

Book Reviews

The Posnerian Harvest: Separating Wheat from Chaff

Antitrust Law: An Economic Perspective. By Richard A. Posner. Chicago: University of Chicago Press, 1976. Pp. x, 262. \$15.00.

Reviewed by F. M. Scherer†

For a Biblical seven years now Professor Posner has been writing in the field of antitrust law and economics. This book¹ gathers the harvest together, with diverse revisions and extensions, to provide an integrated view of his thoughts. The picture is not comforting. He expresses "a thorough dissatisfaction with the existing state of anti-trust"² and, after chiding Supreme Court Justices for their "extraordinary unwillingness or inability . . . to apply economics or any other body of systematic thinking to antitrust problems,"³ recommends repeal of all the antitrust laws except § 1 of the Sherman Act.⁴

How came Posner to be so out of phase with the traditional wisdom? As a fellow Federal Trade Commission (FTC) veteran, I may have a clue. From 1963 to 1965 he was a clerk to then-Commissioner Philip Elman. Oral tradition at the FTC has it that, among other things, Posner helped Mr. Elman draft the Commission's opinion in the Clorox merger case.⁵ From experience I can well understand his dismay and self-searching upon learning, presumably much later, that certain of the opinion's factual foundations rested on quicksand.⁶ At any rate, somewhere on the road to Chicago Posner must have had a

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1. R. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* (1976) [hereinafter cited by page number only].

2. P. vii.

3. P. 5.

4. Sherman Act § 1, 15 U.S.C. § 1 (Supp. V 1975). See pp. 7, 212, 216.

5. *In re Procter & Gamble Co.*, 63 F.T.C. 1465, 127 ANTITRUST & TRADE REG. REP. (BNA) X-1 (1963), *rev'd*, 358 F.2d 74 (6th Cir. 1966), *rev'd*, 386 U.S. 568 (1967).

6. See Peterman, *The Clorox Case and the Television Rate Structures*, 11 J.L. & ECON. 321, 343-67, 396 (1968) (criticizing FTC's claim that television networks gave discounts to large volume advertisers).

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vision, and the converted trust buster is now an ardent spokesman for the new unorthodoxy.

In embracing this new cause Posner has equipped himself with an arsenal of the economist's weapons. This is hardly accidental, for, as Posner argues, the "essential intellectual tool" for a needed rethinking of antitrust "is the science of economics."⁷ One must, however, distinguish between substance and style. The substance of Posner's book is for the most part economics, and, within its natural limitations, it is in general adequately handled. But Posner's style is that of advocacy, which, although hardly unknown among economists, is much more the lawyer's stock in trade. Resorting to a technique I encountered with alarming frequency at the FTC, Posner tells only one side of a complex story. Facts, theories, and cases inconsistent with his argument are overlooked or swept aside.

Many of Posner's criticisms of antitrust are at least partly valid. The way Posner presses his argument, however, leaves this reader at best unpersuaded; and at worst, it spurs me to take up arms against the heresies. Since combating heresies is a time-honored function of book reviewers, it will, despite the risk of imbalance, constitute the bulk of what follows. Following a skeptical initial evaluation of the basic premises of Posner's antitrust unorthodoxy, I consider critically Posner's treatment of three substantive topics—collusion, mergers, and divestiture. Occasional digressions correct minor tangential errors encountered along the way. A final conciliatory note on procedure suggests the many areas in which Posner and I are in substantial agreement.

I. The Goals of Antitrust

Let us begin with fundamentals—the goals of antitrust. I am impelled at the outset to offer a dual confession. First, I have never read the complete record of congressional debates underlying passage of the Sherman Act, or for that matter, any other antitrust act. It is therefore with some unease that I raise doubts concerning Posner's interpretations of congressional intent.

Second, perhaps because of this first lacuna, I spent two years as an FTC bureau head not knowing exactly what we were supposed to be accomplishing. To be sure, I had my own impressions, stemming in part from my training (at Harvard, not Chicago) as an economist. My staff (including a Chicago-trained Assistant Director for Antitrust

7. P. 3.

Economics) added a few more; and from the several commissioners and sundry congressional committees came an abundance of further guidance. The trouble was that the signals did not form any coherent pattern. Was Congress truly serious about our probing the bounds of § 5 of the FTC Act⁸ in order to fragment concentrated industries? At what cost? In recommending merger cases to the Commission, what weight, if any, should be given to efficiencies? Did we really want to challenge price discrimination that led to lower consumer prices? What if prices were lower in the short run but as a result were likely to be higher over the longer haul? Did the food processing and distribution industries in fact warrant special attention despite the press of apparently more serious competitive breakdowns? I frequently felt that if we only knew precisely where we were to go, we could proceed there in a more orderly fashion. But clear objectives were a luxury we seldom enjoyed; ambiguity was our guiding star.

In his book Professor Posner sets matters straight. Relying heavily upon Professor Bork's survey,⁹ he observes that "[t]he framers of the Sherman Act appear to have been concerned mainly with the price and output consequences of monopolies and cartels."¹⁰ To those who discern in addition congressional intent to protect small businesses, Posner argues that the Act's provisions contradict that goal. For example, Posner contends that small businesses thrive best under the umbrella of monopoly pricing,¹¹ though he does not demonstrate that this insight was shared by the Sherman Act framers. There is also a brief argument expressing doubt "that monopolists are in general less vigorous innovators than competitive firms."¹² The upshot is Posner's basic tenet that "although noneconomic objectives are frequently mentioned in the legislative histories, it seems that the dominant legislative intent has been to promote some approximation to the economist's idea of competition, viewed as a means toward the end of maximizing efficiency."¹³ On this conclusion rests his entire "economic approach . . . to the interpretation as well as revision of the antitrust statutes."¹⁴

As I have indicated, I can claim no special insight into what Senator Sherman and his colleagues had in mind. My impression from reading

8. 15 U.S.C. § 45 (1970 & Supp. V 1975).

9. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966).

10. P. 23.

11. P. 19.

12. P. 17; see p. 205. The mass of theory and evidence on this issue, see Kamien & Schwartz, *Market Structure and Innovation: A Survey*, 13 J. ECON. LITERATURE 1 (1975), is ignored.

13. P. 20.

14. *Id.*

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Thorelli's magisterial account¹⁵ and the footnotes in Bork's article¹⁶ is that congressional views, not atypically, were muddled and often contradictory. Still, several key points seem clear. First, the legislators definitely had mixed emotions about the trusts. They believed that large, market-dominating enterprises might achieve superior efficiency, and they wished to retain those advantages while avoiding the associated abuses.¹⁷ Second, Congress's sentiments were definitely what we would now call consumerist, although there was also concern over preventing monopsonistic exploitation of input suppliers (such as farmers and oil-well owners). Third, the trusts were perceived as harmful to consumers because they increased prices by restraining output.¹⁸

This third point is crucial to Posner's argument, for price raising and output restriction together lie at the heart of economists' notion of monopolistic inefficiency.¹⁹ Yet I do not believe one can support the logical leap that because Congress recognized these propensities of monopoly, it was concerned with "economic efficiency" in the modern sense of the term. At the time the Sherman Act was passed, a precise notion of allocative efficiency was just beginning to take shape through the work of leading economic theorists.²⁰ To be sure, Congress took exception to monopoly output restriction, elevated prices, and bloated profits, but it could hardly have known or understood how, by distorting relative price signals, monopoly causes a reduction in aggregate consumers' and producers' surplus. Nor would Congress have been much impressed by the threat of such a reduction if it had been

15. H. THORELLI, *THE FEDERAL ANTITRUST POLICY* 164-232 (1954). Thorelli's conclusions, *id.* at 214-17, are particularly pertinent.

16. Bork, *supra* note 9. Bork's thesis, however, is that there was a clear legislative intent to promote efficiency. *Id.* at 7 n.1.

17. This ambiguity is captured nicely in the words of Mr. Dooley, characterizing Teddy Roosevelt's early attitude: "'Th' trusts,' says he, 'are heejooous monsther built up be th' enlightened intherprise iv th' men that have done so much to advance progress in our beloved country,' he says. 'On wan hand I wud stamp thim undher fut; on th' other hand not so fast.'" H. PRINGLE, *THEODORE ROOSEVELT* 172 (rev. ed. 1956).

18. In this respect Congress's analysis of monopoly was no more sophisticated than that of Adam Smith a century earlier: "The monopolists, by keeping the market constantly under-stocked, by never fully supplying the effectual demand, sell their commodities much above the natural price, and raise their emoluments, whether they consist in wages or profit, greatly above their natural price." A. SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 61 (Modern Library ed. 1937).

