REVIEW


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Professor Posner’s antitrust casebook represents an extraordinarily successful effort to assimilate economic analysis into the consideration of a legal subject. The book’s economic notes are remarkable in two respects. First, the presentation of the essential economic concepts is comprehensible to a reader with no previous knowledge of economics. I find it astonishing that technical concepts to which chapters are devoted in economics textbooks are explained with so much clarity in these brief notes. The notes make it possible, without recourse to any outside sources, to offer an antitrust course which is economically sophisticated to students with no prior training in economics.

Secondly, the notes are also valuable for a reader like myself who has moderate familiarity with economic analysis. Repeatedly I found that issues about which I had previously thought a good deal were materially sharpened and clarified by the discussion contained in the notes. The notes, then, serve both to provide the basic material for the wholly uninformed and to enrich the appreciation of the sophisticated reader.

The relevance of the economic analysis to the issues raised by the statutes, cases and administrative materials is made unmistakably plain. The organization of the book in terms of the economic analysis and the explicit relating of economic ideas to legal issues combine to produce a book with great analytic unity.

My reservations about the book are not based on criticism of

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The origin of these notes, apparently, is the economic lectures given by Aaron Director as part of the antitrust course he offered for many years with Edward H. Levi. The author states: “Much of the economic analysis expounded in these notes is based on ideas first proposed by Director. A number of these ideas were later developed and published by other economists whose work I do cite. These citations conceal Director’s seminal role in the development of the economics of competition and monopoly presented in this book.” R. Posner, Antitrust: Cases, Economic Notes, and Other Materials xiii (1974) [hereinafter cited as Posner].
what has been done but rather on unease about what has been left out. Curiously, one part of what I would like to have seen included, the development of a positive theory of economic regulation, has been considered in Professor Posner's own writings and those of scholars with whom he is closely associated. The other omission is one which has been characteristic of the author's work. He devotes scant attention to the normative issues which must be faced in evaluating the system of antitrust regulation.

Accordingly this review will be in two parts. I will consider the book first as it is and then as it might have been if the additional issues to which I have referred had been considered.

I. THE BOOK AS PRESENTLY CONCEIVED

The great strength of the book lies in its analytic unity. The concept that a misallocation of resources results from the monopolist's restricting the quantity of a product or service supplied and increasing the price charged is introduced very early in the presentation, and this misallocation is consistently referred to as the evil to which the antitrust laws are addressed. The notion that monopoly is "bad" because by limiting output and increasing prices it diverts resources that would have higher value if employed in the monopolized industry to less highly valued uses is a powerful idea which, at least prima facie, has great normative appeal. It may be that we wish to pursue goals that will have the effect of making society as a whole poorer. But if at least one goal of the legal system is to increase total wealth, it is at least relevant to know that the antitrust laws can in principle be justified on this ground. Moreover, the wealth maximizing or efficiency goal has great value as a unifying concept for an appraisal of the superficially diverse practices to which the antitrust laws have actually been applied or to which it is urged they should be applied—even if, in the end, it is rejected as the paramount goal.

I am comfortable with the book because its normative underpinnings are consistent with my own view that the efficiency crite-

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2 This work is discussed in Posner, Theories of Economic Regulation, 5 Bell J. Econ. & Mgmt. Sci. 335 (1974). Oral tradition proclaims George Stigler the leader of this intellectual movement.

3 Professor Posner is very cryptic about his normative position. I read the three brief paragraphs dealing with this question as asserting: (a) The efficiency loss created by monopoly pricing is unambiguously bad. He states: "These purchasers [who substitute other products at the monopoly price] are unequivocally worse off as a result of the monopoly. And their loss is not offset by any corresponding gain to the owners of the monopolist, since the monopolist derives no revenue from the sales that he does not make." Posner 13. (b) The wealth
tion is the only relevant one in appraising the antitrust laws. My reasons cannot be developed at sufficient length in this essay to persuade anyone presently holding a contrary opinion. Briefly, however, I believe that the antitrust laws are a poor instrument for redistributing wealth, both from a normative and a positive perspective. Furthermore, compensation is not a goal worth pursuing as an end in itself—at least at the cost of doing so by prosecuting antitrust violations. I also believe that the "encouragement of small business" and "dispersement of power" rationales advanced by some antitrust scholars do not provide an operational theory or theories for implementing the antitrust laws, even if one accepts the normative premises of these views—which I do not. I find no special social virtue in any particular number of entrepreneurs, either in a given industry or in general; nor do I find any consistent relationship between violations of any provision of the antitrust laws and the existence of political and social power which would permit effective use of the antitrust laws to regulate the exercise of such power.

