REVIEW


Peter O. Steiner†

This is a hard book to come to terms with, for it is difficult to know just what it is. It has a central thesis—or argument—that I will state in a moment. It has a central quarrel—or debate—that seems to be its motivating force. It proposes major changes in antitrust laws and in antitrust enforcement, which apparently derive from either the argument or the debate. Whether the proposed new approach is designed merely to further the debate or is intended as a program to be taken more or less literally is not clear. The suggested approach does not consist of proposals for small adjustment, but requires rather a bold quantum leap to a new regime in law, in enforcement techniques, and in procedures. As such it is, concededly, often unrealistic and impractical. The dust jacket suggests the book will “challenge the thinking” of anyone concerned with public policy toward business. If that is the relevant criterion, the book is certainly a success.

I

Professor Posner’s central thesis can be simply stated. Let me put it in terms that maximize my agreement with it.

1. Efficiency in the use of resources is and ought to be a dominant goal of antitrust policy. There are important and well understood economic-theoretical senses in which competition promotes efficiency. Economics must therefore play a central role in a sensible antitrust policy.¹

2. Monopoly, whether exercised by a single firm or by a group of firms acting jointly, may lead to inefficiency both by reducing output of the monopolized commodity below the allocatively efficient output and by creating monopoly profits some of which become converted into social costs as real resources are devoted to efforts to achieve or maintain the monopoly.²

† Professor of Economics and Law, University of Michigan.


² Posner 8-14.
3. Monopolies, however, may be the source of real efficiencies in some instances. Thus while monopolistic behavior is a proper focus of attention, one must be wary of structural solutions or diagnoses. Cartel-like output restriction is most likely to lead to the social inefficiencies of monopoly, and least likely to offer the advantages of large-scale production or distribution.  

4. Antitrust policy has proved a failure, by virtue of errors of both commission and omission. Practices are forbidden that should not be, and other practices that in fact contravene the policy of the antitrust laws are left alone. More specifically:

a. The Sherman Act has proved to be ineffectual in dealing with forms of collusive pricing that do not generate detectable or inferable acts of agreement or communication among the colluding sellers.  

b. The courts have been obsessed with defining objectionable behavior in a legalistic way, to the neglect of discerning probable adverse effects on competition. The courts have swept within the rule forbidding price-fixing many practices, such as the exchange of price information among competitors and the fixing of maximum or minimum resale prices by a seller, which are often procompetitive rather than anticompetitive. The category of prohibited exclusionary practices has been uncritically permitted to expand, embracing many practices that actually reduce the social costs of monopoly.  

c. When the courts, Congress, and the Department of Justice have turned from behavior to structure they have been unable to formulate consistent, sensible, and workable standards of illegality for mergers between competitors or between potential competitors. Similarly they have failed to define structural standards of size and concentration that satisfactorily identify cases where inefficient monopoly occurs.  

5. These deficiencies require fewer, simpler statutes, not more. Section 1 of the Sherman Act should be given an expansive interpretation, eliminating the need to find or infer an agreement (conspiracy), and all other antitrust statutes can usefully be repealed. Enforcement can be left more often to private enforcers, if

---

3 Id. at 26-27, 89-91.
4 Id. at 39-55.
5 Id. at 135-47.
6 Id. at 151-66.
7 Id. at 196-201, 203-05 (vertical integration and lease-only cases).
8 Id. at 97-110, 113-22.
9 Id. at 212-17.
penalties are made appropriate to the social costs imposed by violations, and if the transactions costs of litigation are reduced to manageable proportions.\textsuperscript{10}

I accept points 1 to 3.\textsuperscript{11} Points 4 and 5 provide too long an agenda for me to discuss fully. I shall focus largely on the non-legal\textsuperscript{12} stages in the arguments by which Professor Posner advances his thesis. Issues where I find myself in relatively clear disagreement with Posner will be highlighted.\textsuperscript{13}

Whether this is a very good book or a very bad one depends upon how seriously one takes its pretensions and its stated purpose. It is bold, uneven, and idiosyncratic. It is easy to fault in the small. It is most generously viewed as an expanded essay that might appear as one of a series under the general rubric "Point of View." One might imagine former antitrust chiefs (and law professors) Donald Turner\textsuperscript{14} and Thomas Kauper\textsuperscript{15} as well as a couple of economists from the large, able group whose views and contributions Posner virtually neglects (for example, Richard Caves of Harvard, M.J. Peck of Yale, Leonard Weiss of Wisconsin, or F.M. Scherer\textsuperscript{16} of Northwestern) doing similar pieces. I commend such a series to the University of Chicago Press.

10 \textit{Id.} at 221-32.

11 I have understated Posner's view in point 1. He feels strongly that efficiency is the only defensible goal of antitrust policy. \textit{Id.} at 8-22. It is not clear, however, why a distaste for power (for example) does not merit some weight even at the cost of some sacrifice of efficiency. One of the major teachings of economics is that whenever marginal benefits would be provided by a change, it is worth incurring some marginal costs to secure those benefits.

12 For those who do not know, it is perhaps appropriate to explain that I am, by training at least, the mirror image of Professor Posner. While we both work the interface of law and economics, he is formally trained as a lawyer, but knows a relatively small but important part of economics quite well. I am formally trained as an economist but know a relatively small but important area of the law quite well. While, for reasons of comparative advantage, I resist the temptation to debate purely legal issues, I do find some things odd. For example, Posner has almost nothing good to say about the Court's ability to utilize its ample discretion to make sense out of the statutes it has, particularly section 1, yet he appears willing to make section 1 even more constitution-like, and to trust the same judges to make sensible decisions.