19. Pp. 10-13.

20. The notion of a "deadweight welfare-loss triangle" entered the mainstream of Anglo-American economics in the first edition of Marshall's *Principles*. A. MARSHALL, *PRINCIPLES OF ECONOMICS* 447 n.1 (1st ed. 1890). An obscure English-language precursor was Jenkin, *On the Principles Which Regulate the Incidence of Taxes*, reprinted in *READINGS IN THE ECONOMICS OF TAXATION* 227, 233 (R. Musgrave & C. Shoup eds. 1959) (originally published in 1871). A variant of the concept can be traced to Dupuit, *On the Measurement of the Utility of Public Works*, translated in 2 *INT'L ECON. PAPERS* 83, 108 (A. Peacock, et al. eds. 1952) (originally published in French in 1844).

familiar with the quantitative estimates of monopoly welfare loss first made by Harberger,²¹ and later (with varying results) by other researchers. To use a comparison that would have appealed to the distinguished legislators in 1890, most such estimates of the annual welfare loss to producers and consumers translate to not much more than the price of one bottle of good Kentucky bourbon per capita.²²

Professor Posner is well aware of this last embarrassment. He tries to elude it through a bold assertion: What might otherwise be monopoly profits, and hence redistributions of wealth without clear efficiency connotations, are transformed into costs as entrepreneurs compete for monopoly positions or for a larger share of an established monopoly's rewards.²³ In the book under review this assertion is made without any supporting evidence; the skeptical reader is referred in a footnote to an earlier article by Posner. Upon consulting the article, he finds that the postulated transformation takes place by assumption; only a few scraps of indirect and anecdotal evidence are offered in support.²⁴ In its weak form—*i.e.*, as a hypothesized *tendency*—this idea is neither new nor empirically implausible. To the extent that monopoly profits are indeed so transformed, the indictment of monopoly as inefficient takes on much greater weight.²⁵

At times in his book, however, and more consistently in his prior article, Posner implies that *all* monopoly profits are converted into costs.²⁶ This requires, as Posner recognizes,²⁷ free entry with perfect foresight or the absence of diminishing returns in the acquisition of monopoly position.²⁸ The realism of these assumptions as such is arguable, and observation of real-world industries reveals that monopoly profits exist in abundance, so they can hardly have been trans-

21. Harberger, *Monopoly and Resource Allocation*, in *Papers and Proceedings of the 66th Annual Meeting of the American Economic Association*, 44 AM. ECON. REV., May 1954, at 77.

22. The quantitative estimate is adapted from F. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 402 (1970), which surveys the literature up to 1968. More recently there has been a debate over whether, at least in theory, the early estimates may have been much too low. See Bergson, *On Monopoly Welfare Losses*, 63 AM. ECON. REV. 853 (1973); Carson, *On Monopoly Welfare Losses: Comment*, 65 AM. ECON. REV. 1008 (1975); Worcester, *On Monopoly Welfare Losses: Comment*, *id.* at 1015; Bergson, *On Monopoly Welfare Losses: Reply*, *id.* at 1024.

23. Pp. 11-13. Posner refers specifically to costs engendered by nonprice competition (*e.g.*, one cartel member's efforts to provide better service than another). The value of such competition to consumers, Posner argues, is less than its cost. Pp. 12-13 & n.5.

24. See Posner, *The Social Costs of Monopoly and Regulation*, 83 J. POLITICAL ECON. 807, 809-10 (1975).

25. See F. SCHERER, *supra* note 22, at 404-08.

26. See, *e.g.*, pp. 15, 18, 52; Posner, *supra* note 24, at 809.

27. Posner, *supra* note 24, at 809.

28. See Stigler, *Price and Non-Price Competition*, 76 J. POLITICAL ECON. 149 (1968).

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formed entirely into costs. It suggests utter disregard for evidence to state baldly, as Posner does, that “[t]here is no reason to think that monopoly has a significant distributive effect. Consumers’ wealth is not transferred to the shareholders of monopoly firms; it is dissipated in the purchase of inputs into the activity of becoming a monopolist.”²⁹

If a considerable fraction of monopoly gains is not transformed into costs and if, as I believe, Congress was concerned at least as much with income distribution effects (which were well-understood in 1890) as with efficiency effects (which were not), Posner’s monolithic efficiency-maximization approach to antitrust loses considerable logical force. Certainly some of the knottier problems with which our staff grappled during my tenure at the FTC were those in which efficiency considerations pointed toward one course of action and distributive ones toward an alternative. We might have welcomed a simple, overriding goal to resolve our difficulties, but to insist that only efficiency mattered would, in my judgment, have been less than faithful stewardship to the (admittedly ambiguous) will of Congress.

Even if efficiency were accepted as the sole goal of antitrust, Posner’s analysis would contain important ambiguities. Whether for expositional convenience³⁰ or some more fundamental reason, Posner appears to view the condition for achieving economic efficiency as the equality of price with *long-run* marginal costs under equilibrium conditions.³¹ When a market is not in long-run equilibrium, as is almost always the case, it is not evident what Posner would do. The (usually implicit) assumption of most welfare economists is that short-run marginal-cost pricing is optimal and that, unless there are peculiar cobweb effects or inexhaustible economies of scale, it will also lead to equalization of long-run marginal cost and price. Posner shows no recognition of this and, in a discussion of “overproduction” and the information problems confronting sellers that is confusing if not confused,³² he seems to have no idea of how a competitive market attains short-run equilibrium. I can think of no surer way to immobilize an antitrust agency than instructing it to enforce competition under all but disequilibrium conditions; yet this is what Posner seems to suggest.³³

29. Posner, *supra* note 24, at 821.

30. P. 239.

31. P. 136.

32. Pp. 136-37, 141-42.

33. This is my inference from Posner’s continuing emphasis on efficiency goals in antitrust and from his statement that constraining price to cost (presumably long-run marginal cost) when there has been an unexpected increase in demand would result in an inefficient allocation of resources. Pp. 136-37. A purely competitive market would

One final point on goals. Posner dismisses as inappropriate or unnecessary certain "sociopolitical" rationales for antitrust—notably, the encouragement of small business and the aversion to monopolists' alleged tendency to manipulate political processes. The small business argument is rejected, as noted already, in the belief that monopolists' umbrella pricing helps small firms survive and grow,³⁴ the manipulation argument because monopolists presumably play politics to facilitate pricing behavior already deemed undesirable on efficiency grounds.³⁵

Though it could scarcely have escaped his notice, Posner completely ignores another goal: the diffusion and decentralization of power as an end in itself.³⁶ Professor Bork strained to interpret the legislative history otherwise, but it is not hard to infer such intent from Sherman Act coauthor Edmunds's allusions to trusts as "grinding tyrannies" and Senator Hoar's complaint that the "great monopolies . . . are a menace to republican institutions."³⁷ Consider Senator Sherman's statement in the principal speech supporting his 1890 bill:

If we will not endure a king as a political power we should not endure a king over the production, transportation, and sale of any of the necessaries of life. If we would not submit to an emperor we should not submit to an autocrat of trade, with power to prevent competition and to fix the price of any commodity.³⁸

Much more recently, the late Senator Hart eloquently stated the case for controlling business power per se when he introduced his "no-fault monopolization" bill:³⁹

The [desire] of the Founding Fathers to prevent the accumulation of power was born in large part of the experience of living under a monarch with too much power. Not surprisingly, given the commerce flourishing at the time, the question of economic power was not addressed in the Constitution. So, while we have relied on the Constitution to protect the individual from the power of Government, . . . [the] control of economic power has

adjust by expanding output until short-run marginal cost (not mentioned by Posner in this context) rises to equal the bid-up price. Unless marginal cost functions are discontinuous, this equality, contrary to Posner's assertion at p. 136, will hold for all sellers, not just the marginal seller.

34. P. 19.

35. Pp. 18-19.

36. See C. KAYSER & D. TURNER, *ANTITRUST POLICY* 5, 14-15, 17-18 (1959).

37. Bork, *supra* note 9, at 43.

38. 21 CONG. REC. 2457 (1890) (remarks of Sen. Sherman).

39. S. 3429, 94th Cong., 2d Sess., 122 CONG. REC. S7153 (daily ed. May 13, 1976).

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been left to the forces of competition and to antitrust laws to keep those forces vigorous.

In theory, the Constitution and antitrust laws take the same approach to controlling power—a diffusion of power centers and reliance on competition rather than a decree to determine the value of an idea or product.⁴⁰

If this is what the people speaking through their elected representatives want, Professor Posner cannot dismiss it as a goal of antitrust reform by ignoring it. And if such a goal has already been assimilated into antitrust law, as one might infer from some of the judicial decisions Posner criticizes, there is a remedy identified by President Taft:

[I]t is impossible that such a function as [antitrust adjudication] could be performed by judges, who are only men, without at times exceeding their just discretion, without at times stepping over the line which is very hard to draw between judicial construction and judicial legislation. But it must always be remembered that the legislature has complete power in this regard, and that if the courts in their construction of law miss the intention of the legislature there is immediate relief at hand in a new law which may be made more clearly to set forth the legislative will.⁴¹

Thus, if the courts have strayed beyond the bounds of the efficiency criterion Professor Posner considers so important, and if this is not what Congress wants, one wonders why Congress has not intervened. Posner provides no explanation. His case for a monolithic efficiency approach suffers as a result.