As I shall develop more fully in the second part of this review, I think it is unfortunate that these issues are not addressed more explicitly in the book. Both teacher and student who have not worked their way through these questions will be understandably resistant to the book's single-minded emphasis on efficiency. If, however, the wealth maximization goal is accepted, even as a conditional act of faith, then appreciation of antitrust law is enormously enhanced by the rigorous efficiency analysis implicit in the book's organization and explicitly developed in the questions and economic notes.

Everything in the book is organized functionally in terms of the efficiency criterion and evaluated with reference to it. The book contains three main parts: "Cartels," "Mergers of Competitors," and "Exclusionary Practices." The first two address the basic ques-
tion of how competitors can coordinate their activity to restrict the available supply and raise the price of the goods ("monopoly pricing"). The third considers perhaps the most controversial of antitrust issues—how one firm can (other than by offering better products or lower prices) gain or retain the power to practice monopoly pricing.

These basic issues of antitrust policy are addressed in the variety of legal contexts in which they arise. The organization is particularly useful in dealing with the exclusionary practices category. With regard to the law of cartels, which is based principally on section 1 of the Sherman Act, and the law of horizontal mergers, which (at least since the amendment of 1950) is based principally on section 7 of the Clayton Act, there is a simple correspondence between legal provisions and analytic issues. Exclusionary practices, however, while raising interrelated analytic issues, are dealt with under a wide range of legal provisions: boycotts under section 1 of the Sherman Act, tying arrangements and reciprocal buying under sections 3 and 7 of the Clayton Act, vertical integration and exclusive dealing also under sections 3 and 7 of the Clayton Act, price discrimination under the Robinson-Patman Act, and a miscellany of practices, including those specified above, interpreted as "exclusionary" devices under the ban on "monopolizing" imposed by section 2 of the Sherman Act. It is far better to consider these practices in the context of the single question of what explanation other than superior efficiency can account for a firm's ability to exercise monopoly power, than to examine the practices each time they arise under a different legal provision.

The book also does an extraordinary job of organizing and examining the issues within the three major categories. Again, economic analysis rather than legal doctrine provides the basis for the organization. The legal material in the first main part, dealing with cartels, is organized around three basic strands of analysis.

The first is the theory of cartels. A series of economic notes and questions examine the problems of how a cartel organizes to deal with outsiders, arrives at price and output decisions which maximize the profits of the cartel as a whole, divides the gains generated by the cartel, and polices cheating.

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2 Id. § 18.

3 Id. §§ 14, 18.

4 Id. §§ 13, 13a.

5 Id. § 2.

6 POSNER 47-48, 63, 126, 128, 135-36, 221.
The second strand of analysis deals with the question of how restrictions on competition among competitors may enhance efficiency by lessening the impact of the "free rider" effect.\(^2\) The classic example is an agreement among sellers limiting the areas in which participants can sell the same product, so that a seller's investment in advertising and servicing the product is not inhibited by fear that others offering the product will take a "free ride" on his investment by offering the product, without advertising or services, at a lower price.

The third basic aspect of the analysis focuses on the costs of enforcing the antitrust laws. This issue is raised implicitly with respect to the desirability of the present per se rule concerning "price fixing,"\(^3\) the proof of the requisite "agreement" to satisfy the rule,\(^4\) and the characterization of particular arrangements as within or without the per se rule.\(^5\) The cost issue is examined most explicitly with respect to the desirability of private enforcement.\(^6\)

The first main portion of the book uses these strands of analysis to appraise existing and proposed rules and enforcement strategies for preventing collaboration in setting price and output levels among formally independent firms. The focus is on an appraisal of the per se rule which has emerged with respect to price fixing and other forms of collaboration among competitors as the principal instrument of antitrust enforcement. Several major objections to existing law are raised implicitly in the organization of the book and the questions raised and, to some degree, explicitly in the economic notes.

