

# Michigan Law Review

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Volume 75 | Issue 4

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1977

## Antitrust Law: An Economic Perspective

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### Recommended Citation

Thomas E. Kauper, *Antitrust Law: An Economic Perspective*, 75 MICH. L. REV. 768 (1977).

Available at: <https://repository.law.umich.edu/mlr/vol75/iss4/6>

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## Recent Books

### Book Review

ANTITRUST LAW: AN ECONOMIC PERSPECTIVE. By *Richard A. Posner*. Chicago: University of Chicago Press. 1976. Pp. x, 262. \$15.

The book jacket on Professor Richard A. Posner's *Antitrust Law: An Economic Perspective* states: "This book will challenge the thinking of businessmen, lawyers, economists, government officials, and anyone concerned with public policy toward business." The anonymous writers of book jacket blurbs are notorious for engaging in puffing well beyond what many a subsequently disappointed reader feels legitimate. But in this case, the statement is accurate. This compact, lucidly written book by one of our leading antitrust scholars will surely take its place as one of the major antitrust works of recent years, even though its primary conclusion, that all antitrust statutes except section 1 of the Sherman Act be repealed, is totally unrealistic and acknowledged by Posner to be so. But the book focuses discussion on a great many issues, and it contains an analysis of the defects of conventional thought that simply cannot be ignored, no matter how strongly one disagrees. It will anger some and please others. Ultimately, the book left me unsatisfied.

Before explaining in some detail precisely why, I might add that the book was fun to read. I recognize that an academic may be frowned upon for making such an admission, but I think many will have the same reaction. I believe this is the only book in the antitrust field I have read from cover to cover in one sitting. The book is short, and that is a virtue seldom found these days. It is provocative. It is stimulating. And whatever else may be said of Posner's work, we must all acknowledge that unlike some in the field he knows how to write, although his style has a pontifical quality from time to time.

Posner's articles in the antitrust field are known to a number of specialists, and much of this book will be familiar to them. Some has been said before by others. And much of it has already been said by him, for substantial portions of this book are simply taken in whole or in part from a series of articles in legal or economic journals written by Posner over the past several years.<sup>1</sup> Yet several

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1. Portions of the book are taken from or based upon the following articles by Professor Posner: *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282 (1975); *Exclusionary Practices and the Antitrust Laws*, 41 U. CHI. L. REV. 506 (1974); *Oligopoly and the Antitrust Laws: A Suggested Approach*,

chapters are wholly new, written in part to provide a cohesive, total overview. In this review I will simply treat the book as a whole, with little effort to separate what Posner has previously said from what he says here, leaving that detective work to others.

The book is not an antitrust treatise but rather a critique and blueprint for reform, not only of the substance of antitrust but of its procedures and institutions as well. It will be of little assistance to the lawyer looking for case citations and bibliographic references. Indeed, if the reader wants to find what Posner does rely upon to support his arguments, other than the economic rationale developed early in the book, he must turn to the original articles from which part of the text is taken. While this adds to the seemingly oracular quality of some of his pronouncements, it is consistent with his hope to make the work understandable beyond the world of specialists.

### I. THE GOALS OF ANTITRUST

Style is one aspect of the book, substance is something else. Innovative ideas are not always directly useful, and programs based on them may not work. It is at this level that I have difficulty with Professor Posner's book.

The changes proposed by him are sweeping indeed, even if we put to one side his suggestion that all antitrust statutes except section 1 of the Sherman Act be repealed. He starts with the proposition that the major concern of antitrust enforcement should be collusion among competing firms that has the effect of maintaining prices at noncompetitive levels. Collusion is broadly defined to include any tacit meeting of the minds, with or without direct communication. He believes, contrary to the views of many others, that section 1 of the Sherman Act can and should be utilized to reach such collusion, through the use of economic evidence. Indeed, he views the "criminalization" of rules with respect to price-fixing as antitrust's major doctrinal failing, placing unwarranted emphasis on conspiratorial acts rather than economic effects and leading to a concern with concentration levels that is both unnecessary and costly. In his view, "oligopolistic" or "administered" pricing is a competitive problem only in the presence of "tacit collusion;" market concentration is relevant only insofar as a small number of firms may find it easier to

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21 STAN. L. REV. 1562 (1969); *Problems of a Policy of Deconcentration*, in *INDUSTRIAL CONCENTRATION: THE NEW LEARNING* 393-400 (Goldschmid, Mann & Weston eds. 1974) [hereinafter cited as *INDUSTRIAL CONCENTRATION*]; *A Program for the Antitrust Division*, 38 U. CHI. L. REV. 500 (1971); *The Social Costs of Monopoly and Regulation*, 83 J. POL. ECON. 807 (1975). The interested reader may want to examine the following, also by Professor Posner: *ANTITRUST: CASES, ECONOMIC NOTES, AND OTHER MATERIALS* (1974); *ECONOMIC ANALYSIS OF LAW* (1973); *Oligopolistic Pricing Suits, The Sherman Act, and Economic Welfare: A Reply to Professor Markovits*, 28 STAN. L. REV. 903 (1976); *A Statistical Study of Antitrust Enforcement*, 13 J. L. & ECON. 365 (1970).

collude than a large number. Since section 1 can directly reach the offending behavior, deconcentration need not be sought. Posner sees little, if any, virtue to monopolization or attempt to monopolize cases seeking structural relief by use of section 2 of the Sherman Act, viewing most of these cases as direct or indirect attacks on efficiency.

Posner's proposed anti-merger policy would be confined to a few vertical mergers and some horizontal mergers in markets where four-firm concentration exceeds sixty per cent, or where the industry is predisposed to collusion. Restrictions on distribution—resale price maintenance and vertical territorial restraints—would be unlawful only if shown to be the result of a dealer cartel. Tying arrangements should be analyzed as a form of price discrimination and condemned only under very limited circumstances. Substantial revisions in the current approach to predatory pricing, exclusive dealing arrangements, and group boycotts are also proposed. Finally, Posner suggests a wide range of administrative and procedural reforms, from abolition of prison sentences and substantial curtailment of the private treble damage remedy (with the creation of a new monetary penalty) to major changes in the procedures by which major antitrust actions are tried.

This is, then, an ambitious undertaking, perhaps overly so. At places the book is too terse, the conclusions too categorically stated, to be thoroughly convincing. Posner utilizes a basic approach that is no longer novel, although in saying that I am to a degree simply acknowledging his own previous contribution. It is, in large part, the approach of the so-called Chicago school, which advocates using primarily the "science of economics" to rethink antitrust's substantive and administrative aspects. Posner's carefully selected use of the word "science" may suggest to some heavy reliance on empirical data. In fact, Posner makes little use of such data. The primary tool used is an economic theory of monopoly, which for him both defines the ultimate goal of antitrust policy and guides application of that policy to specific conduct.

The single, over-all goal is simply the promotion of efficiency in the economic sense. Where competition is less efficient than monopoly, monopoly ought not be condemned. Nor would Posner accept the suggestion, seemingly made from time to time,<sup>2</sup> that conduct should be condemned *because* it makes the offending firm more efficient than others of its competitors. Antitrust policy should be directed solely toward the elimination and prevention of monopoly pricing, which, in Posner's words, "results when firms create an artificial scarcity of their product and thereby drive price above its level of competition."<sup>3</sup> He rejects, for lack of empirical support,

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2. See *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962).

3. R. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 4 (1976).

arguments that monopoly should be condemned because it dulls incentives to reduce costs or retards innovation, thereby putting to one side a basis on which monopolies are frequently faulted,<sup>4</sup> and rests instead on the direct social costs of monopoly pricing. These costs are, first, the reduction of output and the correlative satisfaction of consumer demand at a higher cost than under competition, and, second, the tendency of monopoly profits to be transformed into further social costs as sellers attempt to gain or maintain monopoly positions and consumers attempt to combat it. The latter point is a significant one that, while not wholly new, is more fully developed and utilized by Posner than I have seen before.

Measured against a single-minded concern with economic efficiency, as he defines it, Posner believes much of our conventional anti-trust analysis is wrong, and, indeed, counterproductive. In its place he proposes a form of analysis and body of doctrine of striking structural symmetry, and, in a sense, of stark simplicity. It brings to mind some great cathedral, with all its stone, all its bits of glass, in the right place, all designed to serve one purpose. But those awed by such structures commonly are struck by the air of unreality about them. They are too symmetrical, too perfect. While they are a great human achievement, they do not seem to speak to the world in which most of us live and work. They often stand in stark contrast to what surrounds them. I have something of the same reaction to Posner's analysis. Even assuming the almost mathematical correctness of his rigorous economic analysis, is the structure simply out of social context? And, since the analysis rests on behavior of markets, firms, and ultimately, people, do they behave as Posner believes, or in some other way? Have we reached the point where economic theory must give way to the study of industrial and organizational psychology? Is it realistic to believe the reforms he suggests can be accomplished? These are the first questions raised by this book.

That the goal of antitrust should be elimination of the misallocation of resources resulting from economic inefficiency is not a startlingly new proposition, although it is hardly universally accepted. Indeed, were it so accepted, Posner's severe attack on a number of Supreme Court decisions inconsistent with this goal would be unnecessary, and, I suspect, this book would never have seen the light of day. There is, of course, little disagreement over the proposition that the misallocation of resources resulting from economic inefficiency is *a* goal of antitrust. The crucial debate is whether there

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4. The classic statement is that made by Judge Learned Hand in *United States v. Aluminum Co. of America*, 148 F.2d 416, 427 (2d Cir. 1945). The empirical studies with respect to the relationship between concentration and innovation are discussed in Markham, *Concentration: A Stimulus or Retardant to Innovation*, in *INDUSTRIAL CONCENTRATION*, *supra* note 1, at 247.

are others as well,<sup>5</sup> and Posner, along with a number of his colleagues, has played a major role in it. This book will further sharpen the discussion, although it is not primarily directed toward the choice of goals but is instead an analysis based on the starting assumption that there is no other proper antitrust policy.

Whether Posner's attack on current antitrust policy and court decisions, and his proposals for reform, are right or wrong for the most part depends on the validity of his central thesis. I will not here attempt to set forth my views which, while in some substantial agreement with those of Posner, would take too many pages to explain. But I will deal briefly with several aspects of Posner's analysis that trouble me.