II. The Substance of Antitrust: Collusion

Posner condemns collusive price fixing because it causes inefficient resource allocation. To combat it he would retain § 1 of the Sherman Act, but with significant amendments. He criticizes existing § 1 enforcement for punishing the *attempt* to fix prices instead of the *result*—*i.e.*, the actual restriction of output. This misdirection, he believes, has two unfortunate consequences. First, enforcement resources are frittered away attacking manifest conspiracies that, because of unfavorable market structure or other conditions, have little chance of materially influencing outputs and prices.⁴² Second, the need to prove some overt conspiratorial action allows much effective collusion

40. 122 CONG. REC. S7152 (daily ed. May 13, 1976).

41. W. TAFT, THE ANTI-TRUST ACT AND THE SUPREME COURT 36 (1914).

42. Pp. 40-41.

to go unprosecuted because respect for interdependence and informal modes of communication are sufficient to sustain restraint or, more frequently, because the firms involved are able to cover the tracks of actual conspiratorial meetings.⁴³

Posner would reverse the emphasis on conspiracy, eliminating, *inter alia*, the requirement that illegality be inferred only when there are cooperative acts going beyond "individual business judgment motivated by the desire for maximum revenue."⁴⁴ He would instead advocate price-fixing liability whenever a meeting of minds on a non-competitive price can be inferred.⁴⁵ This in turn would be accomplished through a two-stage determination: first, whether market conditions are propitious for the emergence of collusion and, only after that is shown, whether such collusive pricing in fact exists.⁴⁶ Economic evidence would be stressed, with the Government bearing a heavy burden of proof to compensate for the greater possibility of error in interpreting such evidence. Posner would simultaneously eliminate prison sentences for § 1 convictions and tailor corporate fines to approximate the estimated economic costs imposed by collusion divided by the probability of its detection.

Posner's proposed approach is an interesting one that would do much, *inter alia*, for the already relatively satisfactory welfare of my chosen profession. Its most attractive feature, as Posner stresses, is that if it worked it would solve the "oligopoly problem" that has for a long time been an open sore on the corpus of antitrust law.⁴⁷ Specifically, if the tendency of concentrated industries to maintain prices at supracompetitive levels through purely tacit coordination could be controlled by the result-oriented enforcement Posner proposes, there might be less demand for the controversial alternative: an intensified campaign to fragment oligopolistic industry structures.

On two broad counts, however, I am skeptical whether Posner's approach would work. First, I doubt that the power of economic analysis has advanced so far that his two-stage determination is feasible. The first stage depends on our limited ability to predict the likelihood of supracompetitive prices from the kinds of structural indicia identified by Posner—*e.g.*, high seller concentration, low demand elasticity, slow entry, standardized products, atomistic buyer structure, static

43. Pp. 52-55, 71-72.

44. *Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 542 (1954).

45. P. 75.

46. P. 55.

47. See C. KAYSEN & D. TURNER, *supra* note 36, at 110.

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demand, and a high ratio of fixed to variable costs.⁴⁸ While I was with the FTC we had an active effort to identify potential price-fixing cases using only such structural evidence. The kindest thing I can say about the effort is that it was a resounding flop—partly because of severe data limitations and partly because our staff lacked the insight or imagination to hold its conceptual divining rod in the right position.

The second stage of Posner's approach assumes that the existence of collusive pricing can be inferred with a high degree of confidence from such indicia as stability of market shares, persistent price discrimination, divergent regional price patterns, identity of bids, profitability, and the like.⁴⁹ Granted, with *enough* strong evidence of this type, a competent economist could in good conscience testify that even though no meetings in smoke-filled rooms were proved, it was quite unlikely prices could have been set as observed had there been no tacit restrictive understanding. The trouble is, economic analysis is an elastic instrument and, I am sorry to report, some economists' consciences are also elastic, so one can find economists who with apparent conviction will explain away any pattern of behavior, however bizarre, as the consequence of special but highly competitive industry circumstances. Sometimes they may even be right, if there exists any absolute measure of "right" in such complex matters. Every tacit collusion case under Posner's scheme would be a "big case," drawing teams of economists to ply the courts with their expert but conflicting opinions.⁵⁰ In the end, the decision would turn significantly upon whose experts were more credible. It would not, I fear, be a system highly likely to yield either truth or justice, especially when private respondents pay \$1,000 per day for "credibility" (including extensive preparation) while the Government is limited to \$150 or (in exceptional cases) \$250.

My second difficulty with Posner's § 1 proposal is that, if I understand him correctly, conviction under his new approach would require more than a supported inference that a price-fixing agreement, perhaps tacit, existed. He indicates that there must be "serious limitations" of output or a substantial elevation of prices above competitive levels.⁵¹ "The antitrust enforcers," he says in a different but related context, "have more serious things to worry about than trivial departures from

48. P. 55.

49. Pp. 62-71.

50. Certain procedural reforms advocated by Posner would alleviate but not eliminate these "big case" problems. See pp. 1001-02 *infra*.

51. P. 42; cf. p. 166 (discussing lack of "tools for determining when a group of sellers is maintaining a price that is above the competitive level").

competitive pricing.”⁵² In other words, some rule concerning the reasonableness of prices presumably is to be applied. Posner decries the Supreme Court’s shift to an attempt-oriented standard of collusion, away from its stress on “the effect . . . on the market price”⁵³ and from its purported original requirement of a supported “inference that the defendants were likely to succeed in raising the market price above the competitive level.”⁵⁴ This interpretation of the Supreme Court’s original position is consistent with the Court’s *Addyston Pipe* opinion of 1899,⁵⁵ which Posner footnotes in context. I find it hard to reconcile, however, with the *Trans-Missouri Freight Association* decision two years earlier, in which the majority rejected the argument that Congress intended to outlaw only those agreements that were unreasonable restraints.⁵⁶

More significantly, the courts of the 1890s recognized more clearly than Professor Posner the difficulty of ascertaining whether prices have been elevated unreasonably. They therefore shunned setting sail upon that “sea of doubt.”⁵⁷ Furthermore, as the Supreme Court noted in *Trenton Potteries*,⁵⁸ the price that is reasonable today may under tomorrow’s changed business conditions become unreasonable. Implementing Posner’s policy would require a continuous monitoring of prices and the repeated, excruciatingly difficult, determination of whether an unreasonable elevation had occurred. The attendant litigation complexities are self-evident. I for one attach sufficient weight to the goal of decentralizing power, private *or* governmental, that I take an extremely dim view of having an antitrust agency armed with criminal sanctions perform such a price-monitoring function. I would rather see the antitrusters play “cops-and-robbers,” as Posner puts it,⁵⁹ searching for cases of explicit collusion.

III. The Substance of Antitrust: Mergers

Posner perceives antimerger law as a crude second-best solution to the problem of collusion.⁶⁰ If his direct approach to collusion were

52. P. 131.

53. P. 24.

54. P. 25.

55. *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 235-38 (1899) (modifying 85 F. 271 (1898)).

56. *United States v. Trans-Missouri Freight Ass’n*, 166 U.S. 290, 328-42 (1897).

57. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 284 (1898), *modified*, 175 U.S. 211 (1899); *see United States v. Trans-Missouri Freight Ass’n*, 166 U.S. 290, 331-32 (1897).

58. *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-98 (1927).

59. P. 76.

60. P. 96.

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implemented, he believes, the Celler-Kefauver Act, which amended § 7 of the Clayton Act,⁶¹ could be scrapped and § 1 of the Sherman Act could be used to stop mergers that would create a single dominant firm with monopoly power.⁶² This proposal turns on the feasibility of his direct approach, but let us leave those problems behind us and examine certain other aspects of his merger policy analysis.

Posner severely criticizes the economic analysis the Supreme Court used to define relevant markets and evaluate anticompetitive effects in several of its key merger decisions.⁶³ In much of this criticism I concur without further comment. For reasons outlined earlier, he also takes strong exception to the stress placed by the Supreme Court on protecting small businesses through Celler-Kefauver Act enforcement—*e.g.*, in its *Brown Shoe*⁶⁴ and *Von's Grocery*⁶⁵ decisions. Again I concur, though with reservations.

I agree with Posner that a policy of protecting small businesses may be futile. If small firms cannot hold their own in open competition with larger enterprises, banning mergers that yield economies will give small businessmen at best only a temporary reprieve, since the most efficient firms will exploit other routes (notably, internal growth) to expand their market shares. Indeed, a ban on mergers may worsen small firms' positions, and not only because it decreases the possibility of umbrella pricing emphasized by Posner. It seems clear, for example, that the new, efficient plants built by the leading American brewing companies, which were barred from expanding by acquisition, have worsened the relative cost disadvantage of small brewers and hastened their demise.⁶⁶ Medium-sized companies like Falstaff and Associated, which grew by acquiring old plants (at least, until the merger screws were tightened), later experienced significant cost disadvantages vis-à-vis internally-expanding Anheuser-Busch, Schlitz, Pabst, and Coors. In West Germany, in contrast, where a few brewing groups were permitted to acquire numerous competitors, the pace of small-plant exit has been perceptibly lower than in the United States.⁶⁷

61. The Celler-Kefauver Act of 1950, which strengthened § 7 of the Clayton Act of 1914, is codified at 15 U.S.C. § 18 (1970).