First, the formulation of the rule as a prohibition of "agreements to fix prices," has caused the criteria of legality and harmful social effect to diverge. Some agreements which "fix" prices, at least in the sense of limiting price competition (e.g., market division and resale price maintenance), can in fact enhance efficiency by dealing with the free rider phenomenon. Other agreements may be wholly ineffective as means of practicing monopoly pricing. Still other agreements, such as that for exchange of information among competitors, can facilitate competition or cartelization depending upon the circumstances. This critique casts doubt on our ability to devise any simple definition of "agreement to fix prices" which will permit

\(^{12}\) Id. at 221, 225-26, 234-37.
\(^{13}\) Id. at 94-95, 136-37.
\(^{14}\) Id. at 94-95, 128.
\(^{15}\) E.g., id. at 204 (question 2); 212 (questions 1, 2 & 3); 217 (question 2).
\(^{16}\) Id. at 176.
a court to ignore the economic context in appraising the arrangement. In any event the present per se rule may cast much too broad a net of illegality.

The great emphasis on "agreement" as a basis of liability has three other questionable effects. First, strong evidence of "agreement" makes a case very attractive to a prosecutor even if the practice is entirely unsuccessful, indeed, even if it has been economically trivial from its inception. The irrelevance of the actual harm caused or threatened means that the prosecutor has little incentive, even for purposes of exercising discretion in enforcing the law, to incur the high costs of finding out whether the practice was of any real consequence. A second and related consequence is that an enforcement strategy which is heavily dependent on explicit evidence of "agreement," and largely unresponsive to the relative seriousness of the practices fails to create a desirable set of incentives for the firms subject to the antitrust laws.

The third consequence of the rule is to place great stress on the concept of "agreement" in the critical area of oligopoly or concentrated industries. Under this approach the critical issue has become whether the behavior of the oligopolists, which may involve elements of interdependence in decision making, demonstrates either that there was an "agreement" or that the parties acted independently. The alternative suggested by Professor Posner is to focus on "the price and output effects of the seller's actions"\(^{17}\) rather than attempting to reconstruct the inchoate stage of the conduct and decide if there was an "agreement."

The suggested approach is based on two related ideas. The first is that it may be possible to appraise the actual effects of attempted monopoly pricing. The second is that the decision to pursue a course of monopoly pricing is a choice, not the inevitable consequence of responding individually to circumstances prevailing in "concentrated" industries.\(^{18}\) These two hypotheses are fundamental not only to cartel policy but to the whole range of antitrust issues that turn on the preference for a "structuralist" or "behaviorist" approach, most obviously the treatment of horizontal mergers.

The discussion of these fundamental questions in a series of incisive economic notes constitutes the intellectual heart of the book. These notes consider, in turn, the prevailing views concerning the desirability of a per se rule focusing on "agreement" and the alternative position emphasizing the ability to evaluate the eco-

\(^{17}\) Id. at 95.
\(^{18}\) Id. at 128.
nomic consequences of collaborative behavior and to distinguish competitive price and output decisions from collusive ones. Although other areas involve additional questions as well, for example, the possibility of efficiency-enhancing cooperation which includes restrictions on the behavior of individual firms, it is always necessary in the end to decide how great a threat of monopoly pricing is present in a given market and how that threat may best be controlled.

The second part of the book, dealing with the merger of competitors, builds upon and extends this basic analysis. Both the skepticism about any simple relationship between market structure and monopoly pricing, and the suggestion that monopoly pricing can be directly detected, developed in the first section of the book, are brought to bear in criticizing existing merger policy. The merger of competitors into a single corporation may, of course, be an alternative method of establishing an organization to practice monopoly pricing and distribute the gains it generates. How well that organization will be able to achieve its objective again depends on the issues considered in the first part of the book.

The second part develops more fully two themes only touched upon in the first. It is simple to draw a monopoly diagram with a dramatic welfare triangle which the antitrust laws will capture for the society as a whole. What, however, determines the magnitude of the welfare loss which in fact will result from the monopolization of an industry? The answer, as the book elegantly develops, turns upon the behavior of rival producers now in the market, of producers who would enter if they could command a particular price, and of consumers who may turn to substitutes for the monopolized goods.

