The Antitrust Paradox: A Policy at War with Itself, Robert H. Bork, New York, Basic Books, Inc., 1978, xi + 462 pp. $18.00.

There is no doubt that this work written by a former Professor of Law at Yale Law School, and now a federal appellate judge is an important contribution to the study of American antitrust law. The central theme of the book is that American courts have gone astray in the enforcement of these laws because, according to Bork, antitrust's basic premises are mutually incompatible, and some of them are incorrect.[1]

For the author the two key elements or centres of disagreement are first, the goals or values which the law may legitimately and profitably implement; and secondly, the validity of the law's vision of economic reality. It must be observed that the Borkian vision of antitrust is firmly wedded to the Chicago school which places great emphasis on an economic analysis of antitrust law. According to the Chicago school non-economic values are externalities, and as such have no place in the framing of a rational antitrust system.[2]

Part I of the book is devoted to an explanation of the basic ideas of antitrust law. Part II examines the main subject headings of the law including, amongst others, an analysis of monopoly and oligopoly, mergers — horizontal, vertical and conglomerate; horizontal price-fixing and market division, exclusive dealing and requirements contracts and price discrimination. Part III contains two chapters, one summarizing the major recommendations of the book for the substantial reform of the law, and the other constituting an overview of the implications of antitrust law in relation to society.

Bork begins his analysis with an examination of the legislative and judicial interpretations of the Sherman Act and the Clayton Act. The two basic propositions espoused are that, first, the only legitimate goal of American antitrust law is the maximization of consumer welfare, and secondly, competition, for the purposes of antitrust law must be understood as a term of art signifying any state of affairs in which consumer welfare cannot be increased by judicial decree.[3] Bork attempts to find support for these propositions by an analysis of the legislative intention which underlies the various antitrust statutes. He also argues that the "responsibility of the federal courts for the integrity and virtue of law requires that they take consumer welfare as the sole value that guides antitrust decisions".[4] He bases his criticisms of the enforcement of antitrust law by the American courts upon the fundamental proposition that the sole goal is the maximization of consumer welfare. However, an analysis of a number of other works indicates that it is not a simple matter to work out

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[1] Robert H. Bork, *The Antitrust Paradox: A Policy of War with Itself,* Basic Books Inc. New York, 1978, 7.

[2] The approach of the Chicago school to antitrust is described in L. A. Sullivan, "Economics and More Humanistic Disciplines: What are the Sources of Wisdom for Antitrust?" (1977) 125 *University of Pennsylvania L.R.* 1214; and see also R. A. Posner, "The Chicago School of Antitrust Analysis" (1979) 127 *University of Pennsylvania L.R.* 925.

[3] R. H. Bork, *op. cit.,* 51.

[4] *Ibid.,* and see also Chapter 3, "The Goals of Antitrust: The Responsibility of the Courts".

what the goals of antitrust law are,[5] and indeed it has been observed by other antitrust scholars that the legislative history of the antitrust statutes is not very helpful in ascertaining the goals.[6] In the end it may be that the Borkian view while enticing is an over simplication.[7]

After explaining the two key factors of allocative efficiency and productive efficiency, and expounding the consumer welfare model of analysis,[8] the view is advanced in Chapter Six that price theory is the only correct intellectual basis for antitrust law. In Bork's view, price theory "enables us to identify, with an acceptable degree of accuracy, those activities whose primary effect is output restricting, leading to the inference that all other activity is either efficiency creating or neutral".[9] However, one central issue is whether price theory is a solid foundation for an analysis of the antitrust laws. While the adherents of the Chicago school would not require much convincing as to the rectitude of this theory, it cannot be asserted that this is the only possible approach, and indeed, there is a strong body of academic opinion which takes the view that economics is not and cannot be the sole intellectual basis for antitrust enforcement.[10]

After stating that the "root trouble with modern antitrust, more damaging even than confusion over goals, is the unsophisticated, indeed primitive, state of the law's economic doctrines",[11] the author indicates the reforms which he believes are necessary. He states that the "law of arrangements that remove rivalry by agreement (e.g. horizontal price fixing, market division, mergers and the like) must be substantially revised to save those arrangements whose primary effect is an increase in efficiency. More important are the changes required in the law concerning practices and arrangements thought to be exclusionary (e.g. vertical and conglomerate mergers, exclusive dealing, tying arrangements, price discrimination, and the like)".[12] In Bork's view, the "theories of automatic exclusion and incipiency, upon which the Clayton Act, the Robinson-Patman Act and the Federal Trade Commission Act are now based, should be abandoned completely. Antitrust should attack no practice or arrangement on the grounds that it is exclusionary or foreclosing unless deliberate predation can be proved".[13]

In Part II entitled "The Law and the Policy" Bork analyses various areas of antitrust law, and is particularly critical of merger policy, especially the decision of the United States Supreme Court in *Brown Shoe*

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[5] H. B. Thorelli, *The Federal Antitrust Policy*, George Allen and Unwin, London, 1954; W. L. Letwin, "Congress and the Sherman Antitrust Law: 1887-1890" (1956) 23 *University of Chicago L.R.* 121; D. D. Martin, *Mergers and the Clayton Act*, University of California Press, Los Angeles, 1959; L. A. Sullivan *op cit.* at 1218; and K. G. Elzinga (1977) 125 *University of Pennsylvania L.R.* 1191.