The critical question of goals is one of choices. If economic efficiency is the sole goal of antitrust, other goals are rejected to the extent they are either inconsistent with or not satisfied by it. Those who reject Posner's single standard advocate others, some of which have been accepted on occasion by the courts. These range from a concern over the political and social power exercised by large firms, jointly or individually, to a belief that monopoly is an evil because it is a means of wealth transfer from "poor" consumers to "wealthy" shareholders. Most common, of course, is the concept that antitrust should be utilized to protect or promote small business, both by handicapping large firms and by creating (artificially, perhaps) an equality between large and small firms in their dealings with each other and third parties. Robert Bork, in his detailed analysis written a number of years ago, categorized judicial decisions varying from the economic efficiency criteria as "the deviant theme."<sup>6</sup> One could easily conclude from Posner's severe criticism, and from the fact he finds little in them to applaud, that these decisions are in fact the dominant strain—that when truly required to resolve a *policy conflict*, the courts have frequently chosen some value other than efficiency. In fact, the courts have tended to base decisions judging the legality of horizontal restraints on economic efficiency grounds and have applied other criteria primarily, although not exclusively, in cases involving vertical restraints.<sup>7</sup> Most often these decisions have placed heavy emphasis on the protection of small business through the preservation of business opportunity and equality, although there are some decisions that emphasize the

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5. See, e.g., Blake, *Conglomerate Mergers and the Antitrust Laws*, 73 COLUM. L. REV. 555 (1973); Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division I, II*, 74 YALE L.J. 775 (1965), 75 YALE L.J. 373 (1966); Dewey, *The New Learning: One Man's View*, in *INDUSTRIAL CONCENTRATION*, *supra* note 1, at 1; *The Goals of Antitrust: A Dialogue on Policy*, 65 COLUM. L. REV. 363 (1965); Liebel, *Toward a Consumer's Antitrust Law: The Federal Trade Commission and Vertical Mergers in the Cement Industry*, 15 U.C.L.A. L. REV. 1153 (1968).

6. Bork, 74 YALE L.J. 775, *supra* note 5, at 781-82, 811.

7. See Kauper, *The "Warren Court" and the Antitrust Laws: Of Economics, Populism, and Cynicism*, 67 MICH. L. REV. 325, 333 (1968).

political and social power of the firms in question.<sup>8</sup>

Posner spends little time explaining why he rejects these values as legitimate concerns of antitrust, largely, I suspect, because he and others have been over this ground before. But the arguments he does advance are not altogether convincing, not so much because they are wrong, as because they do not fully meet the arguments advanced on the other side.

For example, he offers his restatement of the argument for an antitrust policy based on political power: "[M]onopoly, or more broadly any condition (such as concentration) that fosters cooperation among competing firms, will facilitate an industry's manipulation of the political process to obtain protective legislation aimed at increasing the industry's profits."<sup>9</sup> He then dismisses the argument, having reduced it to nothing more than "concentration facilitates monopoly pricing indirectly through the legislative process,"<sup>10</sup> as adding nothing to an antitrust policy based solely on criteria of economic efficiency. This is a legitimate response to the political power argument as Posner has articulated it. But proponents of the political power approach would not accept Posner's restatement of their position. Perhaps the logical argument *should be* that political power will lead to monopoly pricing. We have seen numerous examples of this in some of our regulated industries. But the more common fear is of unbridled political power that may be utilized for a variety of purposes, ranging from fiscal policy to social welfare programs, and in a variety of ways, from outright bribery to effective control of regulatory agencies. Not surprisingly, those who seek the use of the antitrust laws as one means of controlling such activity come very close to attacking corporate size alone. To be sure, the ultimate goal of some corporate political activity is enhanced profit levels through monopoly pricing, but much of it is not. Such activity may in fact have more to do with the personal political convictions of those in top management, who desire to remain at the top economic class levels, than those of the corporation itself. Posner does not really answer this type of argument, although there are a number of ways of doing so, at least in terms of logic. The literal language of the antitrust statutes focuses on competition, and this alone suggests the inappropriateness of the political power approach. Moreover, unless we are prepared to use the antitrust laws to attack size alone, that approach furnishes no specific principles to guide decisionmaking. Nor is it clear why corporate political power is to be singled out for such treatment. Other groups, including labor unions, may be equally powerful, if not more so. Finally, if antitrust

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8. See, e.g., *United States v. Von's Grocery*, 384 U.S. 270, 274-77 (1966); *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962).

9. R. POSNER, *supra* note 3, at 18.

10. *Id.* at 19.

is to be measured against corporate political power, it has not been a singular success.

The major argument against exclusive reliance on economic efficiency criteria, and the one that appears to gain acceptance over and over again in judicial decisions, is that antitrust must play a role in the preservation and promotion of small business, or individual opportunity. Posner responds, in part, with the observation that small business as such generally benefits from monopoly, which, by creating a spread between costs (including a fair capital return) and prices, permits smaller firms with higher costs to survive under the umbrella monopoly pricing creates. This is, in essence, an argument that even those decisions that are openly protectionist in their rationale do not really achieve the results they seek. To a substantial degree Posner is right, although he carries the argument too far when he asserts that the best antitrust policy for small business is *no* antitrust policy.

To the extent small businesses fear single firm or cartel pricing as such, it is in their role as purchasers. As *purchasers*, small businesses are like any other buyers and are adequately protected by an antitrust policy based upon Posner's proposed criteria alone. As *competitors*, my own experience suggests small firms *do* recognize that they stand to gain if the dominant firms engage in monopoly pricing and may be understandably reluctant to invoke or have someone else invoke antitrust sanctions against the major firms, which may bring prices more in line with costs of these firms. And, consistent with this recognition of their own interests, small firms commonly do object to mergers involving competitors that they perceive will lower the merged firm's costs, precisely on that ground. In short, small business has no unique concern with monopoly *pricing* and in their own industry may prefer it, as Posner suggests.

But his contention has little to do with two concerns commonly expressed by the small business community and those who reflect similar views. While many firms would undoubtedly be delighted with monopoly price levels in their markets, they want protection against acts of major firms that might lead to that monopoly pricing and make them victims along the way. It is in the area of exclusionary practices that smaller firms most commonly seek, and obtain, antitrust protection. Second, there are a number of businesses, small and large, controlled by persons who value freedom of action, perhaps wholly without regard to economic consequence, and who view the antitrust laws as the means of keeping themselves free of "undue" restrictions that might otherwise be placed upon them by sellers or licensors.<sup>11</sup> Concern with exclusionary practices that would in fact lead to monopoly pricing is to a substantial degree consistent with

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11. They might, of course, be equally concerned about the restraints placed upon them by the antitrust laws themselves.



Posner's economic efficiency argument, as he makes clear in a significant chapter of this book. To the extent the two goals are consistent, no special recognition of the "rights" of smaller firms is needed. But I am sure the differences are significant, for there will be argument over what is in fact exclusionary even under the economic efficiency standard, and many will assert that antitrust should prohibit certain forms of conduct without regard to its role in monopoly pricing. The latter argument is either a rejection of the economic efficiency argument or a reflection of a belief that, if the economic case can be made against a particular type of conduct (such as tying arrangements) in some situations, the law should flatly prohibit it, to avoid the undue complexity and costs associated with a broader inquiry.

Posner recognizes that critics of his economic efficiency approach will find unconvincing his proposition that smaller businesses would be better off without antitrust policy, and he proceeds to make his ultimate policy choice clear. If one has to choose between economic efficiency and the protection of small business or the preservation of large numbers of competitors, efficiency must be the choice. To protect small business at the expense of efficiency is ultimately self-defeating, since this will increase costs and force the efficiency-seeking firm to make choices that will be even more damaging to the small firm. I am not convinced that this is universally true, although its likelihood is considerable.

I do not mean to belabor these points. Clearly Posner's views will not be accepted by everyone, and he knows that. I have raised these questions because they reflect the uneasiness many of us feel with the economic efficiency criteria as the sole guide to antitrust policy. Perhaps that uneasiness rests in the fact that we have been led to these criteria less by philosophical commitment than by a pragmatic concern over the law's inability to quantify social and political concerns and thus make them workable guidelines, and in response to what have seemed particularly muddled judicial pronouncements. The apparent simplicity of the efficiency concept is appealing and is a way to avoid making difficult, if not impossible, value choices. But I think the uneasiness is far more the result of two other factors. We are not totally convinced that the economic efficiency criteria, at least as developed so far, are themselves really workable or, perhaps more importantly, totally in tune with how people and markets really behave.

In large part, this is more a concern with the implementation of an antitrust policy directed solely toward the economic efficiency goal than with the goal itself, although not entirely so. We are also uneasy because the courts, the Congress, and the enforcement agencies have long emphasized other goals, and, perhaps, because the lawyer in us rebels at putting such traditions to one side without being totally sure that they are now irrelevant.

Posner does not examine, in historical terms, how some of these "deviant" strains have worked their way into antitrust analysis and have retained their vitality. The only reference to the intention of Congress is the statement that "the dominant legislative intent has been to promote some approximation of the economist's idea of competition."<sup>12</sup> In a sense, an historical examination is beyond the scope of this highly conceptual analysis, but its absence leaves the reader both uneasy in accepting Posner's central thesis and unwilling to believe that much of the reform he proposes can be achieved.

One cannot simply assume that Supreme Court justices are persistently misguided, ignorant, or malevolent, although some portions of this book might create that impression. Indeed, the very severity of the criticism on occasion reduces its effectiveness. But it surely is true that the Court has, at least in some areas, been totally unable to reconcile conflicting goals and produce a completely rational body of law. Nowhere is that as clear as in the Court's struggles in recent years to deal with vertical territorial restraints and resale price maintenance. The artificial distinctions drawn by the Court between agreements and unilateral refusals to deal, sales and agency, and "coerced" conduct and free choice, and its condemnation of vertical territorial restraints as per se violations in *United States v. Arnold, Schwinn & Co.*<sup>13</sup> after it declined to adopt such a rule only four years earlier in *White Motor Co. v. United States*,<sup>14</sup> can at best be described as confused. Posner and others, including myself, have criticized the rationale of these decisions.<sup>15</sup> But why have these legalistic doctrines and inconsistent value judgments persisted? Similarly, the analysis of the tying arrangement as a form of price discrimination has become virtually conventional.<sup>16</sup> It is repeated by Posner, who, unlike a number of others, then goes on to consider whether and when tie-ins should be treated as unlawful discrimination. But he also correctly observes that this whole body of literature "has virtually no impact on public policy."<sup>17</sup> I made a similar statement eight years ago, noting that the Supreme Court has "virtually ignored" the growing body of economic knowledge about vertical restraints.<sup>18</sup> The Court's refusal to change its approach to tying arrangements is explained, Posner claims, by the persistence

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12. R. POSNER, *supra* note 3, at 20.

13. 388 U.S. 365 (1967).

14. 372 U.S. 253 (1963).

15. See, e.g., Kauper, *supra* note 7, at 340-41.

16. See, e.g., Bowman, *Tying Arrangements and the Leverage Problem*, 67 YALE L.J. 19, (1957); Burstein, *A Theory of Full-Line Forcing*, 55 NW. U.L. REV. 62 (1960); Markovits, *Tie-Ins, Reciprocity, and the Leverage Theory*, 76 YALE L.J. 1397 (1967); Stigler, *United States v. Lowe's, Inc.: A Note on Block-Booking*, 1963 SUP. CT. REV. 152.

