from the tariffs themselves and did not rely on trucking company estimates.) Even with this adjustment, however, the figures for interstate rates were still substantially above the rates quoted for moving within Maryland. Moreover, it is not clear that the adjustment should be made: several firms providing intrastate moving service told me they would be willing to be bound by their estimates—a practice the ICC prohibits for interstate moving.

I have heard it said that shippers of household goods prefer a single rate in the market—that they are confused by the multiplicity of rates quoted in a market like Maryland's. In an unregulated market, where there are no rate bureaus setting rates, the customer has to go to the trouble of "shopping around" to find the lowest rate. But the argument ignores an obvious point. Unregulated markets benefit both those who want to shop around *and* those who do not. The latter will still be better off without collective rate-making and its accompanying ICC regulation because, on average, the individually set rates will be lower than collectively set rates. Indeed, the highest intrastate rate quoted by any one of the fifty-one movers covered in my survey was still one dollar *less* than the interstate rate.

The difference between regulated collusive rates and Maryland's unregulated rates provides an indication of the general effect of rate bureaus and the ICC. If, as I believe, this effect is felt nationwide, then the $1.2 billion spent annually for interstate moving of household goods is, I would conservatively estimate, 25 percent greater than it need be. Or to put it another way, American families are spending at least $240 million more than they need to every year because of ICC regulation.

This assumes, of course, that there is no quality difference in the services provided for moving interstate and for moving within Maryland. This we cannot be sure of. But any quality difference would have to be substantial in order to justify the significant difference in rates. And there is no evidence that it is. ■

The research embodied in this article was carried out as part of the author's Ph.D. dissertation (Ohio State University, 1975). For fuller detail, see "Statement of Denis A. Breen, July 1978," in *United States of America before the Interstate Commerce Commission* (Ex Parte No. 297, Sub-No. 4), Answer of the Federal Trade Commission.

A Book Review

Antitrust: A Form of Regulation

Thomas E. Kauper

The Antitrust Paradox (Basic Books, 1978) represents the culmination of Robert H. Bork's thinking on the development of substantive antitrust doctrine, its impact on the legal system and the economy, and the need for reform. Because Bork, a dominant figure in the antitrust world for many years, has long been building through a series of articles to this volume, the analyses seem familiar, the conclusions those we would have predicted, and the recommendations perhaps less dramatic than they really are. But this is more a tribute to Bork's earlier writings than a defect in this impressive work. In fact the analysis now set forth goes well beyond what Bork has done before. He believes antitrust doctrine has gone seriously wrong and devotes much of his book to proving that point. But he goes on to ask why and at what cost, questions of import not only to reforming antitrust doctrine, but also to understanding judicial and government enforcement processes as a whole.

Bork's specific recommendations are dramatic. Vertical and conglomerate mergers, vertical price maintenance and territorial restraints, tying arrangements, exclusive dealing contracts, and price discrimination—all these should be deemed lawful. Antitrust law should

Thomas E. Kauper is professor of law at the University of Michigan Law School.

strike at naked horizontal agreements (primarily price-fixing), horizontal mergers that leave less than three significant firms in the market, and a variety of very carefully defined (and in his view highly improbable) predatory practices. In the absence of such predation, monopoly should be tolerated because it is the result of efficiency. Greater attention should be paid to interjecting competition in industries now economically regulated. Clearly, if the Supreme Court were to follow these recommendations, it would be overruling cases for the next decade.

The central thesis is that antitrust doctrine has become an effective instrument against the very efficiency it was intended to ensure, as well as a form of state intervention in the very markets it was designed to keep free. These errors, in Bork's view, come from confusion of goals and lack of economic understanding.

Beginning with the basic proposition that the antitrust laws are designed solely to protect consumer welfare, Bork devotes a substantial part of the book to establishing this proposition, in terms of both legislative intent and the need for developing judicially administrable criteria. The latter is particularly important, for if the courts are to make tradeoffs between efficiency (consumer welfare) and other social and political values, they are without legislative guidance and are therefore necessarily making decisions fairly characterized as "political." In Bork's view, the courts ought not make "political" decisions and the law ought not be predicated on the assumption that they should. Some will suggest that this strong emphasis on workable standards—and, therefore, on a form of judicial restraint—counsels an undue limitation on the judiciary's role and reflects an unwarranted skepticism about the judiciary's ability to resolve broad social issues. I can only say that I find Bork's argument powerful.