13 I agree for example with most of his discussion of restrictive practices. The disadvantage in neglecting agreements is that it makes my comment appear highly critical. The fact is that I agree with a large fraction of Posner's prejudices, and an even larger fraction—perhaps 80 percent—of his analysis. I would even agree with Posner that this implies I may well be wrong 20 percent of the time.

14 Turner is the personification of the "other side" in the central debate. He is cited, alone or with his co-conspirators Kaysen or Areeda, at least a dozen times, virtually none of the references favorable. Only Posner himself is cited more frequently. Other multiple citees are Stigler (7), McGee (5), Bowman (4), Bork (3), Peterman (3) and a handful at 2 each.


Viewed in this light, Professor Posner's book is a delight, full of penetrating critiques, interesting insights, and suggestive policy proposals. Among the critiques are a dissection of the Neal Task Force's deconcentration statute,17 of the Warren Court's antitrust opinions in general (and Brown Shoe in particular)18 and of John McGee's cavalier dismissal of predatory pricing as too improbable to worry about.19 Among the insights are uncommonly comprehensive views of the efficiency losses due to monopoly,20 of how to set the economic punishment for an antitrust violation so as to approximate the expected external costs imposed by the violation,21 and of the potentially adverse incentive effects of using many kinds of stated threshold levels as prerequisites to structural violations.22 Some of the most attractive new policy suggestions concern penalties,23 procedures for trying complex cases,24 guidelines for evaluating information exchanges,25 and the desirability of distinguishing between tying agreements that involve systematic price discrimination and those that do not.26 That this spicy goulash is salted with truisms ("Some degree of concentration thus appears to be a necessary condition of successful collusion in markets governed by the Sherman Act."27), peppered with falsisms ("If we knew the elasticity of demand facing a group of sellers, it would be redundant to ask whether the group constituted an economically meaningful market."28), and contains some foolish policy suggestions, is of small

17 Posner 80-95.
20 Posner 8-14.
21 Id. at 221-25. Thus an offense that has, on average, one chance in (say) five of being detected and successfully prosecuted should cost the offender five times the external costs imposed by his violation. Multiple—for example, treble—damages are thus viewed analogously not to a finder's fee for the plaintiff, but to an effluent charge on the defendant. While suggestive, this is not wholly satisfactory. Posner appears to neglect the inherently haphazard impact on individual defendants and plaintiffs of private litigation. For example, if individuals or firms are risk averse, penalties calculated under Posner's scheme will over-deter them. Moreover, since potential violators can surely affect the probability of detection and conviction by investing resources (wastefully, from a social point of view) in concealment, in bribery, and in legal defenses, there are some wasteful disincentives in Posner's scheme.
22 For example, if a certain market share triggers antitrust concern, an efficient firm approaching it will be motivated to raise price and not compete vigorously for additional customers. Posner 94.
23 Id. at 221-25.
24 Id. at 232-36.
25 Id. at 135-47.
26 Id. at 171-84.
27 Id. at 52.
28 Id. at 125.
moment if the book is viewed as a provocative essay. Hyperbole, even occasional error, keeps things from getting dull. This is without question a sprightly book. Perhaps it is ungracious, in this world of dreary writing, to expect more.

Treated, however, as Posner asks us to treat it—as a "cohesive book" designed both to sustain a coherent argument that inheres in his many earlier writings on antitrust and to provide his "reasonably detailed blueprint" for the overhaul of the antitrust laws before a wide audience—it is far less satisfactory. This book is, on the surface and deep down, merely one thrust in a debate. The talents and tools of the debater are not those of the architect, and a debating position has more caricature than blueprint in it. Professor Posner's edifice is not only impractical, as he more or less recognizes, but it also has insufficient foundation. Neither is Posner (at least as here reflected) much on scholarly citation, and his neglect of all sorts of prior and by no means superseded analyses is disturbing, not because it offends a sense of scholarly due process but because his analysis is unnecessarily superficial as a result.

All this gives a reviewer problems. It is bad form to criticize an author for not having written a book he might have written but did not choose to write. On the other hand, neither must one accept preface rhetoric as indicative of real purpose. Because I believe a major purpose of the book is to argue against the policy views of Turner and others who believe in legislative structural reform (such as deconcentration statutes), I shall not neglect the sufficiency of that attack. But, however impractical some of Posner's proposals may be, his central proposal deserves attention. Professor Posner, it is plain, believes he is on the right track and intends to be taken more or less seriously. If he does not provide a blueprint, he does suggest a compass direction. Thus his basic arguments supporting the thesis that what we now do is plainly wrong and can readily be improved by proper attention to the teachings of economics are worth a closer look.

There is one further difficulty in doing this. Posner, we have come to know, is an indefatigable writer, and, less laudably, a relentless publisher of what he writes. On many subjects one can identify an "early," a "middle," and a "most recent" Posner; indeed he has chided one of his critics for failing to deal with the "mature Posner" view on a particular topic. This book, while it is 1976

---

29 Id. at vii-viii.
20 See Posner, Oligopolistic Pricing Suits, the Sherman Act, and Economic Welfare: A Reply to Markovits, 28 STAN L. REV. 903, 906 n.9 (1976). In this book Posner does not indicate
Posner by definition, is third or fourth stage Posner on some topics, such as oligopoly, and first stage Posner on other topics, such as predatory pricing. One of the small fascinations with this collection of new and edited old is to see how his views have shifted, and to wonder what they will be two or three years hence. Posner never highlights these shifts, but they are present nevertheless.

II

Posner's explanation for what he regards as the shambles of antitrust law and its enforcement today is that the courts have been beguiled into looking simplistically either at certain aspects of the behavior of firms (particularly communication with competitors) or at various measures of market concentration. Although phrased as an attack on the Supreme Court, it is no less an attack on the many economists and lawyers who have seen market structure and market behavior as more or less promising proxies for market performance.