17. R. POSNER, *supra* note 3, at 174.

18. Kauper, *supra* note 7, at 331.

of the view that tie-ins are exclusionary and raise barriers to entry, effects he seeks to disprove in economic terms. But this is not wholly satisfactory, for ultimately the exclusion or "foreclosure" concept does not appear to be rooted in economics at all.<sup>19</sup>

This is the basic dilemma. If the courts have persistently simply misapplied the "science" of economics in an honest, albeit misguided, effort to satisfy an economic efficiency criteria, their "error" may result from nothing more than the unavailability through much of our history of the economic tools that now can be utilized. While this may suggest that severe criticism of these decisions on the basis of economic knowledge not contemporaneously available is unwarranted, it also means that reform should be relatively easy. Yet the values reflected in a number of these decisions are not values predicated on economic efficiency but are drawn from other sources. I suggested at one point that the Warren Court's emphasis on unrestrained, independent decisionmaking and equal opportunity, which seemed to me to be the themes underlying a number of vertical restraint decisions, was derived from the same concepts rooted deep in our history, upon which a number of its civil rights and criminal cases were predicated,<sup>20</sup> but that explanation is not wholly satisfactory either. Nor is it sufficient to dismiss these decisions as undue obeisance to *stare decisis*.

Perhaps we ought not be concerned with explanations of past decisions and policies. Posner's goal is to put forward a systematic, rational antitrust program based upon economic criteria and analysis, and this requires no historical exegesis. But without a full understanding of the undercurrents of the past, we have little way of evaluating the extent to which they presently exist and, therefore, the extent to which reform is possible. Posner at several points suggests that his proposed reforms are "impractical," or "academic," or "unrealistic." The reason, I would suppose, is not because he has doubts about the merits of his proposals. It is because others have doubts, and thus change within the political system may not be possible. In short, it seems to me that the most likely explanation for the continued emphasis on the protectionist approach to antitrust is the obvious one, namely, that as a people we continue to believe that the antitrust laws are intended to protect small business and individual opportunity and to preserve a variety of social and political values. This may at any given moment reflect a general antibusiness attitude, a nostalgic desire to return to the days when local businessmen were truly local, or a simple fear of power.<sup>21</sup> If this is so,

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19. *Id.* at 332.

20. *Id.* at 334.

21. Professor Donald Dewey, speaking as an economist, has asserted that economists' attachment to antitrust results because "[w]e are made uneasy and suspicious by great corporate size in the private sector of the economy for the same reason as our fellow citizens. We react in this way because we believe that great corporate size concentrates discretionary authority in the hands of too few people." Dewey,

reform along the lines suggested by Posner may be impossible to achieve, even if it is desirable, at least in the absence of some other means of meeting these concerns.

Posner recognizes that statutory reform necessary to implement his proposed body of doctrine is most likely not achievable, and thus he chooses to emphasize that most of the changes he proposes can be carried out by judicial interpretation, the basic doctrines having been judicially created in the first instance. This sharp line between judicial and legislative action is unrealistic. Judicial decisions are not composed in a vacuum. Judges share the values of the society from which they are drawn. If the public is unprepared to accept an antitrust policy predicated solely on economic efficiency, and to see implementation of that policy through legislative change, how likely is it that the courts will do so? Moreover, courts do not simply pronounce. They are confined to cases put before them and often make decisions based primarily on the record and contentions of the parties. In private antitrust cases, these contentions are likely to be directed solely to private interests. While in a few cases this may lead to more imaginative and creative decisionmaking, such cases are more likely to sidetrack any rational, systematic approach to antitrust enforcement. Judgments about government enforcement actions can be made on a more systematic basis, but these decisions also are made within a political system and are thus affected by a variety of societal concerns manifested in a variety of ways—through presidential involvement, congressional oversight, and the appropriations process. These “input” processes, which are of some consequence, are not fully understood and warrant further attention.

And even apart from the specific influence of a variety of others, the enforcement agencies are not totally free to disregard the law as it has been interpreted. Posner has argued elsewhere that by virtue of making judgments concerning the best utilization of scarce resources, the Justice Department's Antitrust Division could substantially implement a policy based solely on economic efficiency, declining to bring certain kinds of cases that did not meet that criterion even where the violation under the law as interpreted was clear, on the ground that scarce enforcement resources could be better utilized elsewhere.<sup>22</sup> To a substantial degree Posner is right, but in practical

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*The New Learning: One Man's View*, in *INDUSTRIAL CONCENTRATION*, *supra* note 1, at 10-11. At a later point, he explains this concern as follows:

It is that many of us fear that, at some time in our lives, we may find ourselves opposing its owners and managers in an unequal contest. No doubt there are also other reasons for distrusting great corporate size and concentration. Some, I suspect, are so deeply buried in our subconscious that they could be revealed only by a psychiatrist with an MBA degree.

*Id.* at 13. Compare this statement with that of Judge Learned Hand, who describes one of the purposes of the Sherman Act as “a desire to put an end to great aggregations of capital because of the helplessness of the individual before them.” *United States v. Aluminum Co. of America*, 148 F.2d 416, 428 (2d Cir. 1945).

22. Posner, 38 U. CHI. L. REV. 500, *supra* note 1, at 502-06.

terms his argument is overstated. The ability of the agencies to shape antitrust policy poses a whole series of questions that I hope at some time to address in more detail. For present purposes, I suggest only that they are not, and cannot be, quite as freewheeling as Posner seems to suggest.

## II. TACIT COLLUSION AND THE "OLIGOPOLY PROBLEM"

Whether the reforms Posner proposes will be adopted, either by the courts or through political processes, is not the major concern of his book. Were it so, the tone would be more one of compromise. Instead, his message is that such reforms should take place and that antitrust policy is already too much the result of compromise. Those who reject his basic premise will reject many of his proposals, although his analysis is also a means of evaluating the economic costs of using the antitrust laws for other ends. But even if the basic premise is accepted, are Posner's proposals sound? And, assuming that his economic conclusions are sound, can they be translated into workable rules than can both guide industry practice and afford a rational basis for decisionmaking by our enforcement agencies and courts? I seriously doubt that they can.

The wide range of substantive reforms proposed by Posner has been alluded to earlier. Each is predicated on the economic efficiency criteria, and each will become the focus of intense discussion among economists and other specialists for some time to come. As a noneconomist, I found the economic analysis clearly set forth in understandable terms and the logic frequently compelling. There are, however, wide divergences of view among economists over issues central to the analysis, and no one should assume by virtue of his style and consistency that Posner's views are the gospel, even in purely economic terms. To pick but one example, and, I believe, a relatively critical one, Posner minimizes, if he does not totally reject, concern over barriers to entry. This leads him to the view that entry into new markets by firms capable of efficient production is relatively easy, in the sense that entry can be made on cost terms substantially equal to those of existing firms, with the resulting erosion of monopoly pricing levels. Equally important, he gives little credence to arguments that some types of conduct should be condemned *because* they raise barriers to entry. There is surely general agreement that economies of scale in most instances ought not be viewed as entry barriers, but there is considerable disagreement concerning the effect of capital costs and advertising expenditures. Posner obviously believes that capital markets work freely and effectively, providing capital whenever the costs and risks justify it. This is not self-evident.<sup>23</sup> He contends that advertising is seldom, if ever,

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23. See F.M. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 102-03 (1970).

a true barrier to entry because advertising expenditures by those in the industry raise their costs and permit others to enter without advertising at *lower* cost. Again, some disagree.<sup>24</sup>

All of this suggests that within the overall goal of economic efficiency, there is considerable room for disagreement about the economic perspective and analysis as Posner develops it. He recognizes this from the outset, and this discussion so far is not to be taken as criticism. But it does raise, in general, the question of building a new antitrust structure on a theoretical economic base over which there is considerable disagreement. Posner himself has argued elsewhere that "[t]he least unsatisfactory solution . . . is for the antitrust chief (with the help of economist advisers) to identify those questions on which there is a consensus of professional opinion—and to build his policy on that common ground."<sup>25</sup>

This is the key to Posner's approach, for it permits development of an efficiency-oriented policy in the face of argument and dispute among those to whom policymakers must turn for guidance. It is, however, a debatable proposition. There comes a point where public agencies, and indeed all of us, must make decisions on less than perfect knowledge, acting instead on the belief that, consensus or not, someone is right. This is so because we recognize that inaction may be so costly that we must take a chance. That is perhaps where we now find ourselves in terms of the economics of antitrust.

Posner's "consensus" approach calls for a conservative antitrust enforcement program and supports many of the proposals made in this book. Most of his reforms are aimed at narrowing the range of antitrust policy, particularly in areas where there is a wide range of views among economists. But taking Posner's consensus approach at face value, what of his own affirmative proposals? Are they widely enough accepted to form a basis for reshaping antitrust policy? More specifically, what of his proposals for dealing with "tacit collusion"?

Since Posner believes that collusion among competing firms that results in monopoly pricing is, or should be, the major concern of antitrust policy, the major part of his analysis is devoted to the problem of collusion. His central theme, simply put, is that the law and its enforcement agencies have not gone far enough in attacking and condemning tacit collusion—coordination of pricing without any overt or detectable acts of communication—on the basis of economic evidence, and that this in turn has caused a distortion in the law's treatment of mergers, information-exchange agreements, resale price

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24. See, e.g., Comanor & Wilson, *Advertising, Market Structure and Performance*, 49 REV. ECON. & STAT. 423 (1967); Mann, *Advertising, Concentration, and Profitability: The State of Knowledge and Directions for Public Policy*, in INDUSTRIAL CONCENTRATION, *supra* note 1, at 137.

25. Posner, 38 U. CHI. L. REV. 500, *supra* note 1, at 507.

maintenance, and vertical territorial arrangements. Unable to deal with supracompetitive pricing levels in highly concentrated industries in behavioral terms, the law has been shaped with an emphasis on structure unacceptable to Posner. His thesis, developed more fully elsewhere,<sup>26</sup> is that contrary to much popular learning, such pricing results, if at all, not as the inevitable consequence of structure but through tacit collusion that may be attacked under section 1 of the Sherman Act.<sup>27</sup> And the remedy, in his view, should be directed toward behavior, not structure.

This central theme is at the heart of much of Posner's analysis and criticism of current policy. It is the underpinning for his attack on structural relief. He sharply attacks the historical treatment of price-fixing, which is predicated on proof of truly conspiratorial conduct directed toward actual agreement among competitors and applies criminal sanctions where such conduct is found. The "criminalization" of the price-fixing rule has, in his judgment, led to two unfortunate consequences. First, by leading to a search for overt conspiratorial acts, it has led the law away from the economic approach he now proposes and is thus part of the historical explanation for the belief that such acts are a prerequisite for successful prosecution. Second, the criminal rule, with its emphasis on such acts, has led the courts and agencies to ignore actual effects, resulting in the prosecution of mere attempts. But the implications of Posner's "tacit collusion" argument also carry over into his analysis of other behavior. Mergers ought to be condemned only if they facilitate collusion. Posner would apparently go a step further and conclude that even then we do not need to prohibit the merger but can separately deal with any "tacit collusion" that results. He does not press the point, however, and suggests instead a merger policy predicated wholly on his concern over collusion.

