected. If, however, this is Dworkin's position, then he is committed to the existence of a right to liberty in the stronger sense that he claims to reject. One has a right in this stronger sense when utilitarian considerations are not enough to justify denial of that to which one has a right. Dworkin's position, however, is that utilitarian arguments are never enough, for nonviolation of the right to treatment as an equal is also necessary in every case. Even when laws are justified solely on utilitarian grounds—those, for example, establishing one-way streets—the nonviolation of the right to treatment as an equal is assumed, for surely Dworkin would be committed to rejecting such laws if they

25. *Id.* at 188-89.

did violate his right to equality. Thus the right to liberty presupposed by Dworkin's claim that government must justify its interference with liberty is a right to liberty in the stronger sense Dworkin claims to reject.

The apparent failure of Dworkin's rejection of the right to liberty does not undermine his positive thesis. Indeed to me he is on strong ground insofar as the idea behind his rejection of the right to liberty is intended to reflect that the right to liberty requires interpretation through the use of other rights or values. That something is an interference with liberty is not in itself, therefore, a decisive objection since we often accept many kinds of interferences with liberty. The exact dimensions of the right to liberty must be determined by references to something beyond liberty itself, and Dworkin's proposal of the right to treatment as an equal remains an attractive possibility. His approach to delimiting the right to liberty would clarify why the liberties placed beyond the law by a limits thesis belong beyond the law's reach. To do this, he needs to show that none of the acceptable arguments for restricting liberty succeeds when applied to the forms of liberty he wishes to defend.

Dworkin distinguishes three kinds of arguments, successful use of which would show that particular kinds of constraints on liberty are justifiable. These three types fall under two more general headings, arguments of policy and arguments of principle. "Arguments of principle," Dworkin asserts, "are arguments intended to establish an individual right; arguments of policy are arguments intended to establish a collective goal."[26] Used specifically to support constraints on liberty, arguments of principle "support a particular constraint on liberty on the argument that the constraint is required to protect the distinct right of some individual who will be injured by the exercise of the liberty," while arguments of policy support constraints when they "are required to reach some overall political goal, that is, to realize some state of affairs in which the community as a whole, and not just certain individuals, are better off by virtue of the constraint."[27] Arguments of policy are of two kinds, utilitarian and ideal. Dworkin describes utilitarian arguments as those "that the community as a whole will be better off because (to put the point roughly) more of its citizens will have more of what they want overall, even though some of them will have less."[28] Ideal arguments of policy are those "that the community will be better off, not be-

26. *Id.* at 90.
27. *Id.* at 274.
28. *Id.*

cause more of its members will have more of what they want, but because the community will be in some way closer to an ideal community, whether its members desire the improvement in question or not."[29]

Justifying the enforcement of morality, in Dworkin's view, would require that the necessary constraints be defensible on the basis of one or more of these types of arguments. Defense of a limits thesis thus requires an argument that the constraints are not supported by these kinds of arguments. Dworkin does not explicitly address the possibility that the enforcement of morality might be defended by an argument of principle, although his discussion of Devlin's assertion of society's right to protect itself suggests that he would deny that available evidence is sufficient to establish that any rights are threatened by violations of popular morality.[30] The greatest threat to Dworkin's limits thesis, however, lies in his acceptance of utilitarian arguments of policy. His attempts to meet this threat lead to the development of an interesting new twist in the standard objection that utilitarianism permits violations of justice.

Utilitarian arguments are potentially damaging to Dworkin's limits thesis because they are based upon the maximum satisfaction of the preferences of most citizens. Utilitarian arguments will support any restrictions that satisfy more preferences than any alternative. Thus, the prohibition of private conduct thought to be immoral would be justified if the prohibition satisfied enough preferences. Dworkin responds to this problem not by denying that utilitarian arguments could lead to such consequences, but rather by claiming that the arguments that would have these results are in violation of the fundamental right to treatment as an equal. In other words, although utilitarian arguments do constitute a legitimate and important mode of political argument, they must be constrained by the right to equality.