The second theme developed in the section dealing with mergers is the role of the antitrust laws in protecting “small business.” The conclusion drawn with respect to merger policy is a challenging one to assimilate into a general theory of regulation. It appears that the Supreme Court thinks it is helping “small business” by its severe view of horizontal mergers, whereas implementing this view may in balance harm “small businesses” by reducing their salability and, presumably, by reducing the amount of supercompetitive pricing which can shelter inefficient small firms.

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19 Id. at 94-95, 116-27, 128-35 and 136-37.
20 Id. at 437. The implications of this analysis would be an important component of the development of normative and positive theories of antitrust which I discuss in the second part of this review.
21 Id. at 416-17. This question would be more extensively examined if the suggestions advanced in the second part of this review are accepted.
The final section of the book is an extremely successful effort to examine systematically the miscellany of practices which have been held to be "exclusionary." Here, the benefits derived from utilizing economic theory to sort out the relevant effects are particularly striking.

Three main ideas are emphasized in this section. First, these practices are economically ambiguous and frequently misunderstood by the courts. They may be simply efficient competitive responses which have proven successful, or a way of maximizing profits from monopoly, most significantly by practicing price discrimination, or ways of gaining monopoly power other than through superior performance. It is presumably only the last class which existing law is designed to prevent. Distinguishing among these different types of conduct is very difficult, particularly when identical practices (again, most significantly price discrimination) can fall within any of the three categories depending on the economic context. There is, moreover, no set of "common sense" principles for drawing the relevant distinctions. Words like "exclusionary," "coercive," or "predatory" simply do not convey a coherent theory for distinguishing lawful from unlawful conduct.

The economic complexity of these practices, combined with the fact that the persons allegedly injured by them are competitors, raises an important dilemma for antitrust enforcement policy. On the one hand, since the persons injured will have a large stake in enforcement and are likely to have a great deal of relevant information about the practices, perhaps this is an area particularly suited to private rather than public enforcement. On the other hand, given the ambiguity of the conduct and the difficulty of drawing operative distinctions in the statutes or precedents, this is also an area where much may be gained from the exercise of prosecutorial discretion to distinguish among superficially similar practices.

The final major theme of the third section is the recurring one of protecting "small business." This notion has two aspects. First, if indeed the successful firm has gained its position by conduct that is itself socially harmful and now may be in a position to practice monopoly pricing, then there may be good reason to "protect" its rivals from these tactics. This point of view is entirely consistent with a consumer-oriented focus on efficiency, for the concern for competitors is merely derived from the desire to maintain the level of competition necessary to promote efficiency.

But the notion of "protecting" small business may go beyond this. The related ideas that foreclosing "opportunities" for "small" firms in the industry is independently bad and that some given number of firms in an industry is independently good have also been advanced as goals of the antitrust laws. These ideas have been prominent in the opinions dealing with "exclusionary practices." The book does not deal explicitly with these conceptions, although its unmistakable position is that concern for particular firms in the industry is legitimate only as a means of maintaining the competitive process and thus avoiding the social waste created by monopoly pricing.

In sum, the casebook in its organization and in its presentation of relevant economic analysis is a virtual tour de force as a self-contained source for the systematic evaluation of the antitrust laws. What then are the additional questions I would like to see addressed?

II. THE BOOK AS IT MIGHT BE

As I have indicated, the book does not consider in depth two sets of issues that are relevant to an appraisal of the body of antitrust regulation. These issues cluster around the general problems of developing normative and positive theories of antitrust law. By "normative theory" I mean a systematic statement of ends which includes a method of quantitatively trading off all of the relevant consequences of pursuing various courses of action to achieve these ends. By "positive theory" I mean the elucidation of variables which explain the system of antitrust regulation which has actually emerged.

My focus on the failure to consider systematically the development of normative and positive theories of antitrust is not necessarily a criticism of the book. It may be that there is simply no demand for the book I would like to see written. It is also possible that the type of issues I raise should be examined elsewhere in the curriculum. And, for that matter, Professor Posner may consider that his

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23 Be that as it may, that was not the way that Congress chose; it did not condone "good trusts" and condemn "bad" ones; it forbade all. Moreover, in so doing it was not necessarily actuated by economic motives alone. It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few. These considerations, which we have suggested only as possible purposes of the Act, we think the decisions prove to have been in fact its purposes.