The need for proxies, in both economics and law, has long been recognized. Even though the purpose of antitrust policy is to prevent unsatisfactory performance (for example, the restricting of output and the raising of prices), we cannot tolerate being placed in the position of having to evaluate the reasonableness of actual prices and outputs. That conception of the rule of reason died a deserved death long ago. The alternative is to find proxies for, or predictors of, the conditions that are likely to lead to unsatisfactory performance. Much legal and economic groping in the fields of antitrust and industrial organization has been directed toward finding or forging the links that will lead to satisfactory proxies.

Economics has led the law to some obvious ones. Because a monopoly has both the ability and the incentive to restrict output and raise price, a sufficient degree of market power is a likely correlate, albeit an imperfect one, of monopolistic performance. Hence section 2 is not inherently absurd.

Because agreements among competitors to raise prices, divide markets, and restrict output are likely mechanisms by which otherwise independent sellers might achieve monopolistic results, it is reasonable enough to make such agreements at least presumptively illegal. Hence there is some logic that he is recanting his earlier views: "I thought at first that the articles could be reprinted with few changes, but a rereading has convinced me that a collection of the unrevised articles would contain too much detail, too much repetition, and too many gaps to sustain a coherent argument." POSNEvii-viii.

21 See United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897).
to section 1. The less the chance that a particular practice has redeeming virtues, the stronger might be the presumption against it. Hence the distinction between naked and ancillary restraints, and hence too, the rule of reason which applies different treatment to different forms of conduct. Practices viewed as having virtually no redeeming value become likely candidates for per se illegality.

Because mergers between large, viable competitors increase the size of firms, the market share of the larger firm, and market concentration (factors widely taken as correlated with intensity of competition and likelihood of monopolistic behavior), such mergers seem to merit close scrutiny. For one thing, the pre-merger firms have proven their ability to survive in the market. Moreover, a merger between existing competitors may lead to less competition for a given amount of growth in firm size than would internal expansion. Further, a merger is a temporally well-defined event which presents an obvious opportunity for examining industry structure, behavior, and performance. If a merger is likely to prove socially undesirable it is plainly easier to enjoin it than to subsequently undo it. Hence there is good reason to treat the merger differently from either the single firm monopoly (which is more likely to be a result of real economies, and is more difficult and risky to undo) or the loose-knit cartel (which is less likely to achieve real economies of integration, and may be more difficult to detect). Thus a separate merger statute, such as section 7, has a logical foundation.

One can agree with Posner that current antitrust regulation is marred by legal lacunae (such as undetectable collusion or unilateral predatory conduct by firms lacking sufficient monopoly power to be reached under section 2) and legal error (such as the failure to recognize that form is sometimes an extremely misleading guide to substance, that fixing maximum prices has effects different from the effects of fixing minimum prices, and that vertical relationships are very different in competitive terms from horizontal ones). Moreover, one can agree that none of the proxies is perfect. A monopoly may lead to greater efficiency, more concentration may increase the intensity of competition, and concentration may interact with transport costs, elasticity of supply, and other factors in ways that

---

sometimes make simple relationships unsatisfactory. But these con-
cessions imply only that a perfect policy is unattainable by use of
imperfect proxies.

The analytic leap from this modest proposition to the notion
that existing antitrust policy is thoroughly unsatisfactory and
should be discarded implies either that it is worse than nothing, or
that there is a superior alternative. Posner persuades us of neither
implication, and that is my major concern. What he does instead is
to keep poking at the imperfections of present policies until one feels
(not necessarily with justification) that anything so flawed could
beneficially be replaced by a drastically new approach. Then he
suggests such an alternative, one which avoids certain mistakes of
present policy, but he does not expose his proposal to the same kind
of probing and pecking. These are the techniques of the advocate
and are appropriate in an adversary proceeding. Whether they make
for a satisfactory blueprint is another matter.

III

In this section I wish to look briefly at the form of Posner’s
negative argument. In the following section I will examine his posi-
tive alternative.

Much of present policy is unsatisfactory, and critics of diverse
backgrounds, on and off the Court, in and out of government, have
so noted. However, some of the worst decisions of the Supreme
Court do get overruled, or at least eroded, and I do not think one
can readily rebut the hypothesis that constructive changes in anti-
trust interpretation have occurred over the decades. But neither
the presence of imperfections, nor the fact that they are sometimes
corrected goes to the heart of the matter.

Posner plainly means to say more than that present policy is
not satisfactory. He means, I infer, that present policy makers think
about (or work on) antitrust problems in a way that is bound to lead
to unsatisfactory results. That is a hard case to make, and Posner
has not seriously tried to make it. What he has done instead is to
attack, almost anecdotally, the quality, the logical sufficiency, or
the practicability of the arguments of his mainstream opponents.
This kind of attack cannot show that failure inheres in the present
approach. Moreover, many of his apparently devastating thrusts

31 The decisions in United States Steel Corp. v. Fortner Enterprises, Inc., 97 S. Ct. 861
(1977) and Continental T.V., Inc. v. GTE Sylvania, Inc., 97 S. Ct. 2281 (1977) are recent
examples of the Court correcting genuine imperfections.
32 See, e.g., POSNER 40-41.
and slashes rest upon debating tricks that can be turned the other way. Let me provide a few illustrations of Posner's style of argument, for it is my thesis that his negative argument is mostly style, not substance.