At the heart of this collusion analysis, then, are two arguments. First, highly concentrated market structure does not inevitably lead to monopoly pricing. To be sure, high concentration facilitates collusion, because the fewer the number of sellers the easier it is both to organize and subsequently police a collusive arrangement. But structure itself is not determinative. Those advocating structural relief view high concentration as a measure of firm market power; Posner views it only as showing use of collusion. The additional elements needed to assure monopoly pricing are discretionary acts that can be directly prohibited. Second, Posner believes that section 1, in conjunction with economic evidence, can reach all or virtually

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26. See Posner, 21 STAN. L. REV. 1562, *supra* note 1; Posner, 38 U. CHI. L. REV. 500, *supra* note 1; Posner, 28 STAN. L. REV. 903, *supra* note 1.

27. 15 U.S.C. § 1 (Supp. V 1975). Section 1 is applicable to conduct that can be described as a "contract, combination . . . or conspiracy." Unlike § 2, 15 U.S.C. § 2 (Supp. V 1975), which makes it an offense to "monopolize or attempt to monopolize," § 1 is not applicable to purely unilateral conduct.

all undesirable, persistent monopoly pricing in concentrated industries, thus obviating any further need to look to structure alone. Monopoly pricing results from behavior the law can prohibit as such—that is, monopoly pricing previously explained as “interdependent” pricing can be attacked under section 1—through the use of economic proof. If Posner’s analysis is to be taken as far as he suggests, both points are crucial, for if monopoly pricing can result without “tacit collusion,” or if section 1 cannot theoretically or practically reach all such collusion, a remedial gap remains. This would not mean that Posner’s approach to tacit collusion lacks utility but simply that it is not the complete answer to the “oligopoly” problem. The economic argument calling for deconcentration would not be completely satisfied, although it must be recognized that there are a number of practical cost and efficiency loss arguments against a deconcentration program as well, arguments that Posner makes very strongly. And his proposed shift in merger rules would also lose much of its analytic support.

Professor Posner’s “tacit collusion” analysis starts with a firm rejection of the interdependent pricing concept and of much of the now-historic analysis of behavior in highly concentrated industries. While the economists will argue over much of what he says on these points, I did not find his reasoning altogether convincing.

Posner attacks the “structural” thinking on oligopolistic pricing on both the empirical and theoretical levels. He has been an active participant in the current debate over the correlation between high industry concentration and high profit levels, and he views the evidence as ambiguous at best.<sup>28</sup> Ambiguity does not of course mean no correlation exists. It may simply mean some studies were badly designed, improperly interpreted, or insufficiently sophisticated. Consistent with the method he commonly employs, however, Posner concludes that, since there is dispute over this evidence, a public policy directed against high levels of concentration cannot be predicated upon it. But it does not seem to me that he adequately deals with all of the empirical data suggesting that highly concentrated industries do at least behave differently with respect to price and output than those with more firms. Indeed, he does not discuss this evidence at all. In fairness, Posner apparently felt that this volume was not the appropriate place to debate such evidence, and that the interested reader could find that discussion elsewhere. But his

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28. The empirical evidence relating to the economic consequences of high concentration is discussed in great detail in *INDUSTRIAL CONCENTRATION*, *supra* note 1, to which Posner refers his readers. See R. POSNER, *supra* note 3, at 79 n.2. I am more inclined to the view stated by Professor Leonard Weiss that on balance the evidence still reflects the relationship. Weiss, *The Concentration-Profits Relationship and Antitrust*, in *INDUSTRIAL CONCENTRATION*, *supra* note 1, at 184. But that does not explain why this is so, and it is primarily in the explanation of behavior that Posner differs from others.



rather cavalier treatment of empirical data that, after all, is at the core of the very contention he is seeking to counter, is unsatisfying.

Having put to one side the empirical evidence, Posner attacks the conceptual underpinning of the structural analysis, the theory of "interdependent" pricing, particularly as that theory has been espoused by Professor Donald Turner.<sup>29</sup> That theory rests on the proposition that, where there are few sellers, each must take into account the impact of its pricing decisions on its rivals. The result may be that monopoly pricing levels are attained through rational, unilateral decisionmaking by each firm. Because the decision is dependent upon each firm's evaluation of its rivals' reactions, pricing is described as "interdependent." And because the decisions are, in fact, both unilateral and economically rational as unilateral judgments, section 1 should not be used to attack such pricing, even though the effect may be the same as overt collusion. It would make no sense to punish such conduct, for we cannot require that firms not consider rivals' reactions. The problem is the result of structure, and only changes in structure will solve it.

Posner attacks this analysis by pointing out situations where a seller may lower prices and increase output because he can conceal his decisions, or because it will take time for rivals to expand output. The seller may rely on a time lag in response. Rivals may not respond if the new price simply attracts new buyers, or if they lack additional plant capacity. He is similarly critical of the analysis as a general explanation for the reluctance to reduce prices. Substantial parts of his analysis would not provoke argument, even, I suspect, from Professor Turner. For the most part, Posner does not deny that, where there are few sellers, each will consider what its rivals will do. In doing so, however, it may become clear to such a seller that there are price and output decisions that could be made without immediate concern over the rivals' response.

What is the result of Posner's analysis? Despite his unwillingness to accept empirical data suggesting that monopoly pricing has some direct correlation to high degrees of concentration, he has not demonstrated the negative. Indeed, there is no need that he do so, since his own analysis suggests that monopoly pricing *is* more common in highly concentrated industries than in fragmented ones. As he points out repeatedly, a small number of sellers can collude, whether overtly or in some other way, far more easily than can a large number. Nor does he show that monopoly pricing does *not* result from precisely the pattern of interdependent decisionmaking set forth by Turner, and I do not believe he intends to do so. The insight he offers is a simple one, namely, that any given firm may choose not to price at noncompetitive levels, whether the industry

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

is highly concentrated or not. It is the fact of choice that is critical. Because a seller does have a choice, his decision to restrict output and increase price is a voluntary act that can provide the basis for finding "agreement" and thus invoking section 1. And the same fact of choice underlies Posner's contention that structural relief is unnecessary, for if noncompetitive pricing is simply a choice among alternatives, the law, through proper application of economic incentives, can induce (or compel) a seller to opt for the competitive alternative.

Posner's purpose is clear. It is to demonstrate that structural relief is both unnecessary and inappropriate as a remedy for monopoly pricing in highly concentrated industries. But it is a long jump from his pricing analysis to this ultimate conclusion. While the analysis has a virtually mathematical precision, I cannot make all the necessary steps, in either conceptual or practical terms, with the same ease as Posner. And I cannot imagine a truly dramatic shift in antitrust policy predicated upon it.

At the outset, many readers may have difficulty in determining whether Posner's concept of "tacit collusion" is broad enough to cover all conduct resulting in noncompetitive price and output levels. Posner is not as clear on this point in this book as he might be. There is a semantic difficulty with the phrase that invariably causes confusion, for to some it is likely to suggest a process of collusively arriving at collective decisions without direct communication but through acts that are intended to and do operate as forms of communication nevertheless, such as public signals and invitations. The use of section 1 to attack such conduct, which involves something more than interdependence, would hardly be a new idea. But although the reader may think that this is what Posner is suggesting at several points, it seems clear that his concept of "tacit collusion" is not so confined. Indeed, in the article from which much of the current book is taken, "tacit collusion" is simply described as "non-competitive pricing by oligopolists."<sup>30</sup> And proof of a section 1 case is simply proof that such pricing has occurred.

The formulation thus is simple and all-inclusive. The concern with oligopoly is monopoly pricing. Monopoly pricing results from collusion, overt or tacit.<sup>31</sup> In either event, collusion can be remedied through section 1. Neither those who do not accept Posner's economic criteria as a measure of antitrust policy nor those who believe oligopoly tends to retard innovation or slow the drive to reduce costs

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30. Posner, 21 STAN. L. REV. 1562, *supra* note 1, at 1575.

31. Posner has recognized that a higher than competitive price level established by a given firm can result from some degree of monopoly power held by the individual firm, though he views this simply as an issue going to evaluation of the economic evidence offered to prove tacit collusion. But the result may be to make his evidentiary tests virtually unworkable. *See* notes 46-47 *infra* and accompanying text.

will be satisfied. But even in its own terms, the analysis raises more questions than it answers.

Initially, how does Posner's analysis truly differ from that of the structuralists? If monopoly pricing is the concern, and interdependent judgments leading to such pricing are "collusion," the primary differences with the interdependent pricing theory he attacks are first, that under Posner's analysis the conduct is treated as an agreement for Sherman Act purposes; second, the proof at trial, being somewhat differently focused, may be somewhat dissimilar; and third, the remedy would be behavioral, not structural. The first of these differences is of course critical in legal terms, and it is certainly less than clear that courts are prepared to accept such a broad definition of "agreement." Posner asserts that such an interpretation is consistent with prior Supreme Court decisions in *American Tobacco Co. v. United States*<sup>32</sup> and *Interstate Circuit, Inc. v. United States*,<sup>33</sup> but whether or not "consistent," it is clear that those cases do not go as far as Posner does.<sup>34</sup> And while the courts might conclude that "tacit collusion," as Posner defines it, is simply an after-the-fact label to be applied to conduct that does not in fact reflect collusion at all, rejecting the concept out of hand, on its face the language of the statute could encompass such conduct.<sup>35</sup> I do not mean here to debate the point. I would simply note that the courts have not gone this far, and there is no assurance they ever will. To predicate significant shifts in antitrust policy on the basis that the interpretation might be upheld would be premature, to say the least.

Posner addresses the issue of proof in some detail, both here and elsewhere,<sup>36</sup> arguing strenuously that tacit collusion can, and should, be proved by reliance on economic evidence, in some cases by such evidence alone. The validity and workability of this aspect of the proposal is discussed in detail below. But it is important to recognize at the outset what Posner believes is to be proved. What is *not* to be proved is that the firms in a given industry in fact communicated directly, but in a way that left no traces, although Posner concedes this may well occur in a great many cases. The inquiry is simply whether the firms engaged in noncompetitive pricing and out-

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32. 328 U.S. 781 (1946).

33. 306 U.S. 308 (1939).

34. Posner has recognized this fact. See Posner, 21 STAN. L. REV. 1562, *supra* note 1, at 1577. The referenced discussion does not include *American Tobacco*, and on its face at least the case in the Supreme Court involved only § 2 of the Sherman Act and encompassed conduct beyond price and output decisions. Nevertheless, *American Tobacco* does come closer to Posner's analysis than any other decision of the Supreme Court.

35. Compare Turner, *supra* note 29, at 665, 671, with Markovits, *Oligopolistic Pricing Suits, the Sherman Act, and Economic Welfare: A Response to Professor Posner*, 28 STAN. L. REV. 919, 933-35 (1976).

36. See sources cited in note 26 *supra*.

put restriction; if this is shown, cartel theory takes care of the rest.<sup>37</sup> Viewed in this light, does the economic evidence upon which Posner would rely vary significantly from that which would be necessary in a proceeding under section 2 of the Sherman Act, brought either on an attempt or shared monopoly basis, to obtain divestiture relief? Unless the courts in section 2 cases are prepared to rely upon structure alone, and there is little to suggest that they are, proof of some noncompetitive behavior would be critical in such cases as well.<sup>38</sup> A key element of such proof would surely be price and output behavior, and since any section 2 case would rest on some showing of market power, proof of monopoly pricing would at least be relevant on that question. This is not to suggest that the proof Posner would utilize in a section 1 case is identical to that likely to be the basis of a section 2 action. In a section 2 case far more weight would be placed on market structure and so-called exclusionary conduct.<sup>39</sup> But the point is that there would be considerable overlap.