62. P. 97.

63. Pp. 96-104.

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

65. *United States v. Von's Grocery Co.*, 384 U.S. 270, 274-77 (1966).

66. F. SCHERER, A. BECKENSTEIN, E. KAUFER & R. MURPHY, *THE ECONOMICS OF MULTI-PLANT OPERATION: AN INTERNATIONAL COMPARISONS STUDY* 248-49 (1975) [hereinafter cited as *MULTI-PLANT OPERATION*]. See Burck, *While the Big Brewers Quaff, the Little Ones Thirst*, *FORTUNE*, Nov. 1972, at 102, 102-06, 178.

67. *MULTI-PLANT OPERATION*, *supra* note 66, at 167-68. Cf. J. Müller, *The Impact of Mergers on Concentration: A Study of Eleven West German Industries*, in *Proceedings of*

Even when it retards the erosion of small firms' positions, a policy that opposes mergers because they enhance the efficiency of the merged enterprise rubs against the grain of most economists' instincts, including mine. Yet, as Posner acknowledges,⁶⁸ Congress did express its desire to preserve small business in passing the Celler-Kefauver Act. No matter how strongly one may object to this criterion on the basis of logic or one's own value preferences, it seems inappropriate for either the antitrust enforcement agencies or the courts to subvert legislative intent, even when it forces decisionmakers to try to satisfy conflicting policy goals.

I believe, however, that the conflict between efficiency and small-business preservation is not really so acute. Here arises my strongest criticism of both the Supreme Court and Posner. In *Brown Shoe*, the Court seemed to accept the view that the merger of Brown and Kinney would lead to enhanced efficiency and lower prices to consumers. Peterman states that the trial record contained no substantial evidence of such efficiencies.⁶⁹ I have not read the record, but I would go further. My colleagues and I studied multiplant and vertical integration economies in the shoe industry and found that at best slight advantages are likely to be realized by a merger of firms the size of Brown and Kinney.⁷⁰ In other words, the efficiency threat to small business feared by the Supreme Court was, in that specific case, most likely a mere illusion.

Professor Posner's error is more general and hence more egregious than the Supreme Court's in this respect. Underlying his opposition to Celler-Kefauver Act enforcement is his belief that

[a]n antimerger law is bound to be a very costly method of dealing with collusion . . . because mergers that may be held to violate the law may serve to exploit economies of scale sooner than by internal expansion, to concentrate assets in the hands of superior managers, and (where merger occurs pursuant to a takeover bid) to punish inefficient or corrupt managers.⁷¹

the First International Institute of Management Conference on Economics of Industrial Structure 241, 268 (Deidesheim, W. Germany, 1974) (on file with *Yale Law Journal*) (small, inefficient, local breweries "survive comfortably").

68. P. 99.

69. Peterman, *The Brown Shoe Case*, 18 J.L. & ECON. 81, 106-17 (1975).

70. MULTI-PLANT OPERATION, *supra* note 66, at 237-354. For a more detailed discussion of the vertical integration effects, see F.M. Scherer, *Economies of Scale at the Plant and Multi-Plant Levels: Detailed Evidence* 180-81 (1975) (on file with *Yale Law Journal*).

71. P. 96. See pp. 16, 111-12.

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He presents no affirmative evidence to support this assertion, perhaps because a thorough review of what is known would afford him so little support.

There have been several studies of the Manne-Marris contention that takeovers punish inefficient managers.⁷² They reveal only a weak tendency for poorly performing firms to be taken over more frequently than well-performing corporations. Much stronger is the tendency for companies to escape takeovers by increasing their size—if need be through mergers that may even reduce stockholder welfare. Several other studies uniformly show that most sizeable mergers are followed by relatively insignificant operational changes directed toward enhancing efficiency.⁷³ To the extent that changes are effected, they appear to occur least frequently in the production area and most frequently in finance and accounting, with marketing changes (on which I shall comment from a different perspective later) occupying an intermediate position. Complementing this case-study evidence is a substantial body of statistical analysis revealing little if any systematic increase in postmerger as compared to premerger profitability.⁷⁴

In short, although exceptions surely exist, most mergers at a scale large enough to attract antitrust attention yield inappreciable ef-

72. See R. MARRIS, *THE ECONOMIC THEORY OF 'MANAGERIAL' CAPITALISM* 1-45 (1964); Manne, *Mergers and the Market for Corporate Control*, 73 *J. POLITICAL ECON.* 110 (1965). For tests of the Marris-Manne hypothesis, see D. KUEHN, *TAKEOVERS AND THE THEORY OF THE FIRM: AN EMPIRICAL ANALYSIS FOR THE UNITED KINGDOM 1957-1969* (1975); A. SINGH, *TAKE-OVERS: THEIR RELEVANCE TO THE STOCK MARKET AND THE THEORY OF THE FIRM* (1971); Hindley, *Separation of Ownership and Control in the Modern Corporation*, 13 *J.L. & ECON.* 185 (1970); Kuehn, *Stock Market Valuation and Acquisitions: An Empirical Test of One Component of Managerial Utility*, 17 *J. INDUS. ECON.* 132 (1969); Singh, *Take-Overs, Economic Natural Selection, and the Theory of the Firm: Evidence from the Postwar United Kingdom Experience*, 85 *ECON. J.* 497 (1975); Smiley, *Tender Offers, Transactions Costs and the Theory of the Firm*, 58 *REV. ECON. & STATISTICS* 22 (1976); and Singh, *Book Review*, 14 *J. ECON. LITERATURE* 505 (1976).

73. See FEDERAL TRADE COMMISSION STAFF REPORT, *CONGLOMERATE MERGER PERFORMANCE: AN EMPIRICAL ANALYSIS OF NINE CORPORATIONS* 33-54 (1972); G. NEVBOULD, *MANAGEMENT AND MERGER ACTIVITY* 162-69 (1970); *MULTI-PLANT OPERATION*, *supra* note 66, at 161-68 (in half of 36 cases mergers were followed by substantial actions to rationalize combined operations); Kitching, *Why Do Mergers Miscarry?*, 45 *HARV. BUS. REV.*, Nov.-Dec. 1967, at 84, 87-90.

74. See H. ANSOFF, R. BRANDENBURG, F. PORTNER & R. RADOSEVICH, *ACQUISITION BEHAVIOR OF U.S. MANUFACTURING FIRMS, 1946-65*, at 47-89 (1971); FEDERAL TRADE COMMISSION STAFF REPORT, *supra* note 73, at 55-58; H. LYNCH, *FINANCIAL PERFORMANCE OF CONGLOMERATES* 277-83 (1971); S. REID, *MERGERS, MANAGERS, AND THE ECONOMY* 153-264 (1968); A. SINGH, *supra* note 72, at 152-66; Conn, *Acquired Firm Performance after Conglomerate Mergers*, 43 *S. ECON. J.* 1170 (1976); Conn, *The Failing Firm/Industry Doctrines in Conglomerate Mergers*, 24 *J. INDUS. ECON.* 181 (1976); Lev & Mandelker, *The Microeconomic Consequences of Corporate Mergers*, 45 *J. BUS.* 85 (1972); Reid, *Reply*, 26 *J. FINANCE* 937 (1972); Singh, *Take-Overs, Economic Natural Selection, and the Theory of the Firm: Evidence from the Postwar United Kingdom Experience*, 85 *ECON. J.* 497, 503-14 (1975); Weston & Mansinghka, *Comment*, 26 *J. FINANCE* 919 (1972).

efficiency benefits. Much of the impetus for sizeable acquisitions appears to stem not from the quest for efficiency but from the desire to exploit stock market disequilibria,⁷⁵ to avoid double taxation of dividends or reap other tax advantages,⁷⁶ to enhance size and diversification and hence to present a more attractive picture to investors,⁷⁷ or perhaps simply to build an empire. The stock market advantages, I have argued elsewhere,⁷⁸ are largely redistributive. To the extent that there are allocative efficiency benefits through genuine risk reduction to stockholders, the same effect should be attainable through the encouragement of more competitive mutual funds using the portfolio selection methods suggested by modern finance theory in place of costly high-turnover strategies. Efficiency gains attributable to tax advantages ought also to be fostered directly through tax reform rather than through the second-best medium of mergers.