Not all agree that consumer welfare should be the sole criterion applied in antitrust actions. The Supreme Court itself has not consistently confined antitrust doctrine in this way, and its interjection of other values—protecting small business, concern with social and political values—continues to find support.

But given the single goal of consumer welfare, Bork develops a careful framework and, within that framework, rules and criteria predicated on the use of price theory. The ultimate task of antitrust, in his words, is "to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or a net loss in consumer welfare." Where a practice restricts output and thus adversely affects allocative efficiency (the placement of resources where consumers value them most), without producing a gain in productive efficiency, the antitrust laws should intervene. (Horizontal price-fixing is an example.) But there is no reason to intervene in the absence of output restriction. Admittedly, there are actions (for example, some horizontal mergers) that may both restrict output and add to productive efficiency and, for these cases, rules must be predicated on probabilities as to which effect will outweigh the other.

This analysis rests on the proposition that businesses act to maximize profits—a proposition some will contest—and that they can do so in but one of three ways. First, they may restrict output. Second, they may achieve new efficiency. Third, they may employ devices such as tax avoidance that are neutral in terms of allocative efficiency. Antitrust's sole concern, according to Bork, is to identify conduct in the first of these categories and to formulate, through the use of economic theory, rules that will prevent it.

Much of the rest of the book is a critique of existing doctrine, which (because of its failure to focus on output restriction) has condemned a broad range of conduct that in fact creates efficiency. Bork's method, although relying primarily on price theory as the underlying tool of analysis, is more a lawyer's than an economist's. It rests heavily on a lawyer's perception of what courts can and ought to do and on a jurisprudential philosophy about the lawmaking process. While the law's purpose is economic and the discipline to be used is economics, Bork correctly emphasizes the fact that, like it or not, it is *legal* rules of which we speak. A decision in one case will govern the conduct of many who are not parties to it. The fact-finding process itself is a judicial one, confined to a judicial record and having certain clear limitations. Nowhere is this more apparent than in the treatment of the "mixed" case, the case where some output restriction accompanies some productive efficiency gain. It is in handling this type of case that Bork's

sense of the legal system is critical and causes him to depart from the views of a number of economists—those who have suggested that, in such cases, the government should prove the restriction on output, an "efficiencies" defense should be recognized, and the court should then draw the balance. The difficulty with this approach, as Bork recognizes, is simply that it is not within the capability of the legal system. The data are not available, and even if they were, they could not be digested. A court required to draw such a balance would tend to focus on what was available and understandable, and forget the rest. The result would be distortion. Instead, clear rules must be drawn to take account of probabilities. If the balances are too close to call, Bork suggests that antitrust should not overrule private decisions. This may be somewhat arbitrary, but there is no better way. And, I might add, such arbitrariness is inherent in the whole lawmaking process.

Much could be said about Bork's use of price theory, and in general I am content to leave that task to others. Economists who agree with his view on goals and who accept his methods will undoubtedly still find much to contest. Indeed, one of his greatest virtues is the degree to which his boldness provokes debate. But two contested points in particular should be mentioned.

First, he finds no empirical or theoretical basis for believing that high market concentration results in output restriction. (Put another way, the so-called "oligopoly" problem is an illusion.) Moreover, in the absence of collusion (though collusion is admittedly facilitated by a market with few sellers), monopoly or oligopoly results from efficiency and should not be attacked. Thus, conduct cannot be viewed as output-restricting simply because it increases concentration (short of monopoly). This is critical to much of Bork's analysis, inasmuch as a significant element in traditional antitrust doctrine is the belief that conduct that raises concentration above specified levels is sufficiently likely to restrict output so that its prohibition is warranted. Second, if there is no predation, private parties cannot create "artificial" entry barriers, and natural barriers (in the form of superior efficiency) are not the legitimate concern of antitrust. Bork correctly recognizes that these points are central to his argument, both because the absence of artificial barriers is necessary if one is to assert that market structure is the result of efficiency, and because some conduct is today condemned on the grounds that it artificially raises entry barriers and thus contributes to output restriction.

In reformulating antitrust doctrine, Bork is of course sharply critical of the courts—the Supreme Court in particular—and of enforcement agencies. Much of his criticism is surely valid, even if one does not accept all his analysis. Particularly vulnerable is the doctrine on vertical mergers and "exclusionary practices," where competitive injury has been equated with foreclosure of competitors, and restraint of trade with contractual restraints on the freedom of individual traders. Bork is surely correct in asserting that what many of these cases condemn is efficiency—that they offer little or no basis for a belief that the conduct in question restricts output.