United States v. Aluminum Co. of America, 148 F.2d 416, 427 (2d Cir. 1945) (L. Hand, J.).
comparative advantage does not lie in dealing with at least some of these questions.

Nevertheless, I believe that a much richer treatment of antitrust law would be presented if these issues were addressed. The book would also have greater relevance to other areas in which similar questions are confronted. Conceivably, too, the conception of the book may reflect the author’s perception of the limits on utilizing economic analysis, given the necessary assumption that many teachers and students have no familiarity with economics. Examining how pursuing these questions may deepen the understanding of antitrust law and shed greater light on other areas of the law may therefore be informative in measuring the cost of not insisting upon a minimum level of competency in economics throughout the law school population. For these various reasons I now turn to a brief discussion of the additional questions the book might have addressed.

A. A Normative Theory of Antitrust

The most significant contribution of economic analysis to the development of a normative theory of law is, in my opinion, its capacity to furnish a means for appraising a regulatory system as a whole. The unifying notion is that the objective of regulation is to minimize the sum of (1) the costs resulting from the potentially harmful conduct and (2) the costs of reducing the incidence of harmful conduct. Only if this conception is taken seriously can anything systematic be said about the desirability of public versus private enforcement of the antitrust laws, the desirability of the per se rule with respect to competitor collaboration, the severity of antitrust sanctions, or, indeed, any important issue of antitrust policy.

If this approach is taken, a number of issues treated in the book could be assimilated into a more systematic evaluation of the existing body of antitrust regulation. It would, however, also be necessary to consider additional questions, many of which Professor Posner himself has examined in his antitrust writings.

To carry forward the approach I have suggested, three basic sets of issues would have to be considered: (1) an identification of the relevant “harm” caused by the conduct subject to regulation, (2) an understanding of how the reduction in one relevant cost, such as the harm flowing from violations, may increase other costs, and (3) an estimation of the magnitude of these costs.

1. Definition of Harm. The discussion of relevant harm in the book is extremely brief. Moreover, certain important ideas which are touched upon are not incorporated into the consideration of the
legal material to which they are relevant. Finally, various conceptions which have been advanced by scholars and judges are dismissed with no mention whatever.

The position of Professor Posner, as I understand it, is that two relevant types of harm result from the conduct regulated by the antitrust laws. There is first the classic misallocation of resources produced by the restriction of supply necessary for monopoly pricing. Secondly, there is the waste of resources in attempting to secure a monopoly. He rules out, as normatively irrelevant, the wealth transfers resulting from the higher prices charged for those goods which are supplied. Presumably any notions of supporting small business, dispersing social or political power, or increasing the range of individual choice are also rejected.

In addition to defining various consequences as harmful, it is also necessary to decide whether any value will be placed on compensating persons injured by antitrust violations. From the point of view of deterring violations of the law, it does not matter who receives the money exacted from the defendant. If, however, it is considered beneficial to compensate injured persons, or, if you will, "harmful" not to compensate them, the payment of compensation becomes a relevant end in assessing the overall efficiency of the system. Professor Posner never explicitly takes a position on this question, although it is strongly implied that he rejects compensation as a relevant end.

These conclusions happen to conform to my own. They are, however, neither obvious nor universally accepted. An explicit discussion of them would place the normative response to particular questions on a much firmer footing. For example, the student may be unconvinced that recapturing the wealth transfer realized by the owners of the monopoly firm and giving it back to injured consumers is not independently desirable. The student may be convinced of this, however, if he is shown the difficulties of deciding who captured the gain, given the possibility that the stock market took it into account in establishing the price paid by present shareholders, and who suffered the loss, given the possibility of the buyer's "passing on" a portion of the monopoly overcharge to purchasers of his products.

The importance of explicitly addressing these issues is increased by the fact that the author's conception is not wholly conventional—even for scholars accepting efficiency as the control-

25 Id. at 149, 177.
The idea that the assets expended in attempting to secure a monopoly, as well as the misallocation accompanying monopoly pricing, should be included in the welfare loss is not often encountered in the antitrust literature. This notion is introduced briefly in the book, but is not developed with respect to particular practices. Its implications for the level of overall enforcement are not discussed either, although they might be of great significance. For if it is assumed that every wealth transfer achieved by monopoly pricing also masks a wasteful commitment of resources to secure the requisite monopoly, the relevant "harm" is far greater than if only the traditional misallocation of resources is taken into account.