I believe this necessarily oversimplified summary of the evidence, which suggests that mergers seldom yield significant efficiencies, is nearer the truth than Posner's conclusory assertion to the contrary. At the same time I agree with Posner that most sizeable mergers of recent American experience, including those that have been attacked by the antitrust agencies, have tended to have only minor anticompetitive effects. If I am right, mergers contribute little in general either to efficiency or to monopoly. They are a deadly serious but preponderantly sterile game that diverts managerial attention from running existing operations well.

To the extent that such a low-level balance of monopoly costs and efficiency benefits prevails, the injection into federal merger policy of noneconomic goals, such as the desire for maximum decentralization of power, seems to me entirely appropriate. I would make the decentralization goal decisive with respect to quantitatively substantial horizontal, vertical, and conglomerate mergers in the absence of probable efficiency gains, and I would place the burden of proving efficiency gains or other compelling advantages on the would-be merger partners, enforcing a hold-separate order until that burden is borne. If it is borne, the hold-separate order would be removed unless the Government presents affirmative evidence of probable anticompetitive effects. Thus,

75. See Gort, *An Economic Disturbance Theory of Mergers*, 83 Q.J. ECON. 624 (1969).

76. See P. STEINER, *MERGERS: MOTIVES, EFFECTS, POLICIES* 75-95 (1975).

77. See Lintner, *Expectations, Mergers and Equilibrium in Purely Competitive Securities Markets*, in *Papers and Proceedings of the 83d Annual Meeting of the American Economic Association*, 61 AM. ECON. REV., May 1971, at 101, 107-10.

78. *Corporate Takeovers: Hearings Before the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong., 2d Sess. 110-12 (1976) (F.M. Scherer).

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my analysis, unlike Posner's, leads to a recommendation for toughening § 7 of the Clayton Act rather than eliminating it. Obviously, any reform is unlikely to happen without a clear restatement by Congress of what goals it wishes to stress. Until then, the antitrust agencies and courts will continue bumbling along, interpreting as best they can their ambiguous and contradictory mandate.

IV. The Substance of Antitrust: Monopolization and Divestiture

In part for reasons similar to those underlying his approach to mergers, Professor Posner takes a dim view of proposals to break up large firms under § 2 of the Sherman Act.⁷⁹ Besides favoring a direct attack on collusive price raising, he highlights the difficulties encountered in securing divestiture through antimonopolization suits. His review of § 2 cases reveals, not surprisingly, relatively few in which substantial divestiture was ordered and even fewer in which the divestiture had a clearly favorable impact on competition.⁸⁰ He also observes that “[a]ny proceeding to deconcentrate an industry . . . would probably be cumbersome, protracted, and indeed unmanageable.”⁸¹

Posner goes on to argue that, even if the procedural nut could be cracked, “deconcentration might impose heavy costs on society by requiring industries to operate with higher costs.”⁸² Rejecting the *Neal Report's* suggestion⁸³ that such losses be avoided by permitting respondent companies to defend themselves by showing that divestiture would cause substantial scale economy sacrifices, Posner asserts that

[t]here is no accepted method of establishing “directly” the existence of economies of scale at either the plant or the firm level. The methods that have been used (mostly engineering cost studies)

79. 15 U.S.C. § 2 (Supp. V 1975). See p. 78 & n.1.

80. Pp. 84-86. One must dispute his conclusion, however, that the divestiture resulting from the *Alcoa* decision, *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945), was “trivial.” P. 84 n.9. *Aluminium Ltd. of Canada* was hardly a “minor subsidiary” (*id.*)—it had sales 2.6 times *Alcoa's* in 1948 and has been a recurrent competitive thorn in *Alcoa's* side since then. Likewise, the “creation and rapid expansion of competing aluminum producers” (p. 88) following World War II was hardly unrelated to the 1945 decision, since *Alcoa* was deliberately excluded from the bidding for surplus war plants. See M. PECK, *COMPETITION IN THE ALUMINUM INDUSTRY: 1945-1958*, at 11-19 (1961). Similarly, Posner's statement at p. 86 that following the *Standard Oil* divestiture, *Standard Oil Co. v. United States*, 221 U.S. 1 (1911), “there was at first little competition among the companies” (emphasis added) sluffs off a fair amount of important subsequent regional market interpenetration.

81. P. 79. See pp. 1001-02 *infra* (discussion of possible procedural reforms).

82. P. 89.

83. White House Task Force Report on Antitrust Policy (1968), reprinted in 2 *ANTI-TRUST L. & ECON. REV.*, Winter 1968-69, at 11, 30.

suffer from grave conceptual shortcomings and are, in any event, probably insufficiently developed to generate evidence assimilable in a legal proceeding.⁸⁴

In support he cites two authorities. Checking the first, I found that the author did identify certain limitations of engineering cost studies but was on the whole quite positive toward their use, concluding, *inter alia*, that "this exact use opens exciting new vistas for the further study of economies of scale."⁸⁵ The other authority was Professor McGee's half of a debate on scale economies—the uncited half being my own paper that reached a rather different conclusion.⁸⁶ The most I can say under these circumstances is that Posner has not exactly told his readers the whole story.

Posner's argument also suffers from internal inconsistencies. Sixteen pages after asserting that evidence of scale economies is not assimilable in a legal proceeding, he cites the record of the *Von's Grocery* case as indicating "that a modern supermarket able to compete on terms of substantial equality with the leading firms in the market could be started with a capital investment of only \$700,000."⁸⁷ Apparently, such evidence is probative only when it supports the conclusion Posner wishes to draw. From my own experience, including nearly five years using the engineering method in an international study of scale economies in 12 industries,⁸⁸ I would argue that it is much easier to identify the size-related sources of efficiency, determine the minimum efficient scale of operations, and estimate the cost disadvantages borne by smaller plants or firms, than it is to ascertain whether prices have been elevated unreasonably. Here Posner and I appear to disagree profoundly.

He comes nearer the jugular of structural antitrust in posing a decidedly nonrhetorical question: "Ask yourself how it is that an industry becomes, and remains, highly concentrated, notwithstanding that it is presumed to be charging supra-competitive prices"⁸⁹ Specifically, if prices are held above costs and if there are no valid unexpired patents or other governmental monopoly power grants, why

84. Pp. 89-90 (footnote omitted).

85. Smith, *Survey of the Empirical Evidence on Economies of Scale*, in NATIONAL BUREAU COMMITTEE FOR ECONOMIC RESEARCH, *BUSINESS CONCENTRATION AND PRICE POLICY* 222 (1955).

86. McGee, *Efficiency and Economies of Size*, in INDUSTRIAL CONCENTRATION: THE NEW LEARNING 55 (H. Goldschmid, H. Mann & J. Weston eds. 1974) [hereinafter cited as NEW LEARNING]; Scherer, *Economies of Scale and Industrial Concentration*, in *id.* at 16.

87. P. 106.

88. MULTI-PLANT OPERATION, *supra* note 66.

89. P. 91.

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do the high prices not attract new entrants and the expansion of smaller existing rivals, sooner or (as in the case of United States Steel) later eroding the monopoly power base? A full chapter is devoted to one often-suggested answer—exclusionary practices by the monopolistic firm or group. Here Posner continues to ask many of the right conceptual questions and, with the notable exception of some confusion over the relationship between long-run and short-run marginal cost curves,⁹⁰ he shows good insight into the relevant static economic theory.⁹¹

Much less satisfactory is his handling of the case evidence. For example, reviewing the *Telex* case,⁹² he argues that Telex's entry into the plug-compatible peripherals business rendered IBM's dominant-firm residual-demand function more elastic, whereupon IBM's short-run profit-maximizing price fell.⁹³ From this proposition, which even in extreme cases is theoretically unexceptionable,⁹⁴ he concludes that "IBM was adjusting in a natural and socially appropriate manner to the erosion of its monopoly position."⁹⁵ But how does one reconcile this benign explanation with the fact that IBM set up a task force to evaluate peripheral manufacturers' costs, that the task force found (perhaps erroneously) Telex's zero-profit point to be a monthly rental of \$381 per disk drive unit, and that two months later IBM announced a fighting machine (my own interpretive phrase) priced at \$333 per

90. Thus, he states at p. 191 as a "fact" that "short-run marginal cost is lower than long-run marginal cost . . . even when there is no excess capacity." This is unambiguously wrong, when one takes Professor Stigler's preferred definition of "capacity," and is correct only for an implausible special case when the less-preferred definition is adopted. G. STIGLER, *THE THEORY OF PRICE* 156-158 (3d ed. 1966). With the preferred definition, short-run marginal cost equals long-run marginal cost by definition at capacity operation and exceeds it when the enterprise is running above capacity. When "capacity" is defined as the output at which short-run average total cost is minimized, short-run marginal cost can be below long-run marginal cost without excess capacity only if the enterprise is operating in the rising range of its long-run average-cost curve. It is not clear how firms could survive in a competitive industry under such conditions, and it is even less clear why they would engage in arguably predatory price cutting to become even larger and hence experience even more severe cost disadvantages. Posner apparently goes astray by forgetting that short-run marginal costs must rise as capacity operation is approached.