The most basic practical difference, then, between those who would seek to deal with "the oligopoly problem" through section 2 and Posner, other than legal interpretation, relates to remedy. Posner approaches remedy by asking whether noncompetitive behavior not resulting from overt collusion can be redirected by the legal system. Some oligopolists do not restrict output, for a variety of reasons. If this is so, others can be compelled to act in the same way. Those who would seek structural relief, on the other hand, view such attempts to change rational, noncompetitive behavior as an exercise in futility.

At the core of Posner's analysis is the use of economic evidence, both to plan the efficient allocation of enforcement resources and as proof of "tacit collusion" at trial. Initially, economic data would be utilized to identify industries prone to collusion, and as a means of evaluating ambiguous conduct, such as information exchange agreements. Posner would use a variety of data to conclude that an industry is collusion-prone, including such factors as high concentration with no fringe of small sellers, slow entry, standardized product, and a poor industry antitrust record. Insofar as these factors are utilized to target and initiate investigations, without falling back on the "mail bag" approach sometimes used in the past, the resource allocation process can be significantly improved, even if the law's primary concern is overt conspiratorial behavior. In recent years, the Antitrust Division has relied on a number of these factors

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37. *But see* the caveat discussed in note 31 *supra* and in notes 46 & 47 *infra*.

38. *See* Turner, *The Scope of Antitrust and Other Economic Regulatory Policies*, 82 HARV. L. REV. 1207, 1225-31 (1969). This is not to suggest that price and output behavior need be the focus. The more common § 2 approach should focus on exclusionary conduct.

39. *See id.* at 1225-31.

for precisely these purposes.<sup>40</sup> Posner's first stage is to some degree a reality, although the analysis is not, I am sure, as precise as Posner believes possible.

Far more debatable is Posner's second stage, the use of economic evidence at trial to prove noncompetitive pricing, or "tacit collusion." Posner would permit a finding of collusion based on such evidence alone, but only in industries adjudged "collusion-prone" on the basis of the factors discussed above. In other cases, corroboration in the form of evidence of some direct communication would be necessary. The economic evidence on which a finding of "tacit" collusion could be based includes fixed market shares, price information exchanges, regional price variations, and identical bids. If some or all of these tests, twelve in all, are satisfied, a court could find that price and output decisions do not reflect competitive behavior and are the result of collusion.

There are a number of difficulties with this approach. First, virtually each evidentiary standard is by Posner's own admission inconclusive or ambiguous. This is a point already developed at some length by others,<sup>41</sup> and I will not repeat it here. But within Posner's own scheme, the crucial question is what combination of these factors would prove a case. On this question Posner offers virtually no guidance. To be sure, he does suggest that a trier of fact might not be persuaded "to disregard the *uniform* results of twelve *different* tests of collusive behavior."<sup>42</sup> This may be so. Indeed, if all twelve tests are satisfied, a trier of fact might well conclude simply that *explicit* collusion had occurred, despite denials and lack of direct proof. It hardly seems likely that all noncompetitive pricing in highly concentrated industries will be in industries characterized by all these elements. Thus, the analysis rests on the ability of the courts and enforcement agencies to draw the right conclusions from some, but not all, of the evidence Posner suggests. Perhaps this is possible, but it seems more likely that what will result is a voluminous record, a great deal of confusion, and a considerable likelihood of error.<sup>43</sup> Consider, for example, that Posner is severely critical of the Court's

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40. See my remarks to the Mid-Winter Symposium, Chicago Bar Association Committee on Antitrust Law and Illinois State Bar Association Section on Antitrust Law (October 31, 1974), where this approach is briefly described. Cf. Hay & Kelley, *An Empirical Survey of Price-Fixing Conspiracies*, 17 J. L. & ECON. 13 (1974).

41. Professor Richard Markovits has developed this point at great length in a series of articles published in 1974 and 1975. His views on Posner's standards are summarized in Markovits, *supra* note 35.

42. R. POSNER, *supra* note 3, at 75.

43. Posner suggests minimization of the likelihood of error by "imposing a higher standard of proof on the government in cases where the only evidence of collusion is economic." *Id.* at 75. Given the conceded ambiguity of much of the evidence that Posner suggests using, this may appear sensible. But could it not also reduce virtually to zero the likelihood of government success?

use of economic evidence in the very *American Tobacco* case<sup>44</sup> he relies on heavily for the proposition that section 1 extends to "tacit" collusion.

Second, I do not believe that even with more adequate guidance the courts and enforcement agencies can make such standards workable. I first considered Posner's basic analysis not as an academic, but as an enforcement official. My initial reaction was to throw up my hands in despair, for even with a great deal more economic expertise in the Antitrust Division than in years past I could not imagine the Division fashioning such a program. Nor could I imagine a judiciary with the economic sophistication necessary to make such a program effective. My views on this have not changed, even though Posner's standards *seem* the picture of simplicity. The practical difficulties are not simply the result of a lack of economic sophistication, for at least in the enforcement agencies such sophistication can and should be brought to bear. Nor is the problem confined to the fact that economists will disagree over the validity of Posner's tests, thus making the standards themselves the subject of continual debate, although this will certainly be the case. And clearly some of the necessary data can be gathered quickly. It is not difficult to determine, for example, if the industry employs a basing-point system, or whether market shares are declining. But data concerning capacity, demand elasticity, and abnormal profits are exceedingly difficult to obtain and even more difficult to evaluate.

Third, do the tests suggested by Posner actually reflect collective monopoly pricing and only such pricing? Is it not possible that a firm with significant market power will price at noncompetitive levels wholly without regard to the reactions of others, its pricing simply reflecting its own position in the markets? Professor Richard Markovits has sharply criticized Posner's analysis on this ground,<sup>45</sup> and Posner has to a degree recognized the validity of the point. In the present book, he recites it only as an objection to the use of price discrimination as evidence of tacit collusion and responds by noting the care with which such evidence must be evaluated. In a direct response to Professor Markovits, Posner suggested that to a substantial degree the concern is alleviated if the market is properly defined narrowly, thus making the individual power of particular firms clear. He further suggested that he would permit the defendant to escape liability upon a showing that "its noncompetitive pricing behavior was due not to collusion but to the possession of a lawful source of monopoly power, such as a patent or copyright, or a very large market share."<sup>46</sup>

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44. *American Tobacco Co. v. United States*, 328 U.S. 781 (1946).

45. See Markovits, *supra* note 35. The critique is more fully developed in a lengthy series of articles by Markovits. See *id.* at 919 n.4.

46. Posner, 28 *STAN. L. REV.* 903, *supra* note 1, at 912-13.

Whether Posner continues to adhere to that view is not clear. But assuming that he does, it raises both a conceptual difficulty with his analysis and a considerable complication for trial. The latter point is a practical one; the former is the simple recognition that noncompetitive pricing is not solely a product of collusion, "tacit" or explicit, and therefore a court may be reluctant to draw the necessary inference of "tacit collusion" in the first instance.<sup>47</sup>

Thus, the evidentiary problems posed by the Posner proposal are sufficiently severe to raise serious questions of workability even if the basic assumptions were acceptable. Posner is not oblivious of these difficulties, although I believe he understates them. He correctly points out, however, that his proposal cannot be judged in any absolute sense but only in comparison to the alternatives. And any action seeking structural relief utilizing section 2 could well present many of the same difficulties, unless the courts are prepared to place very heavy weight on market structure alone, as they have done with single-firm monopolization cases. In terms solely of complexity, we may have a Hobson's choice. The need to develop simpler standards of proof and simpler legal rules thus persists.<sup>48</sup>

Whatever the proof problems, the ultimate question is one of relief. Viewing the problem of persistent noncompetitive pricing as one of collusion, Posner would rely on the normal antitrust remedies for such behavior. More particularly, the remedy, in his words, would be "an injunction, fine, or damage award which allows the

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47. Recognition of this point suggests a basic difference between Posner and a number of those favoring a structural approach, for it is precisely the individual market power reflected by a large market share that is the latter approach's target. To the extent these differences exist, the two approaches suggest a different focus at trial with respect to the same evidence. This is not to suggest that Posner is inconsistent. He is simply recognizing that if supracompetitive pricing is clearly not attributable to collusion but has instead resulted from a judgment of the firm without concern for rivals' reactions, there has not been any conduct that can be called collusion, at least on the part of that firm. But it may seem somewhat anomalous to permit a firm to escape liability by showing it has individual market power, the very thing about which many are most concerned.

Posner is careful to note that he is talking about "lawful" monopoly power. In the setting of a patent or copyright, few would disagree. But the concept of a "lawful" market share is much more ambiguous. Is the "lawfulness" of a large market share an issue to be tried in a collusion case?

Posner would, in addition, argue that single-firm market power ought not be a major concern in any event. It will persist only if based on efficiencies, superior management, protection granted by the government, or exclusionary practices that the law can prohibit directly. Obviously some would not agree. See, e.g., Williamson, *Dominant Firms and the Monopoly Problem: Market Failure Considerations*, 85 HARV. L. REV. 1512, 1513-14 (1972).

48. I have not addressed the use of § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1970 & Supp. V 1975), as the vehicle for dealing with the adverse competitive effects of high concentration, even though that statute's simple prohibition of "unfair methods of competition" may be viewed as broader in scope than either § 1 or § 2 of the Sherman Act, because the economic issues and methods of proof ought not differ substantially.

defendant complete competitive flexibility, and forbids only the (explicit or tacit) collusive agreement itself."<sup>49</sup> As a purely abstract proposition, Posner's remedial position has a certain attractiveness, if our sole concern is to assure competitive price and output levels, and if we are certain that these levels do not result from the market power of individual firms. If some highly concentrated industries behave in normal competitive fashion, the law can presumably make penalties sufficiently substantial, or enforcement so effective, as to induce other firms in other industries to behave similarly. To paraphrase an old saw, every firm has its price. No decisions of this type are so inevitable that another is not possible. There is an analytic simplicity to the Posner approach that is attractive. But is it a real solution?

Posner's remedy must be considered both in terms of existing law and the new civil penalty he proposes. The deterrents available today are the legal rule itself, which some may obey simply because it exists, injunctive relief, criminal sanctions, treble damages to injured parties, and divestiture. It is unlikely that a general rule against "tacit collusion" will in itself, without regard to sanction, accomplish anything. Until the practices in a given industry are successfully challenged, the firms within it are unlikely even to believe that they are colluding. And the firms are likely to engage in such conduct anyway, unless the cost is made too high. Criminal sanctions seem inappropriate as to individuals, at least if traditional standards governing criminal responsibility are applied. In some cases, the maximum \$1 million corporate criminal fine might be a substantial deterrent.<sup>50</sup> But to the major firm that coldly calculates on a cost-benefit basis, and is influenced to a degree by its likelihood of apprehension, \$1 million is far too small an amount effectively to deter. Nor, I would think, could the government expect to be successful in many of these cases if it had to satisfy the criminal "beyond a reasonable doubt" standard. At this time, then, reliance would need to be placed on the injunction, divestiture, or treble damage actions.