Dworkin's position is that utilitarian arguments in themselves do not violate the right to treatment as an equal. On the contrary, they embody characteristics that give the appearance of respecting that right. In the calculation of preference satisfaction, *everyone's* preferences count and count equally. Hence, a utilitarian argument seems to embody perfectly the right to equal concern and respect, because no one is granted preferential treatment in the evaluation of competing alternatives. Dworkin, therefore, must show that at

29. *Id.*
30. *See id.* at 242-46.

least some utilitarian arguments, those supporting policies such as the enforcement of the positive morality that he opposes, violate the right to treatment as an equal. He does this by distinguishing between *personal* preferences and *external* preferences. The personal preferences of an individual are those that "state a preference for the assignment of one set of goods or opportunities *to him,* while external preferences "state a preference for one assignment of goods or opportunities *to others.*"[31] When a utilitarian argument relies on external preferences, Dworkin believes, it violates the right of persons to be treated as equals. It does so because of the way in which the counting of external preferences distorts the weight given to the preferences of those who are subjects of the external preferences. They count for less simply because they are disapproved by others. Let me quote one of Dworkin's examples dealing with the enforcement of morality:

> Suppose . . . that many members of the community disapprove on moral grounds of homosexuality, or contraception, or pornography, or expressions of adherence to the Communist party. They prefer not only that they themselves do not indulge in these activities, but that no one else does so either, and they believe that a community that permits rather than prohibits these acts is inherently a worse community. These are external preferences, but, once again, they are no less genuine, nor less a source of pleasure when satisfied and displeasure when ignored, than purely personal preferences. Once again, however, if these external preferences are counted, so as to justify a constraint on liberty, then those constrained suffer, not simply because their personal preferences have lost in a competition for scarce resources with the personal preferences of others, but precisely because their conception of a proper or desirable form of life is despised by others.[32]

Hence, utilitarian arguments that count external preferences violate the right to treatment as an equal and for that reason cannot be accepted as justifying the policies they are intended to support.

Interpreting the exact nature of the violation that results from the counting of external preferences poses some difficulty. On the one hand, Dworkin's description of the problem suggests that the violation of equality consists in "a form of double counting"[33] that allows those with external preferences to be counted twice in the overall calculation, once for their personal preferences and once for their external preferences. An analogy might be drawn to a referendum in which some voters are allowed to vote not only on the issue in question, but also on whose vote should count. For example, members of Group *A* vote not only for Policy *A* but also against

31. *Id.* at 275 (emphasis supplied).
32. *Id.* at 275-76.
33. *Id.* at 235.

counting the votes of members of Group *B*, who vote only on the policy question. Members of the latter group clearly are not treated as equals. Accordingly, Dworkin's objection might be put in this way: Utilitarian arguments that count external preferences embody a kind of "one preference, one vote" approach that allows those with external preferences to exercise greater influence in the overall calculation of utilities than those without. This cannot be correct, however, or at least it does not capture everything Dworkin intends by his objection to utilitarianism. This is shown by the way in which Dworkin applies the objection to the use of democratic procedures in the calculation of utilities. "Democracy cannot discriminate," he asserts, "within the overall preferences imperfectly revealed by voting, distinct personal and external components, so as to provide a method for enforcing the former while ignoring the latter."[34] The objection is not that some are given more votes than others, but that external preferences influence the direction of the single votes than those with external preferences, like all others, have. Since a "one man, one vote" approach is also subject to Dworkin's objection, the objection must involve more than the first interpretation we have considered.

On the other hand, there must be a way of understanding the violation of equality that explains the way in which democratic procedures (used from the voter-legislator perspective) violate it. The evil that Dworkin sees in the use of one-man-one-vote democracy to calculate utility lies in its failure to exclude the possibility that the votes of some reflect external preferences. The vote of the racist, for instance, reflects a hatred for the members of certain races and a view of them as inferior. If this is the problem with democratic procedures, however, then the villains who cause such procedures to violate the right to treatment as an equal are the individuals who vote on the basis of their external preferences. They are the ones who view some persons as worthy of less concern and respect than others and, because their votes are based on that view, the outcome is corrupted by a failure to treat everyone as equals.