91. He seems unaware of relevant dynamic theory developments. See, e.g., Gaskins, *Dynamic Limit Pricing: Optimal Pricing under Threat of Entry*, 3 J. ECON. THEORY 306 (1971); Kamien & Schwartz, *Limit Pricing and Uncertain Entry*, 39 ECONOMETRICA 441 (1971); Lee, *Oligopoly and Entry*, 11 J. ECON. THEORY 35 (1975).

92. *Telex Corp. v. International Bus. Mach. Corp.*, 367 F. Supp. 258 (N.D. Okla. 1973), *rev'd*, 510 F.2d 894 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975).

93. P. 195.

94. Scherer, *Predatory Pricing and the Sherman Act: A Comment*, 89 HARV. L. REV. 869, 875-80 (1976).

95. P. 194.

drive?⁹⁶ How does one explain the fact that the fighting machine was merely a repackaged version of an earlier disk drive, which IBM continued to lease at substantially higher rentals to less mobile or cost-conscious customers?⁹⁷ How does one explain IBM's subsequent "term lease plan," carefully designed to impose losses on plug-compatible manufacturers (PCMs), leaving a situation projected as follows in an IBM staff memo: "PCM corporate revenues lower—no funds for mfg., eng.—dying company!"⁹⁸

Posner simply ignores facts inconsistent with his innocent rationalization. To be sure, IBM evidently continued to earn a profit on its repriced disk drives, suggesting (with certain qualifications too complex to explore here) that Telex and other PCM firms were less efficient and, arguably, deserved no protection from IBM's alleged predation. Yet one cannot legitimately stop there. One must ask why the PCM firms' costs were higher: because of unavoidable inefficiencies or because the PCMs had not yet achieved sufficient volume to realize foreseeably attainable scale economies. If the latter, I would argue that IBM's continued profitability should not negate an inference of predation.⁹⁹ None of these criticisms lessens the basic dilemma to which Professor Posner appropriately points: If IBM failed to cut prices, it would lose market position and be criticized (but perhaps, like United States Steel, not convicted) for being a sluggish monopolist; if it did react by cutting prices, it rendered itself vulnerable to antitrust suits. But neither truth nor equity is served by overlooking material facts, as Posner does, and making the dilemma's resolution seem simple when it is not.

Similarly, in analyzing the *United Shoe Machinery* case,¹⁰⁰ Posner skillfully picks apart, one at a time, the exclusionary practices cited by the court as evidence of monopolistic intent. He concludes that no

96. See G. Brock, *THE U.S. COMPUTER INDUSTRY* 116 (1975) (relying on *Telex* record).

97. *Id.* at 116-17.

98. *Id.* at 121 (quoting *Telex* record).

99. See Scherer, *supra* note 94, at 887-89. In a footnote to his *Telex* discussion, p. 195 n.39, Posner seems to embrace the latter explanation, for he states that "in general, the long-run marginal costs of potential entrants will be the same as the long-run marginal cost of the monopoly seller." In other words, if permitted time to win a sufficient volume of orders, Telex could have become as efficient as IBM. In private correspondence with me, Posner has denied that this is his view. He argues that Telex must have been an exception to his general case, for if it did have the same long-run marginal-cost curve as IBM, it would have expanded its output to achieve all economies of scale. This argument sweeps away all the interesting dynamic questions of how one achieves a least-cost volume of output quickly enough to avoid being vulnerable during the transition to larger scale.

100. *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954). See pp. 202-07.

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single practice could have sustained United's alleged monopoly position. But he does not consider whether the practices may have *interacted* to render entry difficult. Thus, he argues that United's 10-year lease policy could be surmounted if a rival manufacturer lined up customers in advance of their lease expiration dates, with roughly 10% of the market exposed to such capture each year.¹⁰¹ But Posner fails to mention the full-capacity clause in United's leases, under which lessees were normally required to use their United machines to full capacity before utilizing any other equipment.¹⁰² This *plus* staggered expiration dates *plus* fluctuations in the level of capacity utilization *plus* learning-by-doing efficiencies could clearly render entry difficult for equally efficient competitive machines, which might stand idle in all but peak-load periods.¹⁰³ Posner also fails to consider the significance of the natural and patent barriers to broad-line new entry when viewed in conjunction with the vulnerability of firms attempting to enter the market with a narrow product line.¹⁰⁴ Narrow-line entrants had to face United's demonstrated price discrimination by machine type, as well as the higher travel costs and greater delays necessary to provide repair service comparable to United's bundled broad-line service. To ignore such interactions is to miss the crux of United's business policies.

These may be extreme cases, however, and Posner's critical focus on them may reflect no more than their visibility. A more important question is whether Posner's proposed inaction with respect to structural monopoly can survive analysis on its own merits. I therefore turn from criticism of the case law to consideration of broader policy issues.

It is no secret that in recent years the FTC has sought to deal with monopolization and tight-knit oligopoly problems under § 5 of the

101. P. 203. Independent evidence shows that multiple units of many machines are used in the typical shoemaking plant. C. PRATTEN & R. DEAN, *THE ECONOMIES OF LARGE-SCALE PRODUCTION IN BRITISH INDUSTRY* 44-50, 54 (1965).

102. C. KAYSEN, *UNITED STATES V. UNITED SHOE MACHINERY CORPORATION* 70, 106-07 (1956).

103. Given n machines, the n^{th} one has value only for peak demand situations and as a hedge against random machine failures. If the machines are technically homogeneous, it would not be possible normally to distinguish the marginal from particular infra-marginal machines. But the full capacity clause does permit such differential value imputations, making machines competitive to United's perceptibly less productive than United machines with unexpired leases. Indeed, competitive machines must be marginal even with respect to United machines of older vintage and inferior productivity. Furthermore, there are learning-by-doing economies in the use of shoe machinery. See C. PRATTEN & R. DEAN, *supra* note 101, at 56-57. The machine that can only be operated when other machines are fully utilized will suffer from lower operator experience and hence be less productive than a machine interchangeable with base-line machines.

104. See *MULTI-PLANT OPERATION*, *supra* note 66, at 153-54 (new entrants tend to enter in product line or geographical niches rather than on broader scale).

FTC Act. One of the most striking lessons I learned during my tenure at the FTC was how difficult it is to find "good" monopolization cases. By "good," I mean cases satisfying three criteria: (i) monopoly power exists and has been demonstrably exercised; (ii) the possession or retention of that power is attributable to something more than superior products, service, or business acumen;¹⁰⁵ and (iii) one can identify remedies likely to benefit the consumer.

No concise summary can possibly reflect all the considerations relevant to finding "good" cases, but four major industry-wide investigations conducted during 1974-1976, my two years at the FTC, illustrate the cautious attitude one develops after undertaking a careful economic analysis. In the outboard marine engine industry, a near duopoly, the leading firm had evidently tried hard to stay within the law in the critical realm of exclusive dealerships, where scale economies severely constrained the number of potential outlets in local markets; the leaders had done a generally good job technically in meeting consumer demands; and divestiture would have sacrificed modest production scale economies while making possible the creation of at most one new competitor. In the major household appliance (*e.g.*, refrigerator and washing machine) industries, there were impressive scale economies even at the scale of the largest seller, and price competition remained vigorous despite high concentration. Evidence of alleged exclusionary practices did not materialize. In synthetic detergents, Procter & Gamble evidently owed its dominant position and superior profitability to early and aggressive development of the market, which gave it regional market shares facilitating the construction of highly efficient decentralized plants. Its lower costs in turn permitted it to maintain prices at approximately the level of smaller rivals' long-run unit costs—not the ideal situation for consumers, but arguably the best that could be accomplished under existing antitrust interpretations. Similar dynamics underlay rapidly rising concentration in the brewing industry. As increasingly affluent consumers "traded up" to premium beers, the leading companies built modern decentralized breweries. With both cost and price advantages over most smaller brewers, these companies squeezed the premium-popular price differential while apparently taking pains to stay within the bounds of relevant laws (*e.g.*, those forbidding price discrimination). Less efficient brewers with inferior brand acceptance were driven to the wall, while consumers benefited from relatively cheap premium beer.