A. Unreasonably Shifting the Burden of Proof

Turner's analysis is a logical application of the interdependence theory of oligopolistic pricing. But the theory is inadequate. The idea that a seller in a concentrated market will [may] be reluctant to initiate price reductions—simply because he knows that, unlike the situation in an unconcentrated market, a price cut will [may] have so large an impact on the sales of his competitors as to force them promptly to match the cut, thereby wiping out the price cutter's gains and leaving everyone worse off than before—depends on a number of critical, but unexamined, factual assumptions. One is that there will be no appreciable time lag between the initial price cut and the response; if there is, the price cutter may obtain substantial interim profits from his lower price. Yet there may well be such a lag, if the price cut can be concealed or, in cases where concealment is impossible, if the other sellers cannot expand their output as rapidly as the first to meet the greater demand at the lower price.\(^9\)

With the substitution of the two bracketed "mays", this is a reasonable statement of a widely held, widely discussed, and frequently tested hypothesis. After pointing out other assumptions made by proponents of the interdependence theory of oligopolistic pricing, Posner concludes, "These assumptions may be generally valid, but more than assertion is required to make them so."\(^{10}\) Posner does not explore for empirical evidence of whether price competition is unimpaired in all, most, or some small-numbers situations. Neither does he explore or cite the substantial theoretical literature that discusses the conditions under which temporary profit possibilities (due to lags in response or due to something else such as cost difference among sellers) do or do not make it profitable for one firm to cut price and seek a larger share of what will be thereby smaller industry profits.\(^{11}\) Instead Posner regards the "oligopolistic interde-

---

\(^9\) Id. at 44 (emphasis added).
\(^{10}\) Id. at 45.
\(^{11}\) See, e.g., F. Scherer, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 224-30 (1970).
pendence” hypothesis as effectively refuted by his counter-example. Of course, Posner may be right, but more than stating (in fact, overstating) the hypothesis and presenting a conceivable counter-example is required to make him so.

Another objection to the use of evidence of price discrimination in proving collusion is that discrimination should be encouraged rather than discouraged because it results in an expansion of output over the level produced by the single-priced monopolist. However, only perfect price discrimination, which is never possible in practice, is certain to result in a larger output than single-price monopoly (in fact, in the competitive output). Whether the much cruder forms of discrimination that one encounters in the real world lead on average to a greater or smaller output than single-price monopoly is an empirical question.42

Because it is an “empirical question,” evidently we need not worry about whether it happens at all, often, or all the time! In the 44 years since Joan Robinson presented a proof of the possibility theorem that a two-price scheme might lower output,43 no one (to my knowledge) has found, as an empirical matter, a case of price discrimination leading to lower output.44 That of course does not permanently resolve the empirical question, but it is surely suggestive. Treating events of unknown probability as if the probability of their occurrence is 0.5 is known as the fallacy of equal ignorance. Let me turn this device around: I am puzzled that Posner does not regard his basic condemnation of cartels (or monopolies) as output-reducing to be unsupportable because it is perfectly possible that cartelization (or monopolization) can reduce costs enough to lead to higher output. Whether they do is, after all, an empirical question.

B. Forced Dichotomization

A similar fallacy is the proposition that if something is not A it must be B. Consider the Posnerian characterization of the oligopolistic interdependence theory: “The impermissible analytic leap (which proponents of the ‘interdependence’ theory of oligopoly often

42 Posner 64 (emphasis added). Posner cites no empirical evidence in support of the quoted statement but instead cites two purely theoretical proofs of a possibility theorem which is not quite the same as the proposition stated by Posner in the next-to-last sentence quoted.

43 J. Robinson, The Economics of Imperfect Competition 188-95 (1933).

44 Indeed, Robinson, on the pages immediately after the ones Posner cites, argues to the conclusion that “on the whole it is more likely that the introduction of price discrimination will increase output than that it will reduce it.” Id. at 201.
make) is from the proposition that concentration is probably a necessary condition of clandestine collusion to the proposition that it is a sufficient condition." Not only do I know of no one who assumes this often, I know of no one who assumes it at all. What the structuralists whom Posner is attacking do assume is that the probability of what Posner calls clandestine collusion is not unrelated to oligopolistic concentration, and that beyond some threshold, it may be appropriate to erect a rebuttable presumption that a concentrated market will produce, among other undesirable results, such undetectable collusion. This is a proposition well worth extended discussion, which it has received. Instead of advancing the discussion, Posner dismisses the argument on the ground that "there is nothing in the theory of cartels to suggest that if there are just a few major sellers in a market competition will automatically disappear."

It is just because oligopoly is not necessarily inversely related to intensity of competition that there is a need for theories of oligopoly in addition to theories of perfect competition and of complete monopoly. Posner implies, but surely he does not believe, that those who worry about oligopoly neglect the possibility of rivalrous behavior or predict perfect monopoly in every oligopolistic setting. A much more sophisticated view pervades Professor Turner's writings, to pick the structuralist Posner cites. The central theme of the theory of oligopoly held by economists for at least 28 years is that fewness, by itself, tells us too little. In oligopoly situations there are tendencies toward, and tendencies away from joint profit max-

---

45 Posner 54.
47 Posner 54.
49 I refrain from tracing the history of oligopoly from A. Cournot, RESEARCHES INTO THE MATHEMATICAL PRINCIPLES OF THE THEORY OF WEALTH (1838) to the present. The publication of W. Fellner, COMPETITION AMONG THE FEW (1949) should be noted, however, not only because this book's central insights remain current, but also because its very title refutes Posner's implication. Fellner, incidentally, is not included in the index to this book, nor, to the best of my ability to discover, is he referred to anywhere in the book. The absence from the index is not very informative. The index printed is a small, possibly random, sample of the cases, subjects and publications discussed and referred to in the book. I cannot remember a worse index than this one. Fellner is cited in Posner's article, Oligopoly and the Antitrust Law: A Suggested Approach, 21 STAN. L. REV. 1562, 1563 n.8 (1969), as part of the "voluminous" economic literature expounding the interdependence theory of oligopolistic pricing. Posner seems largely unaware of how close many of his (and Stigler's) ideas are to Fellner's. The sophistication of the Posner argument suffers as a result.
C. Pejorative Labeling

1. Labeling of arguments. Obviously no one need take seriously arguments that are "ad hoc," "unlikely," "unpersuasive," or "strained." Yet these are the sort of arguments that characteristically stand in Posner's way. Consider Posner's treatment of one aspect of the argument that man-made barriers to entry might justify dissolution of giant firms in concentrated industries.