Suppose now that someone tries to use the utilitarian approach to decide what legislation he should support. Further suppose that he is aware of the double-counting problem present in the one-preference-one-vote method of calculating utility, but that because he wishes to use a method that treats everyone as equals he rejects that method. He next considers the possibility of using the one-

34. *Id.* at 276.

man-one-vote method of calculating utility and is met with Dworkin's argument that this method also violates the right to equality. Would *this person* actually be failing to treat everyone as equals by using the method? Assuming that those who base their votes upon external preferences fail to treat disapproved groups as equals, does this necessarily mean that someone else who allows these external preferences to count in a one-man-one-vote calculation of utility also fails to treat everyone as equals? That person, in trying to decide what policy to support, views everyone as equals in that he takes the satisfaction of the preferences of each equally into consideration. He gives each an equal vote and does not allow *his own* external preferences, if he has them, to influence the outcome. Moreover, if he were to attempt to eliminate this influence from his calculations of the external preferences of others, the elimination itself would be an exercise of an external preference. In other words, his method of calculating utility would be based upon an evaluation of the propriety of the voting preferences of others. The exclusion of the votes of those who vote because of external preferences would be a failure to treat *them* with equal respect. Consequently, the only way that our imaginary utilitarian could make his calculations without violating the right to treatment as an equal would be to use the one-man-one-vote method of calculating utility. Use of the one-preference-one-vote method would fail to treat all *persons* as equals, and any attempt to exclude votes based on external preferences would fail as well, for it would fail to treat those voters with equal respect.

If Dworkin thus fails to show that the one-man-one-vote method of calculating utility violates the right to treatment as an equal, he loses the basis of his argument against justifying the enforcement of popular morality, racist policies, and whatever else might be favored by a majority. His weapon against these is the right to treatment as an equal, but that weapon does not prevail. This, of course, means that utilitarian thinking might not be objectionable in every way that Dworkin claims it to be. Another conclusion equally well supported and more important to those of us who share Dworkin's concern that the rights of persons be protected is that this right to treatment as an equal is not an adequate basis for moral rights. If a stronger ground could be defined, good reason would still exist for supposing that the rights of persons preclude the kinds of legislation sometimes called for by popular morality, such as racism and so on. This tentative conclusion is bolstered by an examination of the other kind of policy argument Dworkin recognizes, the ideal argument of policy.

Ideal arguments of policy, again, are arguments that support policies on the ground that they will bring the community closer to the ideal community, regardless of whether this is desired by members of the community. To such arguments, Dworkin claims that the following limits apply:

> The liberal conception of equality sharply limits the extent to which ideal arguments of policy may be used to justify any constraint on liberty. Such arguments cannot be used if the idea in question is itself controversial within the community. Constraints cannot be defended, for example, directly on the ground that they contribute to a culturally sophisticated community, whether the community wants the sophistication or not, because that argument would violate the canon of the liberal conception of equality that prohibits a government from relying on the claim that certain forms of life are inherently more valuable than others.[35]

Given this constraint on the use of ideal arguments, such arguments can support coercion only when the goal is not opposed by some members of the community, although the goal need not be supported by community members. Dworkin apparently thinks that this is enough to prevent justification of the enforcement of popular morality, at least when controversy exists about the moral judgments involved.

Consideration of other implications of Dworkin's restriction casts further doubt on his view. The worry is that the restrictions might prevent legitimate and necessary forms of coercion, because virtually anything could become controversial within the community. Thus its prohibition would become suspect in Dworkin's view. Far-fetched examples are not necessary to illustrate this possibility. Suppose that some extreme racist organization were to become influential in the community and that the tenets of the organization included the belief that the murder of members of disapproved races is desirable and praiseworthy. In this situation, the question whether killing members of certain races is wrong would be controversial within the community. Surely the conclusion that the government should stop enforcing the prohibition on killing members of these races or that any individual should withdraw his or her support for the enforcement of that prohibition does not follow from this controversy. Yet the enforcement of this law does seem to indicate a reliance on the claim that the moral position of the racist group is an inferior one. Enforcement of the prohibition against racist murder thus would appear to be a violation of Dworkin's demand that everyone be treated with equal concern and respect, since the racist group is not treated with equal respect. The

35. *Id.* at 274.

only apparent solution would be to admit that enforcing views controversial within the community does not necessarily violate the right to treatment as an equal and thus cannot necessarily be ruled out.