105. See *United States v. Grinnell Corp.*, 384 U.S. 563, 576 & n.7 (1966).

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Experience with these investigations reinforced my prior belief that the links between market structure and economic performance are complex. Unlike many Chicagoans, but like Posner (who must be considered slightly, but tolerably, heretical by his colleagues), I continue to believe that markets can of their own accord fail, sometimes badly.¹⁰⁶ In my judgment, however, high concentration does not *necessarily* lead to failures warranting antitrust liability. This is so for at least three reasons. First, especially for producers' goods and intermediates, whose buyers are well-informed and often have some power of their own, price competition in concentrated industries may be a good deal more vigorous than one might anticipate on the basis of naive oligopoly theories.¹⁰⁷ Second, it is clear that scale economies and high concentration often coincide, though not on a one-to-one basis.¹⁰⁸ Third, even when price competition is less than ideally vigorous, extreme abuses of monopoly power, manifested in either very high prices or an oscillation between high and predatory prices, are relatively uncommon—if not because such pricing policies are irrational and fail to maximize long-run profits, then because of antitrust fears. Rather, most dominant firms or oligopolies with exercisable monopoly power appear to pursue some kind of a limit-pricing policy, restraining their prices to levels consistent with barriers to new entry and the expansion of fringe firms, and thus maintaining their market positions.¹⁰⁹

Here, in my opinion, Posner goes astray again. He expresses skepticism about accepted notions of barriers to entry and limit pricing.¹¹⁰ Our differences on this, partly semantic and partly substantive, are not crucial. Much more importantly, he asserts again and again that if a monopolist or an oligopolistic group persistently maintains its position of dominance, it must be because of superior efficiency. Although I have been unable to find an explicit definition, it seems clear that by superior efficiency in this context (as distinguished from the

106. This seems an accurate characterization of Posner's views despite such occasional assertions such as: "The only truly unilateral acts by which firms can get or keep monopoly power are practices like committing fraud on the Patent Office or blowing up a competitor's plant . . ." P. 212.

107. For some supporting statistical evidence, see Lustgarten, *The Impact of Buyer Concentration in Manufacturing Industries*, 57 REV. ECON. & STATISTICS 125 (1975).

108. See MULTI-PLANT OPERATION, *supra* note 66, at 222-23 (reporting correlations of $-.46$ (in untransformed terms) to $-.67$ (in logarithmic form) between three-firm concentration ratios and the number of efficient-sized plants particular markets can accommodate (an inverse index of scale economy imperatives)).

109. See note 91 *supra* (citing sources).

110. Pp. 92-93, 195 n.39.

context of allocative efficiency) Posner means lower costs.¹¹¹ Lower costs, however, are not the only reason why a dominant firm may be able to preserve its dominance without resorting to predatory pricing. They may not even be the most important reason. Alternatively, a seller may enjoy an image advantage that permits it to charge a higher price at given unit costs. Like a firm with lower unit costs than actual or potential rivals, an enterprise enjoying such an image advantage can pursue a pricing strategy that yields both a stable market share *and* continuing supranormal profits.

Posner seems to believe that such image advantages map one-to-one into costs: a price premium associated with a favorable image requires exactly offsetting advertising or other product-differentiation costs.¹¹² His error on this point, if it be that, is understandable, for much of the direct evidence on product-differentiation barriers to entry has been anecdotal, confused, or both. Two new studies, however, provide fresh insights that, I suspect, will prove to be rather general. A statistical investigation of promotion and pricing in the oral diuretic and antianginal drug markets revealed that firms that had played an innovative or pioneering role were able to maintain *both* higher prices (indeed, three to seven times those of me-too drugs) *and* lower long-run unit promotional costs while retaining high market shares.¹¹³ More generally, an analysis by Professors Buzzell and Farris,¹¹⁴ using unusually detailed data on 103 narrowly defined company operating units, disclosed that having been a pioneer in a consumer goods market permitted an average saving on advertising-plus-sales-promotion outlays of 1.45 cents per sales dollar relative to early nonpioneer sellers. Late entrants, by contrast, had to spend 2.12 cents more than early nonpioneer sellers, all else equal.

Until recently I thought such relationships might be attributable to advertising scale economies, *i.e.*, pioneers simply hold larger market shares and reap the cost advantages.¹¹⁵ But the Buzzell-Farris study

111. See pp. 92, 112.

112. Pp. 92-93, 119 n.55. One is inclined to dismiss as advocate's rhetoric Posner's argument that if Procter & Gamble were really "more efficient than any firm in the liquid bleach market" (p. 118 n.54) and hence able "to underprice the existing producers there—including Clorox" (p. 118), it would "enter the market internally and destroy its feeble competitors" (*id.*), achieving "a monopoly position," (*id.*).

113. FEDERAL TRADE COMM'N STAFF, SALES, PROMOTION, AND PRODUCT DIFFERENTIATION IN TWO PRESCRIPTION DRUG MARKETS 19-27, 45-46, 70-77 (1977) [hereinafter cited as FTC REPORT].

114. R. Buzzell & P. Farris, Marketing Costs in Consumer Goods Industries, at 8 (Marketing Sci. Inst. Rep. No. 76-111, Aug. 1976) (on file with *Yale Law Journal*).

115. See MULTI-PLANT OPERATION, *supra* note 66, at 245-53; Scherer, *supra* note 70, at 61-63.

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explicitly controlled for this additional variable and the “firstness” relationship persisted. Evidently, there is an interaction effect between firstness and subsequent ability to spend less per unit on promotion while maintaining elevated prices and a sizeable market share. Firstness in this respect may be associated with technological innovation and the early introduction of physically superior product features. But it may also stem solely from marketing innovation. Thus, Warner-Lambert did not discover or develop the leading antianginal pentaerythritol tetranitrate; rather, it was the first to promote that unpatented chemical entity vigorously under its own brand name.¹¹⁶ It is possible that a “fast second” technological innovation strategy accompanied by vigorous promotion may achieve the same effect.¹¹⁷ The main point is that early historical events, planned or accidental, frequently confer upon firms the power persistently to raise prices by far more than their own unit advertising costs without suffering significant market-share erosion.

The higher price commanded by “premium image” brands may arguably reflect superior quality and its attendant costs rather than higher advertising costs. This is undoubtedly true in some cases, but it clearly is not true generally. As one counterexample, there is evidence that pioneering premium-priced antianginal drugs not only were no more effective than dozens of cheaper chemical equivalents but may have been no more effective in long-term therapy than a placebo.¹¹⁸ Similarly, there is absolutely no reason to believe that Clorox 5.25% liquid sodium hypochlorite bleach, priced at 63 cents per half gallon at my neighborhood A & P in January 1977, is any more effective than the adjacent A & P house brand 5.25% liquid sodium hypochlorite bleach priced at 48 cents. Double-blind experiments in Sweden reportedly showed that consumers could detect taste differences between beers but that the label affected their choices far more potently than taste.¹¹⁹ It is significant that the only data request persistently resisted by the leading American brewers in connection with the FTC’s industry-wide investigation during the early 1970s concerned similar experiments. I surmise that the results, had they been obtained, would have shown that American consumers pay their

116. FTC REPORT, *supra* note 113, at 37-45. Cf. M. PORTER, INTERBRAND CHOICE, STRATEGY, AND BILATERAL MARKET POWER 44-45 (1976) (on Bic’s stick pen and Gillette’s soft-tip pen marketing strategies).

117. See Baldwin & Childs, *The Fast Second and Rivalry in Research and Development*, 36 S. ECON. J. 18 (1969).

118. FTC REPORT, *supra* note 113, at 47-49.

119. Scherer, *supra* note 70, at 55 n.8.

premium price mainly for the label rather than for the quality of the contents.

The economic implications of heavily advertised brand names and trademarking are now the subject of furious debate among economists.¹²⁰ One argument of long standing is that brand differentiation provides incentives for quality maintenance. This is no doubt true, but is control of a virtually generic trademark (such as Clorox or ReaLemon), combined with heavy advertising, necessary to sustain that incentive? In Germany "Aspirin" is a Bayer trademark; all other firms must sell acetylsalicylic acid (usually at a substantial price discount). Does Bayer Leverkusen in Germany strive more vigorously to maintain the quality of its "Aspirin" than Sterling Drug (American Bayer), Squibb, or Walgreen's in the United States? I doubt it. Why not then permit Brown's Clorox, Smith's Clorox, and perhaps even Posner's Clorox?¹²¹ Especially for so-called "experience goods," which are purchased repeatedly, recognition that one's product is identified by maker and that a bad consumer experience will mean lost repeat sales should generate significant quality-control incentives. Another argument might deny that consumers can cope with such subtle distinctions,¹²² holding instead that in a world of increasing complexity heavily advertised brands simplify the learning on which repeat-buying decisions are based, thereby reducing a cost that appears in no firm's books of account—consumers' information-processing costs.

There is undoubtedly some truth also to this second argument, but there exist several further perspectives on the advertising issue, which is a high megatonnage time bomb with which antitrust policy must sooner or later cope. First, no amount of semantic waffling, by Posner¹²³ or anyone else, can paper over the fact that the possession of a well-received brand image is a form of monopoly power. It permits the firm to elevate its price over its own long-run costs, perhaps by a substantial margin. Second, it seems to me that, at least in the consumer goods industries, image advantages confer a quantitatively im-

120. See W. COMANOR & T. WILSON, *ADVERTISING AND MARKET POWER* 8-63 (1974); J. FERGUSON, *ADVERTISING AND COMPETITION: THEORY, MEASUREMENT, FACT* 15-53 (1974); J. SIMON, *ISSUES IN THE ECONOMICS OF ADVERTISING* 167-285 (1970); Brozen, *Entry Barriers: Advertising and Product Differentiation*, in *NEW LEARNING*, *supra* note 86, at 115; Mann, *Advertising, Concentration, and Profitability: The State of Knowledge and Directions for Public Policy*, in *id.* at 137; Nelson, *Advertising as Information*, 82 *J. POLITICAL ECON.* 729 (1974).