Advertising is frequently considered a barrier to entry. The argument is that massive advertising creates a consumer preference for existing brands which the new entrant can overcome only with still more massive advertising. This is implausible, however. Massive advertising will raise the cost and hence the price of those brands and thus give the more moderately advertised or nonadvertised new brand a price advantage.50

A couple of paragraphs later the argument that advertising is a barrier to entry (already "implausible") is further deprecated as "strained and ad hoc."

But surely here it is Posner whose counter-example is strained and ad hoc. It is well known that advertising may pay in the sense of being more profitable dollar for dollar than price cuts.51 And Posner himself argues, roughly 80 pages earlier in this book, that it may well prove profitable for firms to spend profits to achieve a monopolistic market position.52 So, too, it may pay them to spend monopoly profits to preserve monopoly power by investing in barriers to entry. Whether companies invest in barriers to entry is an empirical matter. Much evidence suggests that some of them do.53

2. Deprecating judicial discretion. A good part of Posner's criticism of the state of contemporary antitrust rests on a series of Warren Court decisions that blindly found almost any merger to be a violation of section 7.54 The Supreme Court in General Dynamics55

---

50 Posner 92-93.
51 A proof of this proposition may be found in Dorfman & Steiner, Optimal Advertising and Optimal Quality, 44 Am. Econ. Rev. 826 (1954).
52 Posner 11-14.
53 See generally J. Bain, Barriers to New Competition (1956); F. Scherer, supra note 41, at 332-340.
began to fashion a badly needed retreat from the use of mindless and self-serving market definitions. Justice Stewart, for once writing not in dissent but for the Court, and almost archly using language from Brown Shoe, makes concentration ratios in nominally defined markets the starting point for analysis. This major improvement (in my view) is suspect to Posner for reasons that are not entirely clear—unless it is that a sensibly employed structural approach would undercut his criticism that section 7 is unworkable. General Dynamics opened up the legal process to relevant economic inquiry, but the decision is denigrated by Posner as a potential return to the Columbia Steel era of freewheeling inquiry into all relevant aspects of the merger, with little guidance as to what is relevant since the purpose of the law being applied is not clearly grasped." But Justice Stewart had a pretty firm grasp of the law's mandate, as did Judge Robson in the district court opinion: to judge whether the effect of the merger was substantially to lessen competition or to tend to create a monopoly, and thereby to make probable losses of efficiency.

Similarly, in reviewing the Penn-Olin decision, Posner characterizes the relatively sensible list of factors that the Supreme Court suggests the District Court “take into account in assessing the probability of a substantial lessening of competition” as “this laundry list.” What makes this particular criticism especially odd is that Posner does not propose that courts be confined to a single well-defined criterion for judging whether a market is, or promises to become, tacitly collusive in performance. As we shall see he suggests twelve conditions favorable to collusion, and twelve sorts of relevant evidence for courts to consider. When Posner makes the suggestions, the labels “freewheeling” and “laundry list” are absent.

3. Labeling “unworkable” what is not otherwise dispatchable. The legal concept of potential competition, closely related to the

---

54 Id. at 498 (quoting 370 U.S. 294, 322 n.38).
55 United States v. Columbia Steel Co., 334 U.S. 495 (1948). It is worth noting, given Posner’s proposal to repeal amended section 7 of the Clayton Act and rely on an unleashed section 1, POSNER 212-17, that Columbia Steel was tried as a section 1 case because section 7 had not yet been made applicable to asset acquisitions.
56 Posner 110.
58 In the interest of full disclosure, I report that I was the economic expert witness for General Dynamics in this case.
60 Posner 114.
61 Id. at 55-71.
economists' structural concept of the condition of entry, is among the more interesting—and controversial—of recent antitrust developments. Some find it promising, some do not. Posner does not deal with a number of careful attempts to define and delimit the potential competition concept (including Turner's, as early as 1965⁴). Instead he just dismisses it:

The potential-competition doctrine is unsatisfactory, although the problem is less one of deep confusion as to fundamental policies . . . than one of inability to develop objective and workable standards. . . . The essential problem is the impossibility of developing workable rules of illegality in this area. . . . [In theory, it may have some merit but] there appears to be no way of translating this theoretical insight into an objective standard of illegality.⁶⁵

This may be valid, but more than assertion, even twice repeated, is required to prove unworkability. Some of Posner's own suggestions are "seriously intended" even though he concedes they may be "patently unrealistic and impolitic."⁶⁶

The point of all this is not merely to show why the book is both fun and annoying. It is to suggest that Posner's "negative case" against existing antitrust policies is not decisive. Whether these policies should be massively overhauled will depend upon the relative merits of the alternative proposed.