The injunction envisaged by Posner is the picture of simplicity, prohibiting tacit or explicit collusion in general terms, with no reference to specific types of conduct.<sup>51</sup> Professor Turner, considering the same remedial question, concluded that such an injunction would be hopelessly vague, that an injunction going further and demanding

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49. R. POSNER, *supra* note 3, at 65.

50. The maximum corporate fine was increased from \$50,000 to \$1 million by the Antitrust Procedures and Penalties Act of 1974, Pub. L. No. 93-528, § 3, 88 Stat. 1708 (amending 15 U.S.C. § 15 (1970)).

51. While this seems clear from the text, R. POSNER, *supra* note 3 at 65, it is made clearer in Posner's earlier work. See Posner, 21 STAN. L. REV. 1562, *supra* note 1, at 1591 n.1.



that the firm make its price and output decisions without regard to rivals' reactions would "demand such irrational behavior that full compliance would be virtually impossible,"<sup>52</sup> and that the only prohibition with any chance of success would require an equation involving price and marginal cost. But this latter prohibition embodies a form of judicial public-utility-type regulation that would clearly be unacceptable. Indeed, the very difficulty of framing injunctive relief is one of the keystones of Turner's argument that section 1 ought not be applied. Posner and Turner are so far apart on this issue, I believe, largely because they view the function of injunctive relief differently. Turner adheres to the relatively traditional view that an injunction is designed to particularize the application of a statutory standard to specific conduct. To Posner, however, an injunction is a peg on which to hang a virtually unlimited sanction. The guidance to the businesspersons would come from the evidence on which the firms were convicted in the first instance, and their conduct would be changed because the sanction would be greater than the gain. Violation would presumably be proved by again resorting to economic evidence.

One might debate whether courts are prepared to enter and enforce such broad injunctions, with the prospect of violation resting perhaps on a repeat of the trial just concluded, or how a firm would be able to comply.<sup>53</sup> But that misses Posner's main point, which is the nature of the sanction. For whether that sanction is by contempt, or treble damages, or a wholly new remedy, it is the law's ability to make collusion, whatever its form, more costly than noncollusion that will change behavior. Contempt simply provides the opportunity to impose such a sanction. It is hard to believe, however, that the threat of contempt, with a wholly discretionary dollar sanction to be imposed after another trial based on relatively ambiguous evidence,<sup>54</sup> will be sufficient to bring a radical change in the price and output decision, if for no other reason than the amount is totally unknown in advance.

Under present law, the primary financial deterrent is the treble damage remedy. But it is unlikely that the threat of treble damages

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52. Turner, *supra* note 29, at 669.

53. The firm might simply instruct its employees not to engage in noncompetitive pricing. But such an instruction would have little meaning, particularly to employees who have little sense that they are doing wrong. Any such instruction will more likely be directed toward the specific evidence on which liability was established, but since some of the factors suggested by Posner are not really controllable by a single firm (*e.g.*, declining market shares) they are not readily translatable as standards of conduct.

54. The trial in a contempt action might, depending on the facts, rest on virtually the same types of evidence utilized initially. In such a case, many of the most complex issues will already have been resolved. On the other hand, noncompetitive pricing might persist although the evidence thereof is significantly different. Thus the contempt trial is likely to be as complex as the initial trial at which liability was established.

will be sufficient to induce the firm engaged in "tacit collusion" to change its ways and engage in competitive pricing instead. Based on proof of actual damage to particular persons, it in no way approximates a defendant's gain. It will almost necessarily be significantly less. True, the actual damage award is trebled, but this is a crude way to determine the incentive necessary to alter profitable conduct. Moreover, the offending firms can reasonably assume that such cases can be settled for a fraction of their gain. And, finally, if the threat of treble damages has not been an adequate deterrent to explicit price-fixing, and it surely has not, it cannot be expected to deter "tacit collusion."

Thus Posner's solution to "the oligopoly problem," as he defines it, is substantially dependent upon enactment of a new remedy, as Posner himself recognized in his earlier writings on this subject.<sup>55</sup> Without it, I do not believe firms are likely to opt away from conduct that they can with some reason view as natural. The new remedy Posner proposes is a civil damage award based on the social costs of the wrongful conduct (the gains to the firm, measured by the difference between competitive and noncompetitive price, plus the cost resulting from reduced output) multiplied by a factor designed to reflect the likelihood of apprehension.<sup>56</sup> In order to bring about the calculated change in conduct Posner believes can occur, the remedy must not only in abstract, conceptual terms be sufficient to alter the cost-benefit equation, including the risk of being caught—the actors must also have some idea of its dimension in advance, and they must be disabused of the notion that it is negotiable or otherwise discretionary. Posner confidently asserts that social costs can be computed with relative ease and demonstrated through economic proofs. But will firms making critical decisions see it this way? And what of the other part of the equation, the likelihood of apprehension? Is it even remotely possible to arrive at such a figure? Finally, given the fact that collusion is often the result of the actions of lower level officials, can we rely on a corporate punishment alone because a corporation has effective methods of preventing its employees from committing acts that impose huge liabilities on it? In conceptual terms this statement is hard to contest, but as a practical matter, I am not certain that this is so. Explicit collusion today can expose the firm to very large liabilities. Yet such collusion exists, often involving employees at low levels acting contrary to corporate policy and under threat of discharge for disobedience. Perhaps this

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55. See Posner, 21 STAN. L. REV. 1562, *supra* note 1, at 1590-91.

56. Professors Elzinga and Breit have also proposed a substantial monetary penalty. After canvassing a number of the elements considered by Posner, they recommend a mandatory penalty of 25 per cent of the firm's pretax profits for every year of anticompetitive activity for all violations. K. ELZINGA & W. BREIT, *THE ANTI-TRUST PENALTIES* 134-35 (1976).

is so because they view the likelihood of apprehension differently than the firm does, or because they are not convinced the corporate policy means what it says. Or do they simply not understand what they can and cannot do? If this is the case, how are they to understand that they cannot "tacitly" collude? These are questions to which I do not have the answers, but they leave me distinctly uneasy about the remedial efficacy of Posner's proposal.

Conspicuously absent from Posner's discussion of relief is any reference to restructuring. Yet, when he first proposed the behavioral analysis now central to this book,<sup>57</sup> he stated:

Moreover, there may be extreme cases where dissolution is the appropriate remedy for convicted tacit colluders because repetition of the offense is difficult to prevent by other means. Ordinarily the conventional remedies should be adequate, but courts should not shrink from employing dissolution in the exceptional case. It is no objection that dissolution is addressed to market structure rather than behavior. As noted earlier, non-competitive pricing is very much a function of the structure of the market; even express collusion is rarely practicable in markets that are not oligopolistic in structure. The possibility of dissolution should provide an additional deterrent to tacit collusion.<sup>57</sup>

Utilization of a structural remedy would move Posner significantly closer to those who perceive the problem to be one of structure from the outset, even though he arrives there by a considerably different route. This is a position in which he apparently no longer wishes to be found. Perhaps he was struck by Professor Turner's observation that to seek structural relief predicated upon a finding of "tacit collusion" is "virtually to concede that the finding of liability on the ground of conspiracy is dubious at best."<sup>58</sup> Or it may be that Posner still adheres to his original view, although I think not. In any event, if collusion, even explicit collusion, is a persistent condition, and if such collusion can be made far more difficult through dissolution, is it not both appropriate and more likely to be effective than a monetary penalty?

Structural relief is slow and costly to obtain. Posner devotes much of one chapter to a statistical analysis proving the point, and I would be the last to disagree. I have said the same thing elsewhere.<sup>59</sup> But a comparative judgment is required. Suppose we know that dissolution will eliminate collusion, and that a monetary penalty *might* do so. Dissolution is costly, but so is a subsequent proceeding in which tacit collusion must be proved all over again. In the long run, which cost is greater?

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57. Posner, 21 *STAN. L. REV.* 1562, *supra* note 1, at 1591 (footnote omitted).

58. Turner, *supra* note 29, at 671.

59. See *The Antitrust Improvements Act of 1973: Hearings Before Subcomm. on Antitrust and Monopoly of Sen. Comm. on the Judiciary on S.1284*, 94th Cong., 1st Sess. 90, 96 (1975) (prepared statement of Thomas E. Kauper, Asst. Atty. Gen., Antitrust Div., U.S. Dept. of Justice).

Structural relief in any antitrust case, whether under section 1 or section 2 of the Sherman Act, or even section 7 of the Clayton Act,<sup>60</sup> raises serious questions with respect to both benefits and costs. On the benefit side, there can never be complete assurance that the competitive gains sought will be achieved. This is so for a variety of reasons, including the simple fact that we may not be sure *how many firms* are needed to assure competitive performance. The history of structural relief is not reassuring on this score, as Posner demonstrates. On the cost side, structural relief imposes a series of transitional costs ranging from attorneys' fees to the costs caused by uncertainty in the industry during the transitional period. In addition, there is a risk that the firms created may not be as efficient as those with which we began. Virtually all proposals for structural relief are confined to firms larger than necessary for economies of scale and would utilize such relief only if efficient firms can be created.<sup>61</sup> Conceptually, at least, efficiency loss can be avoided. But as a practical matter, the issue of efficiency loss would be directly involved in the litigation and become a matter of proof, proof which is likely to be highly speculative. This adds complexity and litigation costs and suggests some likelihood of error. But it hardly means that efficiency losses will always result, and that the structural remedy is always inappropriate. It simply means that it must be utilized cautiously and only if other remedies will not suffice.

In assessing the costs and historical insufficiencies of structural relief, consideration must also be given to changes in the present procedures that might make such relief more effective and less costly. One of the clearest faults with the process is its lack of speed, a point graphically made by Posner. Because of the time that commonly elapses between the filing of a complaint and the date on which divestiture finally occurs, the relief may have little to do with the industry as it existed when the complaint was filed. Part of the lapsed time, of course, involves trial on the issue of liability. But the divestiture process is itself exceedingly slow, both in developing the relief plan and then in carrying it out. My own experience suggests that this is to a substantial degree due to the defendant's tactics. Delay may bring profits in the interim. Even significant changes in the industry may afford the basis for reargument over relief. And

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60. 15 U.S.C. § 18 (1970). Section 7 of the Clayton Act prohibits corporate acquisitions where the effect "may be substantially to lessen competition."

61. See Turner, *supra* note 38, at 1216. The most commonly discussed statutory deconcentration proposals also contemplate that structural relief not be utilized to reduce a firm's size in such a way as to cause substantial loss of economies of scale. This is true of the Concentrated Industries Act proposed by the Neal Task Force in 1968, as well as the Industrial Reorganization Act, S. 1167, 93d Cong., 1st Sess. (1973), proposed by Senator Philip Hart. These two proposals are reprinted as Appendix C and Appendix B, respectively, in *INDUSTRIAL CONCENTRATION*, *supra* note 1, at 444-52.

the passage of time may bring new administrators to the enforcement agencies, administrators willing to depart from the decisions of their predecessors. There is, in short, little incentive for speed. We need to consider alternatives to change these incentives, including, perhaps, the kind of financial incentives Posner himself proposes in another setting.<sup>62</sup> There is no apparent reason why structural relief need be as cumbersome as it is.