121. In a proposed order an FTC administrative law judge required Borden, Inc., to license use of its ReaLemon trade name but also required licensees to disclose conspicuously the identity of the manufacturer or distributor. Borden, Inc., No. 8978, at 167 (Aug. 19, 1976) (on file with *Yale Law Journal*) [hereinafter cited as ReaLemon Order].

122. I say "might" because I have not seen the issue addressed squarely.

123. P. 119 n.55; see pp. 92-93.

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portant form of monopoly power—perhaps the most important. Furthermore, for whatever reason—television, the rising complexity of consumption, greater company sophistication in marketing, or some as yet poorly understood factor—the problem appears to be growing. Since World War II concentration has declined on average in producer goods industries but increased in consumer goods industries—the more so, the stronger the industry’s propensity toward advertising-based product differentiation.¹²⁴ Third, one may well conclude that the problem is already sufficiently serious that something should be done about it. The monopoly price premiums associated with image advantages may be, among other things, a highly regressive tax on consumers. There is reason to believe, for instance, that a higher fraction of consumers in low-income areas than in high-income areas pay the price premium for the dubious superiority of Wonder Bread over private-label alternatives. The traditional remedy for such disparities is better consumer information. Yet consumer groups, news media, and government agencies have poured out untold quantities of information without stemming the tide of high-price brand buying. In view of this failure, or at best limping success, one is emboldened to seek stronger medicine: antitrust.

It is only a slight exaggeration to say that powerful trademarks could be opened up to competitive licensing at the stroke of a judicial pen. The benefit would presumably (although in the present state of knowledge, not demonstrably) be lower prices and reduced outlays on promotion. The costs would be some risk (in my judgment, slight) of weakened quality control, some additional inspection costs to ensure that quality standards are met,¹²⁵ a possible loss of scale economies that would be weighed in advance before trademark licensing were decreed, an added information-processing burden on consumers, and a certain amount of violence to traditional property rights. I believe that in numerous cases the social benefits would outweigh the costs. A keystone of this strong value judgment is the belief that additional mental labor in consumption decisionmaking would not reduce national income or consumer satisfaction. Indeed, it might add spice to life.¹²⁶ And the questions surrounding the allocation of property rights are not unlike those considered in more than 100 compulsory patent-

124. See Mueller & Hamm, *Trends in Industrial Market Concentration, 1947 to 1970*, 56 *REV. ECON. & STATISTICS* 511, 513 (1974).

125. This could be done privately without involving a government bureaucracy. See ReaLemon Order, *supra* note 121, at 167-70.

126. Cf. T. SCITOVSKY, *THE JOYLESS ECONOMY: AN INQUIRY INTO HUMAN SATISFACTION AND CONSUMER DISSATISFACTION* 212-15, 232-36 (1976) (arguing that skill and meticulousness in consumption should be cultivated to increase enjoyment of national income).

licensing decrees issued by the federal courts or in foreign legislation requiring patent licensing in certain instances.¹²⁷ An important open question is whether trademark licensing should be ordered only when classic monopolization symptoms exist, as the administrative law judge found in the *ReaLemon* case,¹²⁸ or, in view of the modest probable social costs, whether such licensing should be decreed when there is substantial monopoly power of long standing without any abusive conduct other than elevated prices. For the latter, a congressional push on the judicial pen may be necessary. I believe that such a step should be seriously considered.

One further step merits attention. Although I acquired at the FTC a healthy respect for the economic costs that would accompany divestiture in certain cases, I believe there is persuasive evidence that in many situations substantial divestiture could be accomplished with little or no sacrifice of scale economies or other efficiencies.¹²⁹ The brewing industry provides a case in point. All of the leading firms but Coors operate multiple plants. Multiplant operation appears to offer few economic advantages in brewing other than those associated with having and reinforcing a nationwide premium image.¹³⁰ I once thought the image factor was a compelling bar to structural reorganization,¹³¹ but at the time I failed to realize that the image obstacle could be overcome rather simply through the cross-licensing of formulas and trademarks among divested, regionally-specialized plants. Even after recognizing that possibility, I opposed structural action by the FTC because the industry was still undergoing efficiency-enhancing structural change; because the leading brewers in particular had done a good job increasing their productive efficiency, thereby providing consumers with cheap beer; and because, given these facts, structural action appeared inconsistent with the intent of § 2 of the Sherman Act, as interpreted by either Posner or me.

But some day the structural rationalization process will run its course; the industry will be a mature, relatively tight oligopoly (or set of regional oligopolies), and the preponderantly competitive pricing behavior of the past may give way to something more closely resem-

127. See STAFF OF THE SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 86TH CONG., 2D SESS., *COMPULSORY LICENSING UNDER ANTI-TRUST JUDGMENTS* (1960). As has the debate over trademark licensing, such judicial decrees have regularly been attended by predictions of economic disaster. See Wall St. J., Jan. 27, 1956, at 6, col. 1.

128. See note 121 *supra*.

129. *MULTI-PLANT OPERATION*, *supra* note 66, at 332-42, 393-96.

130. *Id.* at 259, 334-35.

131. *Id.* at 395.

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bling the textbook oligopoly pattern. What then? If past structural anti-trust enforcement traditions hold, most likely nothing. Yet the social costs of reorganization at that stage will almost surely be small, while the gains in terms of reinvigorated price rivalry will probably be appreciable.¹³² Moreover, with little or nothing to lose in the way of efficiencies, there is much to be said for emphasizing another goal of antitrust—the desire for maximum decentralization of economic power. Like Posner, I do not think the enforcement agencies or the courts should inject that goal at will into their decisionmaking. But apparently unlike Posner, I approve of its inclusion. I therefore believe that Congress should conduct a thoroughgoing review of the relevant evidence, sort out its own thinking, and provide a clear indication of what structural antitrust goals it wants implemented under what conditions. The result might be nothing, but it might also be a radical change in policy toward the kind of economic structure we will carry into the 21st century.

V. Antitrust Procedure

There is a good deal more in the Posner book—*e.g.*, on potential competition,¹³³ information exchanges,¹³⁴ resale-price maintenance,¹³⁵ and exclusive territorial restrictions.¹³⁶ Some of it is good, some not so good. Let me end, however, on a note of harmony and commendation. After a perceptive analysis of how the federal antitrust enforcement bureaucracies function and malfunction, Posner points with justified alarm to the “enormous cost of antitrust proceedings, . . . the substantial probability of error that is inherent in the unwieldy and archaic procedures” and “[t]he monstrous, indeed grotesque, proportions of the modern antitrust suit.”¹³⁷ To remedy matters, he proposes that after pretrial discovery, the parties “hammer out” to the maximum degree possible a stipulated narrative of the relevant facts, leaving

132. One of the potential costs of deconcentration mentioned by Posner is the punch-pulling, price-raising effect that fear of exceeding some actionable market share or concentration threshold might have on leading firms. P. 94. I agree that there is a danger. It could be minimized by giving explicit consideration in divestiture actions, as suggested in my brewing example, to the vigor of a company's performance. Also, divisional-level managers' competitive instincts might actually be whetted by the recognition that substantial market share gains could propel them into running their own (divested and smaller) enterprises.

133. Pp. 113-25.

134. Pp. 135-47.

135. Pp. 147-66.

136. Pp. 159-63, 165-66.

137. P. 232.

only genuinely disputed facts and principles as the focus of oral testimony, document submissions, and argument. Arbitration would be used to settle technical disputes, and fines or damage penalties would be levied for demonstrably uncooperative behavior.

Such procedures might arguably conflict with the right to a jury trial in criminal cases. But even if such constitutional impediments exist, I do not consider them serious, since in my opinion the most fruitful context for such expedited procedures would be suits at equity to enjoin mergers or abusive practices or to dissolve objectionable concentrations of power, not to penalize price fixers. As suggested earlier, it would be much easier to narrow the range of dispute on such essentially objective questions as market definition, the scope of scale economies, and the probable efficiency implications of particular organizational arrangements than to determine whether a price has been elevated to "unreasonable" heights. Despite Posner's argument to the contrary, allegedly criminal price-fixing behavior could be adjudicated under more traditional procedures. The main bar to reform may be judges' natural fear of adverse appellate rulings if they exercise too firm a control over trial proceedings—*e.g.*, by ordering capital punishment for "stonewalling" attorneys. To eliminate this and other obstacles, I believe Congress should speak with a thundering voice for procedural streamlining along Posnerian lines.