Nevertheless, something about the attempt to preclude governmental intervention in matters of a controversial nature is quite appealing. Because the preclusion shows respect for each individual by allowing him or her to form a judgment and to act on it without being faced with external threats, we may want to retain the idea if possible. On the other hand, because we do not want to say that the existence of controversy always precludes governmental intervention, as in the racist murder case, retaining the idea is difficult. I submit that perhaps the reference to an issue as controversial within the community is a reference to the wrong source of controversy or to the wrong kind of controversy. Let me suggest an example. The question of abortion is, of course, an issue that remains controversial within the American community. The abortion issue is not only controversial in the sense that many people hold conflicting opinions about it; it is also controversial because no position on the morality of abortion is clearly more reasonable than several others. For instance, no reason appears to be compelling for picking any particular point in the developmental process of the human being as the point at which terminating the developing entity becomes a violation of rights. The issue is one that objective arguments seem incapable of resolving. When an issue is controversial in this sense, governmental enforcement of one of the competing views takes the decision out of the hands of the individual without any objective justification. On the other hand, if the government fails to enforce any of the competing views, it does not fail to protect any rights that do have a sound basis. For example, if the government prohibited abortion, it would be taking sides on an issue when no clear reason exists for regarding any position as more defensible than another. A failure to prohibit abortion, on the other hand, is not a failure to protect soundly grounded rights. In contrast, the failure to protect the rights of a group threatened with death on racist grounds would be a failure to protect soundly based rights, for there would be no doubt about the irrationality of the racist group's reasons for denying protection to some while accepting it for others. Thus the government ought not to constrain liberty on grounds that are *rationally* controversial and that may capture what is attractive about Dworkin's position without adopting its undesirable consequences.

This way of understanding opposition to governmental intervention into controversial issues may salvage Dworkin's objection to using utilitarian arguments that would result in the enforcement of morality. If the moralistic legislation in question is noncontroversial, refusing to allow the views of those who are noncontroversially wrong to influence the vote would not violate equality. If the legislation is controversial, however, governmental intervention would violate the right to equality because a governmental stand on a controversial issue would deprive individuals of the right to act on their own decisions and would not be based upon sufficient justification. Closer examination reveals, however, that this approach is unsuccessful. Consider the case in which the legislation in question is rationally controversial. For instance, suppose that it is rationally controversial whether homosexual conduct is immoral. Given this assumption, the prohibition of homosexual conduct would fail to allow each person to reach his or her own decision about the matter, a failure without justification since, *ex hypothesi,* the immorality of homosexual conduct is rationally controversial. If, however, a sufficiently large segment of the community disapproves of homosexuality, a one-man-one-vote utilitarian argument could be made in favor of prohibiting homosexual conduct. If such an argument were available, Dworkin could not justifiably oppose the prohibition. Neither could he oppose the one-man-one-vote method of calculating utility in this instance because the issue is rationally controversial and because in such cases the excluding of some persons' votes would fail to treat them with equal respect. He also could not oppose the prohibition on the ground that it would involve an arbitrary governmental position, for the existence of the utilitarian argument for prohibition makes the prohibition nonarbitrary. The government's position would be that, although no objective reason exists for believing that the antihomosexual forces are correct in their view of homosexual conduct, the concern for utility is an objective reason for the prohibition. Since Dworkin permits constraints on liberty to be justified on utilitarian grounds absent a violation of equality, the prohibition would go through. The controversial nature of the issue precludes the possibility of a sound rights-based objection to prohibition, so the utilitarian support for the prohibition is decisive. Dworkin thus has not shown why utilitarian arguments of this sort would not justify the enforcement of popular morality.