IV

The central element in Professor Posner's alternative approach to antitrust law and enforcement is his conception of how to identify, and thus to punish and inhibit, collusive pricing. It figures most prominently in his discussion of oligopoly, but its implications control his views on mergers and on exclusionary practices. If it falls, the grand scheme falls. For this reason I will confine my remaining discussion to this centerpiece of Posner's "coherent argument."⁶⁷

---

⁴ Turner, Conglomerate Mergers and Section 7 of the Clayton Act, 78 HARV. L. REV. 1313, 1362-86 (1965).
⁵ Posner 122-23.
⁶ Id. at 7.
⁶⁶ I have written relatively extensively on mergers and on market definition, see generally P. Steiner, Mergers: Motives, Effects, Policies (1975); Steiner, Markets and Industries, 9 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 575 (1968), and it would become a debate, not a review, to explore my differences with Posner on those subjects. As to other matters I neglect, much of the discussion of restrictive practices is sensible, and some of that
Posner’s “economic approach to punishing collusion—explicit and tacit” is a substitute for the “traditional legal approach” based on conspiracy, and it is also a substitute for a policy that would create rebuttable presumptions based upon structural guidelines—such as those in proposed deconcentration statutes or in merger guidelines. He proposes that antitrust prosecutors and courts employ a two stage approach: (A) identifying those markets in which conditions are propitious for the emergence of collusion by looking at a dozen indicia; (B) determining whether collusive pricing in fact exists by looking at a dozen types of relevant evidence.

The first stage is not strictly necessary, but it is designed to help antitrust enforcers look in promising places, and to help characterize otherwise ambiguous conduct. Although I shall not linger on them, it will be helpful for what follows to present Posner’s lists of conditions and evidence.

The (mainly) structural criteria Posner proposes for stage (A) are: (1) high seller concentration, (2) absence of a competitive fringe, (3) inelasticity of demand at the competitive price, (4) slow entry, (5) many buyers, (6) a standardized product, (7) the principal firms selling at the same level in the chain of distribution, (8) products for which price competition is more important than other forms of competition, (9) a high ratio of fixed to variable costs, (10) non-increasing demand over time, (11) use of sealed bidding, and (12) the industry’s antitrust record. I am not here concerned with either the necessity of these indicia, nor their collective comprehensiveness. Perhaps all can agree with Michael Spence’s summary statement that “the nature of competitive interaction in an industry is determined by a rich collection of structural features of markets.”

is relatively original. Professor Posner’s discussion of a proper policy toward predatory pricing, Posner 187-96, seems to be so flawed as a matter of economic analysis that I think it is sensible to let Posner come up with his more mature views on the subject before discussing them.

However, I am puzzled by the inclusion of (3), since it will always pay competitive sellers as a group to raise price, no matter what the elasticity of demand. I find (10) unpersuasive unless accompanied by (9)—some of the biggest profits with fewest enforcement problems can be expected where increasing demand creates the sellers’ market that a tacit cartel can exploit. As to omissions, I wonder whether similarity in the costs of members of the industry, as well as in their motivations and their expectations of future trends are not highly relevant to the likelihood of cartelization. These factors and others are widely discussed in the oligopoly literature.

Spence, Markovits on Imperfect Competition, 28 STAN. L. REV. 915, 918 (1976). This concise four-page comment on the prolix Markovits-Posner debate is a breath of fresh air.
Posner's list is such a rich collection and thus is consonant with the economic tradition of Fellner, Mason, and Bain, as well as Stigler. Posner does not mean, however, merely to enumerate the variables worth studying, but to provide a workable guide for antitrust enforcement policy. But it is not clear how Posner intends his list, or any amendment of it, to be used. How many of these indicia are required? Any one? Any three? At least six? All twelve? Less abstractly, given that list should an antitrust prosecutor have spent his resources looking for evidence of collusive behavior in any or all of the following industries: automobiles, steam turbine generators, automobile tires, bus tires, paper boxes, uranium, soaps and detergents, professional basketball, cigarettes, motion pictures, and coal . . . ? None meets all of the indicia, each meets some. And this is true of the great majority of manufacturing and mining industries. Without more guidance from Posner, is this proposal anything other than an invitation to the courts and prosecutors to consider all relevant factors, a suggestion he denigrates elsewhere? To be sure, this is only stage (A) and perhaps a liberal approach to inclusion is desirable. But then why not look mostly at the usual conditions of oligopoly, high seller concentration and slow entry, which are usually correlated with and possibly necessary to persistent effective tacit collusion?

The list Posner suggests for stage (B) plays an even more important role in his program, but guidance as to how the list is to be used is likewise absent. The sorts of evidence suggested as indicative of collusive pricing are: (1) nearly identical market shares, (2) systematic price discrimination, (3) exchanges of price information, (4) regional price variation, (5) identical bids, (6) price, output, and capacity changes at the formation of the cartel, (7) industry-wide resale price maintenance, (8) declining market shares of the leader, (9) diminished amplitude and frequency of price changes, (10) demand elasticity higher at market price than the presence of substitutes makes reasonable, (11) level and pattern of profits, and (12) presence of basing point pricing.

72 E.g., POSNER 98, 114. There is a further problem if Posner would have prosecutors use his list to identify industries where they need not look for evidence of antitrust violations. The obvious perverse incentives engendered by that approach need no rehearsing.