[6] P. Areeda and Donald F. Turner, *Antitrust Law*, Little, Brown and Company, Boston 1978, Volume 1 at 14-16.

[7] See P. Areeda and Donald F. Turner, *ibid.*, Volume 1 at 7-33.

[8] R. H. Bork, *op. cit.*, chapter 5.

[9] R. H. Bork, *op. cit.*, 116.

[10] See L. A. Sullivan, "Economics and More Humanistic Disciplines: What are the Sources of Wisdom for Antitrust?", *op. cit.*

[11] R. H. Bork, *op. cit.*, 134.

[12] *Id.*, 160.

[13] *Ibid.*

Co. v. *United States.*[14] This case is seen as "a disaster for rational, consumer oriented merger policy. The incredible severity it forecast for horizontal and vertical mergers has been fully borne out, and the seeds of conglomerate merger policy have germinated".[15] It should be noted that the topic of conglomerate mergers is one of the most important current debates in American antitrust law. This is of course not surprising since conglomerate mergers have become the predominant mode of merger in America.[16] At the core of the conglomerate merger debate is the issue of what the goals of American antitrust law are. For Bork and other Chicago school adherents antitrust has no reason to interfere with conglomerate mergers,[17] but this view is not unanimously shared by all antitrust scholars as a perusal of other academic writings indicates.[18]

The author applies price theory to other areas of antitrust law, and after an almost constant stream of criticism of the current law one is left wondering what antitrust law would be left intact if the Borkian view was adopted. The answer is contained in Part III where Bork's recommendations in relation to antitrust law are set out. His view is that antitrust law should only strike at three classes of behaviour:[19] "(a) The suppression of competition by horizontal agreement, such as the nonancillary agreements of rivals or potential rivals to fix prices or divide markets, (b) Horizontal mergers creating very large market shares (those that leave fewer than three significant rivals in any market), (c) Deliberate predation engaged in to drive rivals from a market, prevent or delay the entry of rivals, or discipline existing rivals . . .". Obviously if this view was adopted antitrust law in America would be confined to a very small area indeed. However, one must question the intellectual basis upon which Bork justifies his view as to what should constitute antitrust law. It is not readily apparent what justification there is for focussing solely on these three matters to the exclusion of any others.

However, the importance of *The Antitrust Paradox* is that it contains many telling criticisms of American antitrust law, and indicates with clarity how price theory can be used as an intellectual weapon to criticise the existing law. There is no doubt that the Borkian approach to antitrust has had an important impact in America in recent years,[20] but since American

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[14] (1962) 370 U.S. 294.

[15] R. H. Bork, *op. cit.* 216.

[16] See "Mergers and Economic Concentration" — *Hearings before the Subcommittee on Antitrust, Monopoly and Business Rights of the Committee on the Judiciary, United States Senate, 96th Congress,* First Session on s. 600, Parts 1 and 2 (hereafter referred to as *s. 600 Hearings*); and F. M. Scherer, *Industrial Market Structure and Economic Performance.* Second Ed. Rand McNally. Chicago 1980, 558.

[17] R. H. Bork, *op. cit.*, 248.

[18] See *s. 600 Hearings,* — n. 16 above, and also see Vol. 42, No. 1069, *Antitrust and Trade Regulation Report,* June 17, 1982; Federal Trade Commission Statement concerning Horizontal Mergers, June 14, 1982; and "Oversight of Government Merger Enforcement Policy", *Hearings before the Committee on the Judiciary, United States Senate, 97th Congress,* First Session, October 27 and November 19, 1981, Part 1.

[19] R. H. Bork, *op. cit.*, 406.

[20] See L. A. Sullivan, "Antitrust, Microeconomics and Politics: Reflections on Some Recent Relationships" in *The Economics of Firm Size, Market Structure and Social Performance,* Federal Trade Commission, July 1980, 10-15 where it is argued that the Supreme Court and lower federal courts are becoming increasingly committed to a conception of competition which emphasizes efficiency.

antitrust law has historically been viewed as having a richer and more diverse basis[21] than that admitted by Bork, it is doubtful that this approach will maintain a monopoly of antitrust wisdom.

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[21] See n. 5 above, and see R. Pitofsky, "The Political Content of Antitrust" (1979) 127 *University of Pennsylvania L.R.* 1051.

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