A similar difficulty remains concerning Dworkin's position on the use of ideal arguments of policy. The rational controversy argument precludes the establishment of constraints on liberty only when the basis of the proposed constraint is rationally controversial.

Although his view thus permits the use of ideal arguments to justify constraints on liberty if the ideal is not rationally controversial, it does not provide sufficient protection from governmentally imposed interferences. The trouble is that constraints on liberty are not always justifiable even for the sake of an ideal that is not rationally controversial. Presumably it is not rationally controversial (or, if this seems doubtful for some reason, suppose for the sake of discussion that it has been shown to be rationally noncontroversial) that an ideal society would be free of persons with certain kinds of racist or sexist attitudes. Dworkin's position seems to allow constraints on liberty that would be justifiable for the sake of bringing society closer to this ideal, since it is, *ex hypothesi,* a noncontroversial ideal, and the pursuit of it would not violate the right to treatment as an equal. Yet in general we do not think the imposition of constraints on liberty to be justifiable merely because they would be effective in achieving a prejudice-free society. Surely the locking away of those who express their prejudices in ways that influence others to share them would facilitate that end. Presumably the prohibiting of prejudiced persons from raising children and thereby from passing on their prejudices also would be effective in eliminating societal prejudice. A theory that precludes the enforcement of morality, however, would not permit this kind of constraint on liberty for the mere expression of prejudice. Acting on the prejudice in ways that would violate others' rights could be prohibited, but not just any constraint that would effectively bring about the goal would be permitted. Ideal arguments of policy thus also would permit constraints on liberty in at least some instances in which they are quite questionable.

Both kinds of policy arguments, utilitarian and ideal, would permit constraints on liberty in dubious instances in which Dworkin himself seems not to want to permit them. Utilitarian arguments could support the enforcement of popular morality on rationally controversial issues, and ideal arguments could support constraints on liberty on the insufficient ground that the constraints would help to bring about the ideal. Because Dworkin himself tries to refute the utilitarian arguments and proposes that ideal arguments not be used when the ideal is actually controversial in the community, clearly he agrees that these are instances in which constraints on liberty should not be imposed. The basic trouble is that the right to treatment as an equal is not sufficiently restrictive to prevent these uses of arguments of policy. Two relevant aspects of the right to treatment as an equal are direct consequences of the right to equal respect. One is the requirement that each person be counted

equally or have an equal influence in decisions affecting the community. The other is that persons not be treated in ways that deny their capacity for forming intelligent conceptions of how life should be lived. Utilitarian arguments influenced by external preferences satisfy these requirements when the issue in question is rationally controversial, and ideal arguments that are actually controversial in the community satisfy these requirements when the issue is not rationally controversial, since as we have seen, constraints on liberty for the sake of actually, but not rationally, controversial reasons cannot be ruled out. The right to treatment as an equal, therefore, does not provide sufficient protection to serve as the foundation of moral rights.

All of this makes the idea of a right to liberty very attractive. If Dworkin's theory does not provide adequate safeguards against constraints on liberty, surely the recognition of a strong right to liberty would do so. As an attempt to provide a satisfactory theory of moral rights, however, an appeal to a right to liberty would present serious difficulties. Liberty must be granted sufficient weight that it is not overcome merely because an argument of policy supports its constraint. If this result were sought by means of a right to liberty independent of and in competition with other rights, the consequence would be a theory of rights that fails to explain why any particular set of rights exists and why those rights have just the implications they are claimed to have. Suppose, for instance, that Dworkin's right to treatment as an equal were supplemented with a right to liberty, as apparently it must be. This would not explain why we have these two rights and no others, and perhaps more important, it would not explain which right must give way when the rights fall into competition. On the other hand, we have seen the need for some right to liberty to explain some of our particular judgments and some of Dworkin's own arguments. This indicates a further reason why the right to treatment as an equal does not provide a plausible foundation for moral rights since it cannot explain the role of the right to liberty that must be recognized. To explain that, to explain the right to treatment as an equal, and to explain the interrelationships of these and other rights, requires something more basic.