Having examined current doctrine, Bork then draws conclusions, and it is here that the book is most forceful and most provocative. It is also here, in my judgment, that it is most given to overstatement.

The consistent theme throughout is the unwillingness or inability of the courts to recognize the societal need for productive efficiency. The most obvious danger, then, is that antitrust policy is counterproductive, undermining the very efficiency a capitalist system demands. At a bare minimum, antitrust imposes efficiency losses. The obvious question is how it went so seriously astray. Bork's answer lays part of the blame on the Congress, which has behaved as though certain specific actions (for example, exclusive dealing contracts) are likely to be anti-competitive when, in fact, they are not. But given that Congress has generally left the formulation of antitrust doctrines to the courts, much of the fault is theirs. Yet, pressed with heavy daily business, the courts have been forced to rely on counsel, and counsel's performance has simply not been satisfactory. This is to a degree simply a reflection of lawyers' lack of economic sophistication (although in fairness I would add that at least in the early days of antitrust there was little in economics to provide guidance). It is also inherent in the adversary system, where defense counsel represents not a principle but a client, and where

his opponent on the government's side is part of a bureaucratic structure committed to continued extensions of doctrine.

Bork correctly points to some of the institutional difficulties that may contribute to economically irrational results in complex cases (antitrust as well as others), though I believe he overdraws the picture of the necessary tendency of the government enforcement agencies to push principle beyond its limits. But, even though the courts depend heavily on inputs from others (whose own interests may often have little to do with doctrinal development), I find singularly curious Bork's failure to discuss the impact of private enforcement. One can read the entire book and not be aware that most antitrust cases are brought by private plaintiffs and handled with no government participation. Indeed, Bork creates the opposite impression. In considering the performance of defense counsel, for example, he asserts: "Nor, since the government has chosen it, is the case likely to be attractive from the defense point of view." But, statistically at least, the odds are that the government did *not* choose it. Increasingly doctrine is developed in cases where *both* sides have private interests and private clients. And, as I have said elsewhere (*South Dakota Law Review,* Winter 1978), since private enforcement has had a significant impact on doctrine, any consideration of reform must include a reassessment of its role.

Antitrust doctrine, of course, is not simply the result of the process by which it is formulated. It has an ideological content which, in Bork's view, both partially explains its misdirection and creates the greatest concern for the future. Quite apart from antitrust's economic costs, he fears that what began as the symbol of opposition to "statist" and "authoritarian" economic ideologies may come to support precisely those ideologies. Antitrust has strayed, he believes, not only because of the failure of those responsible for it to apply the teaching of economics, but also because it has been influenced by a growing trend toward judicial "political" decision-making, by a belief in the efficacy of economic regulation, and by a strong trend toward egalitarianism. These factors have caused confusion over goals and too much confidence in the judiciary.

One can share these concerns without entirely adhering to Bork's portrayal of an "antitrust crisis." Whatever the crisis may have been, there are now signs that both the courts and agencies have begun to move away from antitrust extremes. Indeed, Bork himself justly deserves some of the credit for the move, for there is growing acceptance today of a large part, though hardly all, of what he has said in the past. While he takes some note of the new trend, the tenor of his argument leaves the impression that there has been little change since the Warren Court was at its zenith.

This seems particularly apparent in his final recommendations. Bork calls for greater antitrust emphasis on enforcing the laws against price-fixing. But the Justice Department's Antitrust Division has in fact been moving steadily in this direction for quite a time, while filing, within the past six years, only a handful of vertical cases (cases involving relations between suppliers and customers). He goes on to urge that the division intervene in the regulatory process, both to limit its scope and to interject competition into regulated industries. Further, he recommends that the division "expand its portfolio" to include legislative testimony on anti-competitive measures and to seek repeal of anti-competitive legislation that already exists. These recommendations are also sound, but they too are already being carried out. In recent years, the division has shifted considerable resources to the regulatory process, has testified regularly on anti-competitive measures, and has played a major role in promoting legislation to open regulated industries to competition and to repeal or modify the Robinson-Patman Act.

This is a minor, and perhaps unfair, criticism. It is minor because it in no way challenges Bork's substantive analysis. It is unfair because, but for the author's tour as solicitor general of the United States, this volume would have been published a number of years ago.

No amount of such minor criticism can detract from the intellectual power of this analysis. I cannot imagine a federal judge, antitrust practitioner, or, indeed, anyone even remotely interested in antitrust who ought not to be fully familiar with this volume. It should set the boundaries of debate for years to come. To the extent it is ignored (if it is), antitrust will be the loser. ■