Overall, I believe that Posner's proposed solution to "the oligopoly problem" poses a number of serious theoretical and practical difficulties that may be insuperable, and that at least for now it surely cannot be characterized as "the" answer.<sup>63</sup> But my comments ought not be taken as denigrating the value of Posner's effort, which is a significant contribution to the understanding of cartel behavior. Moreover, Posner's proposals cannot and should not be judged in the abstract, for the alternatives commonly proposed are fraught with similar difficulties. Monopolization cases are at least equally difficult in terms of proof, the remedial problems are severe, and the use of section 2 to restructure highly concentrated industries remains virtually untried. Statutory proposals basing structural relief to a significant degree simply on a showing of high concentration will continue to languish, if for no other reason than the ambiguity of the empirical evidence correlating concentration and various aspects of industry performance. Yet there is a general feeling that a practical solution must be found. This will not happen until there is a greater consensus on the nature and scope of the problem to be remedied.

The courts and enforcement agencies, therefore, continue to find themselves attempting to develop a policy without a strong consensus over the best course. There is little choice but to experiment and to develop a better sense of what is workable on a case-by-case basis.<sup>64</sup> Posner's analysis, or some variant thereof, refined through

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62. See K. ELZINGA & W. BREIT, *supra* note 56, at 151.

63. At an earlier point, Posner put his proposal in somewhat different terms. Having noted that "[m]uch of the economic evidence described above could not yet be assimilated by the judicial process," he seemed to suggest use of economic evidence by the Antitrust Division primarily in making its enforcement decisions, Posner, *supra* note 22, at 523-24, a suggestion with which I largely agree. Since that time, however, the district court in *Walls Prods. Co. v. National Gypsum Co.*, 326 F. Supp. 295 (N.D. Cal. 1971), found a § 1 violation based in substantial part on economic evidence of the type proposed by Posner.

64. The government complaints filed in *United States v. The Firestone Tire & Rubber Co.*, Civ. C-73-836 (N.D. Ohio, filed Aug. 9, 1973), and *United States v. The Goodyear Tire & Rubber Co.*, Civ. C-73-835 (N.D. Ohio, filed Aug. 9, 1973), reflected my disposition to utilize § 2 of the Sherman Act to obtain structural relief in a highly concentrated industry but without single firm monopoly. While the cases were ultimately dismissed after a reevaluation of the government's efforts, I would still view § 2 as an appropriate vehicle in some oligopoly situations. The reasons for dismissal of the tire cases are set forth in a Memorandum for the Attorney General dated February 23, 1976, reprinted in 5 TRADE REG. REP. (CCH) ¶ 50,259 (1976).

further reflections, offers one way in which to experiment, as he suggests. At the same time, however, I would certainly not make significant changes in the current treatment of explicit price-fixing or merger policy in reliance upon it, as Posner apparently would.

Left totally uncertain by Posner's cartel analysis, and indeed by those advocating structural relief, is the quantitative significance of conduct that is overtly conspiratorial in setting or maintaining non-competitive price and output levels in highly concentrated industries. Put another way, to what extent is such behavior dependent on actual agreement? Admittedly, this is extremely difficult to measure, for much of the conduct involved is unlawful and thus not normally disclosed voluntarily. But as a practical matter, the answer to this question is of considerable importance. If most noncompetitive pricing rests in part on overt collusion, more effective enforcement directed toward such acts could eliminate a significant part of the oligopoly problem, without costly structural relief or the need for the type of analysis called for by Posner. Indeed, enforcement activity directed toward express collusion might even deter conduct that Posner views as "tacit collusion," simply because firms may opt not to walk too close to the line.

I have long believed that much so-called oligopoly pricing involves to a significant extent direct communication and agreement. Cartels are difficult to form and even more difficult to police, and more emphasis is perhaps needed on conduct that can be viewed as cartel enforcement. Posner apparently believes much the same thing, asserting that in most of these cases there will be explicit, although well-concealed, collusion that can surely be deterred by threat of punishment. I found this a rather curious statement. Having argued at some length for the use of section 1, in conjunction with economic evidence, to reach nonexplicit collusion, Posner then seems to advance as justification for his proposal the idea that it will be an effective way to deal with explicit collusion.<sup>65</sup> Perhaps so, but more explanation of the deficiencies of a direct attack on such practices is needed, particularly since Posner calls for significant changes in the way these matters are now handled.

Assuming that explicit collusion or direct communication is commonly present when there is noncompetitive pricing, why have we not dealt with it adequately on a direct-proof basis? Perhaps we have and the initial assumption is simply wrong, but I think not. Part of the answer clearly is that concealment is effective, and the acts cannot be detected. Investigative techniques can be improved but admittedly will never be perfect. In addition, however, I believe enforcement in the past has paid too little attention to the kinds of activity directed toward policing, as opposed to creating, cartels.

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65. To the extent Posner means that a greatly increased penalty would add an effective deterrent to explicit collusion, I would not disagree.

Each firm in a cartel will want to cheat, if possible. Thus any effective cartel is likely to be characterized by agreement on a wide variety of details, ranging from shipping terms to package sizes. Price information exchanges may be and are utilized to throw the spotlight on those who cheat. Moreover, the law itself may both encourage agreement and deter cheating. This, it seems to me, is one of the consequences of the Robinson-Patman Act,<sup>66</sup> which encourages firms to check prices with each other for purposes of the "meeting competition" defense and discourages secret price discounting in the first place.<sup>67</sup>

There is more, then, that can and should be done simply in dealing with explicit collusion, particularly where there is little consensus on other courses of action. A number of Posner's proposals are useful in implementing such a program, even without reference to tacit collusion. This is particularly true of his use of economic data to select collusion-prone industries, a program already to a degree being utilized. I found his analysis of price exchange agreements particularly valuable, even outside the setting of his broader proposals.

Posner is sharply critical of the "criminalization" of the per se rule against price-fixing and of what he calls the current "cops and robbers" approach. He would replace the criminal sanction with the new civil penalty discussed above. It is not clear whether he is suggesting that the criminal sanction be dropped now, before any new remedy is enacted. If he is, I would urge the contrary, for I firmly believe that the threat of a jail sentence is the strongest deterrent available under present law, even though jail sentences have in the past been woefully inadequate.<sup>68</sup> But I think we part company on a more basic point. Posner proposes continued use of the per se rule against price-fixing where explicit collusion is found in an industry that according to his economic standards is collusion-prone. He further encourages some continuing enforcement to prevent conspiratorial activities in other industries but also suggests that, as they are not likely actually to establish noncompetitive price levels, they should be punished as attempts, with a lesser sanction. Perhaps I misinterpret him, but it appears Posner is urging that a variety of economic factors be considered at trial even where actual conspiratorial activity is found. If so, I find this a disheartening step backwards in the direction of the old rule of reason approach.

The primary reasons offered for this suggestion are that the emphasis on "attempts" has distracted the courts and agencies from

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66. 15 U.S.C. § 13 (1970).

67. See *United States v. United States Gypsum Co.*, 1977-1 Trade Cas. ¶ 61,238 (3d Cir. 1977); U.S. DEPT. OF JUSTICE, REPORT ON THE ROBINSON-PATMAN ACT 37-63 (1976).

68. A table reflecting jail sentences imposed from 1890 through 1974 is set out in the text. R. POSNER, *supra* note 3, at 33.

focusing on an economic approach and that resources are thereby being wasted on cases with no economic impact. The former is an historical argument and certainly need not be true in the future. The second argument is the stronger so far as future policy is concerned. Indeed, if Posner is simply suggesting the use of economic data in resource-planning decisions, I am in substantial agreement. But I see no reason, in terms of resource use, for requiring proof of economic effects or proof that an industry is collusion-prone at trial. The resources expended in developing such proof and in analyzing it at trial, even assuming this could be done, would be considerable. If the fact of collusion is already known, why should they be expended? Moreover, the need for a precise rule to serve as an effective deterrent militates strongly against conditioning it in any way. And finally, Posner gives insufficient weight to the fact that prosecution itself may deter others by creating the belief that there is a higher likelihood of apprehension than they might otherwise think.

Posner's "tacit collusion" analysis leads him also to suggest that significant changes be made in the law as it now applies to horizontal mergers. Our apprehension about such mergers, at least insofar as it is rooted in economic concerns, rests substantially in the perceived inadequacy of tools to stop anticompetitive behavior once firms have merged. In this sense, the merger rules are prophylactic. Posner suggests that had the law developed to deal effectively with "tacit collusion," the only antimerger policy we would need would be directed toward mergers creating a single firm having monopoly power. He does not seriously propose such a policy, however, recognizing that the law will not so develop and that penalties not yet enacted will not successfully deter monopoly pricing. Whether the concern is simply with structural relief (by virtue of economic consequences necessarily attributable to it) or with the fact that concentration facilitates collusion, a merger policy directed toward prevention of significant gains in concentration remains necessary. Even if there are significant gaps in our economic knowledge concerning oligopoly pricing, we know enough to justify a relatively severe prohibition on mergers between direct competitors. This question is primarily one of degree.

Formulation of horizontal merger rules predicated upon the decisions of the Supreme Court has been particularly difficult, for in its merger decisions the Court has both failed to develop a single consistent rationale and has given considerable weight to factors at variance from those related to considerations of economic efficiency.<sup>69</sup> The merger decisions of the 1960s are not difficult to criticize, particularly if they are to be measured against an efficiency criterion, and Posner does it well. Indeed, even the Department of Justice

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69. See Kauper, *supra* note 7, at 333, 338-40.



Merger Guidelines<sup>70</sup> do not extend as far as the Court's decisions would permit.

Posner proposes that horizontal mergers be presumed unlawful only if the merger creates a market with a four-firm concentration ratio of at least sixty per cent, or if the merger significantly increases concentration in a market predisposed to collusion. In most cases, the latter standard would involve markets already highly concentrated. This is itself a considerable loosening of existing standards. But of even greater consequence is Posner's definition of the relevant market, which would include more substitute products and larger geographic areas than does the present market definition for section 7 cases. The consequence, of course, is the reduction of the relevant market shares.

These proposals, like most of the rest of Posner's analysis, are both provocative and controversial. I offer here only several tentative comments. First, it does not seem to me that the reformulation of merger policy need to be predicated upon resolution of the differences between Posner's analysis and that of the structuralists. Both assume that there are significant dangers from concentration, and there is already as much disagreement over where the danger level arises among those emphasizing concentration alone as will be added by the Posner analysis. A policy predicated on the economic dangers of concentration would itself be a significant change, and the divergent explanations of those dangers may not be of great consequence.