Dworkin touches on an alternative basis for rights, but passes over it with little comment:

> Anyone who professes to take rights seriously, and who praises our Government for respecting them, must have some sense of what [the point of the institution of rights] is. He must accept, at the minimum, one or both of two important ideas. The first is the vague but powerful idea of human dignity. This idea,

> associated with Kant, but defended by philosophers of different schools, supposes that there are ways of treating a man that are inconsistent with recognizing him as a full member of the human community, and holds that such treatment is profoundly unjust.[36]

Rather than pursuing this idea, Dworkin works out his theory of rights using the idea of equality. Since the idea of equality fails to serve as a satisfactory foundation for rights, further exploration of the idea of human dignity seems in order. I shall conclude by indicating some directions that this idea might take.

The Kantian idea of human dignity, of persons as ends in themselves,[37] provides an intuitively plausible basis for the two competing and independent rights used by Dworkin, the right to equality and the right to liberty. Equal concern and respect clearly is embodied in the idea of treating *each* person with the dignity owed to every human being, but the Kantian idea is not limited to that. A right to liberty is a plausible consequence as well, for the refusal to allow a person to order his life as he chooses can be one kind of assault upon human dignity. Thus this Kantian idea potentially harmonizes the two rights and helps resolve the problems that arise when the two rights appear to conflict. Although vague, the Kantian concept of moral personhood seems to form a sounder basis for our thinking about rights than Dworkin's reliance upon the idea of equality.

Use of the Kantian concept of human dignity as the foundation of moral rights offers all of the advantages that the right to equality provides in that role but, with one possible exception, without its limitations. Since the Kantian concept is a possible basis for a right to liberty, a theory of rights based upon the Kantian concept might be subject to the difficulties Dworkin identifies with the idea of a right to liberty. The problem is that the idea of a right to liberty puts severe constraints on the use of policy arguments, and as Dworkin has shown, many innocuous laws are based upon policy considerations. The question about the status of arguments of policy in a theory of rights grounded in the Kantian concept of human dignity is not an especially difficult one to overcome.

Policy arguments could be accommodated into a Kantian theory of rights in at least two ways. First, arguments of policy could be subsumed under the heading of arguments of principle. This subsumption could be achieved by demonstrating that respecting the rights of persons sometimes requires constraints on liberty cho-

36. *Id.* at 198.

37. For Kant's discussion of the concept of persons as ends in themselves, see I. KANT, THE PHILOSOPHY OF LAW 25-27, 108-11, 114-16, 237-39 (W. Hastie transl. 1887).

sen on the basis of policy considerations. One can see roughly how this might go by referring to the example of traffic regulations. Such regulations are necessary to prevent the use of automobiles from seriously increasing the risks to pedestrians and other motorists. Because the regulatory details are not determined by this need to prevent injury, policy considerations could play a derivative role. In short, the idea is that persons sometimes might have a right to pursue goals that are supported by utilitarian or ideal arguments.

Second, although arguments of policy would retain their status as independent of arguments of principle, with respect to some matters the right to liberty properly could be overcome by arguments of policy. Defending these constraints on liberty by showing that they do not violate any rights would still be necessary, but giving a positive defense of the constraint on the basis of rights would not be necessary. Because some arguments of policy cannot be accepted as justifying constraints on liberty, however, this approach would involve distinguishing different spheres in which the presumption against constraints on liberty differs in its weight. The result would be a sphere in which only arguments of principle could justify constraints on liberty and another in which both arguments of principle and arguments of policy could justify constraints.

To me the formulation of some theory of rights capable of doing the work Dworkin assigns to his theory of rights is entirely possible. Such a theory might support conclusions very similar to Dworkin's on the issues of the enforcement of morality, civil disobedience, and reverse discrimination. I have argued, however, that Dworkin's version of such a theory fails to do the necessary work, in part because his arguments concerning the right to liberty and the use of utilitarian and ideal arguments of policy are unsuccessful, but basically because the foundation of rights he proposes is inadequate. Nonetheless, the foregoing remarks should be taken as attempts to contribute to the structure that Dworkin builds, rather than as attempts to bring it down.