73 Id. at 62-71. Let me again offer a few comments. A great many of these—for example (1), (3), (5), (9), (12), and sometimes (6) and (11)—are staples of the sort of evidence relied on by courts in the rejected “traditional approach.” I have little difficulty finding non-collusive explanations of (2), (4), and (8). I find points (6) and (10) essentially conclusions, not evidence. One might want to add to such a list—for example, evidence of excessive reliance on non-price competition, concerted refusals to deal with certain middlemen, and so on.
Again, the crucial question is: Where does Posner suggest we go from there? This is supposed to guide judges and juries. This list is an invitation to open-ended inquiry into all relevant aspects of market performance. Thirty and more years ago economists toyed with the notion of defining "workable competition" by this sort of in-depth look at particular industries. That concept, as a legal yardstick, faded away because, as George Stigler (Posner's main economist) suggested, "workable competition" is unworkable law. Let one economist conclude that industry A was workably competitive (and thus not likely to exhibit the collusive pricing that Posner would hold illegal) and what is to prevent another economist from concluding just the opposite? Indeed, market incentives suggest that conflicting opinions would confront the trial court. Should the court decline to act absent a consensus among expert witnesses, or should it decide the case? If a trial court decides a case where expert economic testimony is conflicting, should an appellate court review the trial court's exercise of discretion, or the weight it gave to particular factors? It is hard to see Posner's proposal as anything but an invitation to freewheeling inquiry into complex economic issues by judges and juries generally untutored in economics. The Posnerian regime might produce more sensible decisions than we now have, but that proposition is not established by this book.

Anticipating the charge of ambiguity and subjectivity, Posner dismisses it as exaggerated:

In some cases, at least, many different types of evidence will point in the same direction, and where that occurs the probative force of each one considered in isolation is strengthened. Suppose, for example, that all twelve types of evidence discussed in the preceding section of this chapter pointed toward collusion. Each type of evidence might be vulnerable to criticisms of one sort or another that would be persuasive in the absence of other evidence; yet the criticisms might be wholly insufficient to persuade a responsible trier of facts to disregard the uniform results of twelve different tests of collusive behavior.

It can be agreed that if all twelve indicia pointed in the same

---

74 Or where it is not, it suggests that one or more sort of evidence has been inadvertently omitted from the list.
75 Clark, Toward a Concept of Workable Competition, 40 Am. Econ. Rev. 241 (1940). See also Sosnick, A Critique of Concepts of Workable Competition, 72 Q.J. Econ. 380 (1958).
76 See generally G. Stigler, The Organization of Industry 12-13 (1968).
77 Posner 75 (emphasis in original).
direction, this would be persuasive. But surely when all twelve indicia evidence collusion, a conspiracy would be inferred under the traditional approach. Conversely, if none of the indicia indicates collusion it is unlikely that the traditional approach would seek or find an agreement. This is not a mere debating point, but the essence of a comparative evaluation of Posner's approach and the traditional approach it is to replace. Examination of cases that both systems would treat the same way does not advance our understanding of their relative merits. Because of the overlap between Posner's list and the indicia used in the traditional approach, yet more guidance from Posner is needed to decide which constellations of evidence would lead to different decisions under the competing approaches.

I have tried to apply Posner's proposed standards to some recent and current case situations. My problem is not that I disagree with where he would have us come out; it is that I do not know where his proposal leads. In the fleet discount cases the three largest American automobile manufacturers were charged with conspiring to reduce and/or eliminate discounts to various classes of fleet purchasers. That various fleet discounts were reduced or eliminated is beyond dispute. The defendants were three times found not to have violated the antitrust laws, specifically section 1—in a government criminal suit, a government civil suit, and in a consolidated set of private treble damage actions. We know what the traditional approach did. It is possible, but by no means certain, that Professor Posner would disagree. It would be instructive to see Posner apply his criteria to the massive factual record now available.

Similarly, I am puzzled as to how Posner's proposal would apply to the facts as alleged in the FTC's Cereal complaints, a current test of whether it is possible to expand section 1 to include a "shared monopoly." Among the structural criteria absent in the

---

28 I do not read Posner to say all twelve types of evidence must point in the same direction before his approach would direct a decision. In his article, Oligopoly and the Antitrust Laws: A Suggested Approach, 21 Stan L. Rev. 1562, 1587 (1969), he suggests:

If sellers engage in tacit collusion with any success they will generate some of the kinds of evidence discussed, and I do not assume that courts are congenially incapable of handling such evidence intelligently. If colluding sellers generate no such evidence, their collusive efforts will not have amounted to much. Economically significant collusion should leave some visible traces in the pricing behavior of the market, even granting fully the interpretive difficulties that such behavior presents.

(Emphasis added and citation omitted).


cereal industry are a standard product, high ratio of fixed to variable costs, static demand, and sealed bidding. There is not, so far as I know, evidence of systematic price discrimination, rigid prices, identical bids, resale price maintenance, a basing point system, information exchange, or declining market shares of the price leader. And yet (I think) the evidence will show high seller concentration, no significant fringe, slow entry, many buyers, and sellers at the same levels in the chain of distribution. These factors are combined with apparently high profits, regional price variations, and high elasticity of demand at the prevailing price. Assuming that my factual assertions are correct, would Posner infer a violation of his reconstructed section 1? What further information would persuade him either way? Would a diligent, intelligent judge slavishly following his instructions find a violation? Should an economist hope for him to find a violation? I submit that Posner's proposal provides no answer to these questions, and that is fatal. At least one can debate Turner, who would presumably be led by the high concentration and slow entry in the cereal industry to a presumption of illegality. One can quarrel with Markovits, who I suspect would (after discussing it for approximately 50 pages) find excessive quality-variety competition. One cannot agree or disagree with Posner without knowing what the Posnerian decision is and how it is reached.