Second, it is not clear to me that we understand the dynamics of concentration well enough to set levels as high as Posner does. Even if the concern is collusion, the size or peculiar characteristics of particular firms may be significant. For example, suppose the industry is comprised of one firm with forty per cent of the market and ten firms with six per cent each. Might not the danger of non-competitive pricing be greater than if the top four firms had fifteen per cent each? I do not think we really know the answer.

Third, Posner's standards appear to ignore mergers that may increase the individual market power of firms, even though he appears to recognize that noncompetitive pricing may in some circumstances result. This is fully consistent with his initial assertion that the concern of antitrust is collusive pricing and restriction of output, but it is also a point on which there will be sharp disagreement. Certainly there is a case to be made for prohibiting mergers that enhance a firm's individual market power without regard to likelihood of collusion, if noncompetitive pricing is the probable result.

Finally, it seems to me that the most fundamental disagreement

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70. See *Department of Justice Merger Guidelines*, 1 TRADE REG. REP. (CCH) ¶ 4510 (1977).

is over the identification of harms caused by a strict policy against horizontal mergers. If such mergers could be prohibited without causing substantial harm, there would be far less reluctance to do so. But some horizontal mergers are beneficial. In some cases, economies of scale may be more quickly achieved. In addition, we must not unduly impair the ability to sell on-going businesses. The most fundamental difference between Posner and a number of others on merger policy, it seems to me, is over the level at which economies are achieved and, indeed, over the economies about which we ought to be concerned.<sup>71</sup> I tend to believe that Posner over-emphasizes the point, but others will disagree.

It cannot be doubted that the law with respect to mergers has in the past been in some disarray. The interjection of social concerns has been a major cause of the confusion. But even though the Court seems to be shifting more clearly toward economic criteria, a significant step forward in itself, a quantum leap of the type proposed by Posner seems both too much to expect and more than is warranted. I would prefer to err on the side of caution, and caution in this instance means a more severe posture toward horizontal mergers than Posner proposes.

### III. EXCLUSIONARY PRACTICES, ANTITRUST REMEDIES, AND ENFORCEMENT

I have devoted a major part of this review to Posner's treatment of collusion, both because it is perhaps the most provocative and controversial theme in the book and because he himself has given it such a central role. In one sense, I find it unfortunate that he did so, not because it is unimportant or lacks useful insight, but because it seems to me the collusion analysis is given more of a load than it needs to bear and, perhaps, more than it can. Even those who are prepared to accept Posner's ultimate goal for antitrust policy, and are thus likely to urge reform, may well find the section 1 analysis unacceptable. And some may not be prepared to make dramatic changes in such areas as merger policy or the rules with respect to information exchanges based on such speculation. If all that Posner has to say is totally dependent on the collusion approach, then final judgment should perhaps rest upon it alone. But there are valuable insights and proposals in this book that should be evaluated independent of his cartel analysis.

Posner has a great deal that is worthwhile to say on most of the major subjects of antitrust enforcement. I found his chapter entitled "Exclusionary Practices, Real and Imagined," particularly incisive. In a relatively few pages, Posner covers tying arrangements, predatory pricing, vertical integration, exclusive dealing, and boycotts.

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71. This issue is discussed in a variety of ways by the papers contained in part 2 of *INDUSTRIAL CONCENTRATION*, *supra* note 1.

Unlike some, Posner is prepared to recognize that some conduct is truly exclusionary and should be prohibited. But if economic efficiency is to be our guide, the legal rules should be considerably reshaped. His analysis of tie-ins and vertical integration is to a considerable degree a repetition of the work of others, as I have already noted, although the tie-in analysis breaks new ground by formulating a policy directly aimed at the proposition that tie-ins should be viewed as a form of price discrimination. The very brief section on boycotts begins with the simple observation that a boycott is a means, not an end, and should be treated by the law as such. Traditionally, however, we have condemned the means without regard to what the parties accomplished, or sought to accomplish. Why this has been so is not altogether clear. If parties sign a contract, the legality of the contract in antitrust terms does not rest on the simple fact the Sherman Act applies to contracts but is determined by examining what the contract is intended to do. Yet if the means can be called a boycott, the conduct is likely to be condemned for that reason alone. But is "conspiracy" really that different from "contract"? Posner clearly thinks not and proposes that boycotts be condemned only if used to enforce an otherwise anticompetitive practice.

The most intriguing portion of the exclusionary practices chapter deals with predatory pricing. This is a subject of considerable current interest, in part because of the recent publication of an influential study by Professor Donald Turner and Professor Philip Areeda,<sup>72</sup> and also because reform or repeal of the Robinson-Patman Act is again the subject of intense debate.<sup>73</sup> Posner is not prepared to dismiss predatory pricing as irrational economic behavior that will not occur, although he would not expect it to occur frequently. He expressly disagrees with Turner and Areeda, who would confine legal prohibition to sales below short-run marginal costs. Posner would include within the prohibition sales below long-run marginal cost with intent to exclude a competitor. Both analyses must be read together. Both are important.

In a final chapter, written for this book, Posner deals with a number of enforcement issues. I hope he will return to this subject, because I have the feeling this chapter is something of an afterthought. While ideas elsewhere are carefully worked out and positions strongly taken, in this chapter much is not spelled out in detail, with the exception of the penalty proposals discussed earlier. Posner suggests a different trial process, calling for trial on an agreed-upon narrative, with documents and testimony to be received only

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72. Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975).

73. See U.S. DEPT. OF JUSTICE, *supra* note 67, which suggests several alternative reforms.

upon issues as to which the parties cannot agree. Big antitrust cases do indeed at least border on the unmanageable, and some reform is clearly necessary (although I am not sure that the problem is confined to antitrust cases and that procedural reform should be so confined). Posner's proposed solution is not new, but his suggestions for incentives to induce parties to reach agreement are. They need more consideration, however, both in antitrust terms and in the context of the litigation process as a whole, than Posner gives them here. Proposals for reform of the process must also deal more specifically with the question of legal standards, for the most unmanageable cases tend to be the very cases where those standards are uncertain at best. Viewed only in process terms, the worst cases are the very kinds of cases Posner elsewhere proposes, the cases in which the court is called upon to make a far-ranging inquiry into behavior and economic effects.

Finally, I cannot refrain from comment on Posner's treatment of the enforcement agencies and the continuing need for private enforcement actions. There is considerable unhappiness with the private treble damage remedy, and some have proposed that it be abolished, thus leaving enforcement to public agencies.<sup>74</sup> Posner turns this question around and asks whether, given the availability of private remedies, there is a need for public enforcement (assuming for the moment that the features of the new penalty he proposes could be worked into private damage measurement). And he expresses considerable doubt on the ultimate need for public enforcement, although he concludes that for the moment it must remain. While recognizing the excesses of private actions, he believes excesses can be curbed by assessing costs against unsuccessful plaintiffs and by confining such actions to actual, as opposed to treble, damages in cases where the conduct involved is not concealed.

Posner's willingness to place heavy, and indeed increasing, reliance on private remedies is consistent with his concepts of free markets and allocative efficiency. It is dependent, I believe, on his belief that structural relief is generally inappropriate. He also asserts that private actions have made a significant contribution to the development of the law, and I do not disagree. But in my judgment he gives insufficient weight to the most obvious consequence of private actions, the virtual transfer of the public policymaking role to the judiciary. Perhaps that is as he wants it. But that seems to me the most disturbing feature of the dramatic rise in private enforcement activity, not simply because I believe the government must have a significant role in shaping antitrust policy as such, but because it tends to isolate antitrust policy from other economic policy decisionmaking of which it is logically a part.

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74. See K. ELZINGA & W. BREIT, *supra* note 56, at 139-48.

Posner's view on the merit of private enforcement also rests in part on his skepticism about the quality of public enforcement:

The initiative in the [Antitrust Division] lies with the trial lawyers—along with the execution, the theorizing, the design of remedies, and virtually every other aspect of the enforcement process. Trial lawyers tend to be combative rather than reflective, and the division's trial lawyers, because they are relatively poorly paid, tend to be young or mediocre, or to be zealots. They are not the right people to be the custodians of the government's antitrust policy, but that is what they are.<sup>75</sup>

He further suggests that for a variety of reasons the trial staffs are not and cannot be effectively controlled, and that there is little incentive to do so. There is some truth in each of these statements, but only some.

Trial attorneys with the government are not well paid. Physical working conditions are poor. Particularly able trial lawyers do tend to be promoted to supervisory positions. Some trial attorneys are young, and some probably can be called mediocre. But Posner has generalized to a wholly unacceptable degree. Most are competent, able people. Some may be called zealots, and others not. But zealotry, in my understanding, means given to zeal, and that is not always a quality to be faulted. On occasion, initiatives do rest with the trial staffs. But Posner does not discuss the role of economists in the Division, a role that has been greatly expanded in recent years. Supervision is not as effective as it should be, and mistakes are indeed made. But the implication that supervisors cannot or do not control the activity of the Division is again simply not so. In my own experience, the greatest difficulty is not getting the staff to exercise self-restraint but to act affirmatively, a problem common to virtually all bureaucracies. On balance, I firmly believe that the quality of governmental decisionmaking, and of judicial decisions in government cases, is significantly better than in private actions.

#### IV. CONCLUSION

That this book is a valuable contribution to the literature of anti-trust is clear. It is stimulating and provocative. And yet as a blueprint for reform, I find it falls short. It remains, in my mind, an imposing edifice to be admired for its symmetry and grace, but existing to a substantial degree outside the social consciousness. Much of what Posner says remains too conceptual, and thus seems too unrealistic, to provide the basis for the sweeping reform he seeks, although some of the insights in the book should and will find their way into doctrine over a long period of time.

Part of the sense of unreality I feel on completing the book is

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75. R. POSNER, *supra* note 3, at 231.

simply attributable to its failure to explain adequately how doctrine arrived at its present form. Part may be attributable to the very fact that it is substantially a collection of previously published articles, a fact that may cause some concepts to receive particularly heavy emphasis and others to receive little, based primarily on the topics initially selected by Posner for separate treatment. The book Posner *might* have written would perhaps satisfy on these points. But the feeling of unreality is also one of substance. The economic analysis, while lucidly presented, reflects neither a theoretical nor an empirical consensus. Too many others have labored too long to be dismissed quite as abruptly as they are here. I am simply not satisfied that, in an economy that seems more characterized by risk-sharing than risk-taking, capital markets work as freely, or entry is as easy, as Posner suggests. But more important, Posner seems to me too preoccupied with attacking structural relief, both as it has been utilized in the past and as part of numerous legislative proposals. His "tacit collusion" analysis and new civil penalty procedure are compared with structural relief as it has existed in the past. But in terms of realistic choices, the comparison should be made only after similar consideration is given to improvement in the process for obtaining structural relief, a task Posner does not undertake. And the "tacit collusion" argument, which has a number of practical and conceptual difficulties, simply has to bear too much of a load. As a result, it seems both unrealistic and unconvincing.

Posner concludes with the statement that it is time to rethink antitrust in economic terms, and that "[t]his book is offered as a contribution to the process of rethinking."<sup>76</sup> That it surely is, and how much more only time will tell.

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76. *Id.* at 236.