The choice of relevant harms may also affect the definition of proscribed conduct, the allocation of resources to enforcement and the selection of modes of enforcement. For example, the attitude toward price discrimination (as Professor Posner himself has pointed out elsewhere) is much more negative if the focus is on the costs of gaining rather than utilizing monopoly power. The efficient level of expenditures to enforce the antitrust laws will be greater if the costs of gaining a monopoly are taken into account or if compensation is posited as an independently desirable goal. And, if compensation is posited as a goal, it is essential to have private enforcement or some other method of distributing money to victims.

I therefore believe that an explicit discussion of the selection of goals would greatly enrich the book. The question of goal selection, moreover, is encountered throughout the legal system. Comparison between the ways this question is resolved in, say, antitrust and securities regulation, or antitrust and environmental regulation, could provide useful general insights into the legal process.

2. The Tradeoff of Relevant Costs. The fundamental contribution of economic analysis is to provide a calculus by which all relevant effects of alternative courses of action or nonaction may be measured. The most obvious interrelationship which emerges is between the costs resulting from undesirable conduct and the costs of utilizing resources to enforce the law. The first simple message, therefore, is that substantive ends cannot be achieved costlessly. This places the burden on persons asserting the desirability of redistribution, compensation, more entrepreneurs, or what have you, to indicate how valuable various quantities of these "goods" are. In the economist's terms we need to know the demand curve for these consequences. It is a chastening idea—one well worth communicat-

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"Id. at 13.

ing to lawyers traditionally fond of "laundry lists" of desired goals—that any end which is advanced as relevant must in principle be quantified in order rationally to trade off its attainment against the enforcement costs necessary to achieve it.

This process, of course, cuts both ways. Just as it is not costless to achieve a substantive end, it is not costless to adopt a cheaper enforcement device. For example, a per se rule may reduce proof requirements and therefore enforcement costs. But such a rule will bring within the ambit of illegality conduct which in fact does not cause the harm sought to be avoided. The cost of this over-inclusiveness is the reduction of the incidence of useful conduct which bears some risk of being held illegal under the per se rule.

There are also, of course, tradeoffs among the various substantive goals which have been posited as potentially relevant. Most obviously, support of "small business" or similar objectives may have to be purchased by reducing efficiency. But the interrelationships among the achievement of various goals may be quite subtle. For example, in deciding the amount which should be recovered by private plaintiffs, it is essential to decide whether the controlling criterion is that of providing appropriate incentives for enforcement, compensating victims, or, conceivably, neutralizing an aspiring monopolist's strategic behavior, such as threatening to practice price discrimination. Moreover, allowing recovery may positively disserve the end of efficiency by decreasing consumers' incentives to adapt to or avoid monopoly pricing.

The process of identifying the interrelationships among relevant goals is another problem repeatedly encountered in evaluating a legal system. Again, consideration of this question in the context of antitrust law can be very useful in developing a general normative theory of law.

3. The Magnitude of the Relevant Effects. Evaluation of the antitrust system as a whole requires not only an identification of ends and a description of how achievement of one end bears on the realization of others but also an appreciation of the quantitative dimensions of the relevant variables. The magnitudes of the harm that would occur in the absence of various legal proscriptions and at different levels of enforcement of the legal prohibitions are among the principal determinants of an efficient system of antitrust enforcement. Similarly, the consequences which would result if the definition of legality, the severity of the sanction or the method of

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enforcement were altered must also be assigned quantitative values if, even in principle, the system as a whole is to be evaluated.

A consideration of the theoretical and empirical work which seeks to estimate the magnitude of these effects may lead to radical notions about antitrust. For example, it may be plausible to assert that, given (a) the limitations on the exercise of monopoly power (particularly in the long run) in light of the ability of consumers to substitute products manufactured by nonparticipants in the cartel, and of nonparticipants to increase the quantity of identical products or substitutes supplied; (b) the costs of organizing, coordinating, and enforcing the cartel; (c) the direct costs of enforcing the antitrust laws; and (d) the indirect costs resulting from behavior responding to the possibility of “mistaken” enforcement, the existing system yields a large net social loss—as measured by any of the standards which have been advanced.