Perhaps I am being obtuse, and Posner's diagnosis is plainly there to be found. But on this score I find no comfort from his discussion of the American Tobacco and Theatre Enterprises cases. In the book he relies on these cases mainly for establishing the proposition that the Court will not have to strain existing precedent very greatly to adopt his proposed revised view of section 1. But in his earlier writings, and to a degree in the book, he does apply his approach to the facts before the courts in those cases. I read both of those cases (as well as the fleet discount cases) as resting on a choice between competing explanations of a set of evidence. On the one hand, the behavior that the evidence reflects may be reasonable unilateral conduct, albeit conduct that is attractive for similar reasons to the whole set of competing sellers. Under the traditional approach this is non-collusive, and legal. On the other

---

14 Posner, supra note 78, at 1583-87.
15 Posner 73.
hand, it might excessively tax credulity to maintain that the observed conduct was taken unilaterally by any seller without some sort of assurance of accomodative responses by other sellers. Under the traditional approach, this is a case of inferred collusion.

In *American Tobacco* the fact that the leading cigarette manufacturers each raised the price of cigarettes during the Great Depression when most costs were falling was taken by the Court (along with evidence of conspiracy in other activities of the same companies) as suggestive of the existence of a conspiracy without explicit evidence of any communication among the manufacturers. In *Theatre Enterprises* the Court held that the defendants' parallel decisions to refuse the plaintiff exhibitor first-run exhibition rights for his suburban theatre made sense unilaterally, and therefore did not require a jury to infer collusion.

Most commentators have accepted the basis of the Court's distinction, and have not found the decisions in these cases unreasonable. In the book, Posner does not seem to disagree. He plainly accepts the *Theatre Enterprises* reasoning:

In these circumstances, the parallel refusals did not connote agreement, tacit or otherwise. . . . [T]he evidence in *Theatre Enterprises* indicated that each of the distributors would have refused to grant plaintiff first-run status regardless of what any competing distributor would have done; the parallel action of the distributors was not even conscious.86

The unwary reader may think Posner would find no violation under his standards. But consider his more detailed discussion of *Theatre Enterprises* in 1969:

*I am more troubled by the case.* The practice of selling the right to exhibit a film at two prices, a high price for immediate exhibition ("first runs") and a lower price for later exhibition, would appear to be a form of price discrimination. The cost to the distributor is the same regardless of when the film is to be exhibited, but a two-price system enables him to exploit the willingness of some moviegoers to pay a premium to see a film when it is first released. As noted earlier, systematic price discrimination cannot persist for long under competition. If, therefore, one assumes, as has the Court in all of the movie cases, that the distributors are in competition with each other—are selling close substitutes even though their films are

---

86 *Id.*
copyrighted and in that sense unique—the refusal of any distributor to sell first runs to the plaintiff in Theatre Enterprises is difficult to understand other than in a context of collusive behavior.87

In the same article Posner found the facts in Tobacco "more equivocal" than the Court thought them to be. He attributed the suspect price increases either to irrational behavior or to misperception of the true elasticity of demand. (The price increases proved to be unprofitable.) He concluded that the cigarette manufacturers' "pricing behavior can be plausibly explained without hypothesizing tacit collusion."88

Thus, at least in 1969, Posner appeared to lean toward legality in Tobacco, and illegality in Theatre Enterprises. He has changed his mind on Theatre Enterprises at least. More important, Posner employs no generally applicable method in reaching admittedly equivocal conclusions. We are left with a haunting uncertainty as to how to apply his theory. Even if Professor Posner adequately explains his shifts in position, need we not worry about the handling of these subtle and difficult economic problems by relatively unsophisticated judges and juries?89

* * *

It is time to stop. My conclusion is that Posner's book has not yet shifted the burden of persuasion to those with whom he takes issue. Without more from him, one cannot take seriously his thorough condemnation of the existing corpus of antitrust law nor his blueprint for its overhaul. Whether or not his "new" section 1 would work is simply unknown, not as an empirical matter, but because his proposal is at present underspecified.

Until we have a workable, comprehensive, new section 1, we will continue to need something like the present section 1, section

---

87 Posner, supra note 78, at 1584 (emphasis added). The presence of price discrimination by itself seems decisive in the passage quoted. Does this imply that adverse evidence on any one of his standards is enough? I find mind boggling the possibility that evidence of price discrimination by a firm in an industry meeting some of Posner's structural standards would imply violation of the antitrust laws. This comes oddly from Posner who (correctly in my view) regards the Robinson-Patman Act as a disaster. An alternative explanation of this quotation is to believe that Posner holds that there are only two kinds of behavior, perfectly competitive and collusive. But I do not think that explanation credible.

88 Id. at 1585-87.

89 My criticism of Posner here is the very same kind of concern he expressed about "returning to the Columbia Steel era of freewheeling inquiry." Posner 110. He would perhaps respond that the difference is that under his scheme the purpose of the law being applied is easily grasped. I am not persuaded.
2, and section 7. Whether we need more legislation, such as a deconcentration statute (as some, but not Posner and I,\(^9\) believe) is debatable. Improvements in interpreting antitrust statutes and in developing procedures for trying antitrust cases should be sought. The Supreme Court, now more closely balanced on antitrust matters than during the Warren Court era, may continue to work its way out of the excesses of some of its prior decisions. Foregoing Posner’s blueprint, we should continue to seek marginal improvements in a flawed but not useless set of laws directed toward achieving the efficiencies that a market can provide. Many of Professor Posner’s comments and suggestions are useful and interesting in that perspective. I suspect Posner will regard this as faint praise.

The reader may well ask, why should I believe you instead of Posner as to whether he has crossed the requisite threshold with his reform proposals? I am pleased to lean on Professor Posner for an answer. In 1971 he suggested in this journal that the least unsatisfactory way to cope with disagreement concerning the application of economic analysis to antitrust policy is to “identify the questions on which there is a consensus of professional opinion—a very substantial majority position (with mere numbers weighted by experience and distinction)—and to build . . . policy on that common ground.”\(^1\) I would apply that test to Posner’s proposals.