Once again, examination of these issues could make an important contribution to a normative theory of law. The point simply is that it is not enough to identify an evil which, in principle, would exist in the absence of regulation. The magnitude of the evil must justify the costs incurred in preventing it. If, indeed, a major area like antitrust law does not pass this test, it strongly suggests that somewhere in the legislative or enforcement process relevant gains and losses are not being properly calculated. Any normative theory of law must take account of actual outcomes in existing regulatory schemes when the desirability of proposed regulation is being evaluated.

B. A Positive Theory of Law

The final set of issues I would like to see considered are those relating to the positive explanation of the existing system of antitrust regulation. Professor Posner, along with a number of others, has examined the problem of developing a theory for predicting what economic regulation will emerge. These “theories of regulation” seek to examine the legislative, enforcement, and appropriation process with a view to describing the factors which together determine the incentives of the relevant decision makers: voters, legislators, public and private enforcers, administrators, judges, and private persons gaining and losing from enforcement. The objective of the inquiry is to explain why the legal system which in fact emerges comes into existence.

Some answer to those questions is necessary for a normative evaluation of the present body of antitrust law and proposed alternatives. For what is relevant to such an evaluation is not the “optimum” correction of market failures which an omniscient enforcer who could operate costlessly would be able to achieve. If the issue is not the ideal but the possible, the key to effective structuring of the system lies in the creation of incentives which will make the conduct of participants in the regulatory process conform to what is socially desirable. How public and private decision makers have in fact reacted to the array of incentives to pass antitrust legislation, appropriate money for its enforcement, select cases for prosecution, decide those cases, and make the multitude of other choices which determine the reality of the body of antitrust regulation is obviously critical in evaluating the existing system and proposed alternatives.

Again, antitrust law is an instructive case for the legal system as a whole. The development of antitrust law is not an example of an industry “capturing” an agency and turning it to its own uses. Nor is there any other obvious beneficiary class which has “purchased” the regulation. Indeed, it is hard to generalize about the gainers and losers from antitrust enforcement. Increasingly, it is government agencies of a similar nature, for example, the Environmental Protection Agency, the Securities and Exchange Commission, and the Food and Drug Administration, which have become the most significant and controversial. In all these cases, there is an elegant “public interest” theory to support the regulation, no obvious class of villains and at the same time grave doubt that the regulation yields net benefits. A study of antitrust law from this point of view could therefore shed a great deal of light on the pervasive question of why regulation of this type comes into existence and assumes the form it does.

**Conclusion**

This book is an important contribution to what I have come to think of as the “first wave” of the economic invasion of the law school curriculum. In this phase positive economic analysis is accepted as helpful in identifying the likely allocative and distributional consequences of a legal rule. It is indeed very useful to know that a monopolist, in principle, will make society poorer, and that imposing a legal sanction exceeding the amount of the gain he anticipates is likely to cause him not to make socially wasteful price and output decisions.

Unhappily, issues of public policy are not confronted in this simple context. An elegant plea for government intervention in prin-
principle is made in cases like that of our monopolist about to restrict output and make the society poorer, or that of the reluctant "polluter" unable to arrange being bought off by his victims because all want to take a "free ride" (or, I suppose, "breath"). But the much harder question, which scholars have only begun to consider, is whether, given the opportunities of the persons involved in passing, enforcing, and complying with or evading the proposed law, government regulation is likely to yield "net social benefits." Involved in this appraisal are both the normative and positive issues I have raised. This is the question the "second wave" of the economic invasion of the law schools must address.

Professor Posner is uniquely qualified to present a systematic examination of the antitrust laws from this perspective. He chose the more modest course of applying positive economic analysis to the practices covered by the antitrust laws—touching only briefly and sporadically on the choice of goals and the efficiency of the antitrust system as a whole and making no effort to relate antitrust to other areas of the law.

It is a measure of my respect for this book and for Professor Posner's enormous contribution to legal scholarship that I am disappointed that the conception of the book was not more ambitious. An antitrust casebook by the author of this one which systematically addressed the related questions of why antitrust regulation has developed as it has and how it might be fundamentally recast would, I believe, be a pedagogical delight for the antitrust instructor—certainly for the one writing this review.