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HANDBOOK OF THE LAW OF ANTITRUST. By Lawrence A. Sullivan. St. Paul: West Publishing Co. 1977. Pp. XXVIII, 886.

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BOOK REVIEW

HANDBOOK OF THE LAW OF ANTITRUST. By Lawrence A. Sullivan.[1] St. Paul: West Publishing Co. 1977. Pp. XXVIII, 886.

Reviewed by Douglas E. Rosenthal[2]

By writing the first true antitrust hornbook,[3] Professor Sullivan has done the improbable. That it is also a very good hornbook is a bonus. One might ask why writing a comprehensive treatise on antitrust is improbable.

Antitrust, the federal law promoting economic competition, has generally been considered inaccessible for hornbook treatment. Hornbooks tend to be most successful in fields with deep common law roots, such as torts, contracts, and trusts. They are nourished by long-term perspectives, the gradual growth of doctrine, and a relatively limited number of path-breaking developments which signal change. The problems for decision usually involve relatively few factors.

None of this is true of antitrust. While there are common law cases relating to trade restraints reported at least as far back as the Elizabethan age, they have had almost no impact on United States law since passage of the Sherman Act in 1890. Antitrust theories rise and fall like the tides. Many of the most important precedents have been handed down within the last twenty-five years. Many relevant facts are involved in most antitrust cases. Sifting masses of evidence for the small gem of critical

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3. The two current books in print which come closest to being treatises are A. NEALE, THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA (2d ed. 1970), which is more limited in scope and becoming dated, and ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS (1975), which is less analytical and scholarly, but which refers to many more cases.

significance is tedious and time-consuming. Trials may take years and some of the most important opinions exceed one hundred pages of fine print. Antitrust analysis leans heavily, though not totally, upon economic theory for the development of legal rules and principles. Legal conclusions are inferred in large part from economic evidence and opinion and this dependence upon the dismal science of economics makes the subject even more forbidding.

Yet curiously, it is not its complexity which is supposed to render antitrust inappropriate for hornbook scholarship, but its lack of complexity. Relatively speaking, the numbers of antitrust cases, though greatly increasing in recent years, have been few. While complex statutes such as the securities laws or the federal rules of procedure, with their rich legislative histories and detailed provisions, may generate valuable treatises, the antitrust laws are very simple. Their provisions are thought too broad for straightforward exposition. Their meaning is considered too dependent upon cases and commentaries which themselves are so chaotic as to becloud rather than illuminate. It has been observed that tax is a difficult field because there is too much law, whereas antitrust is difficult because there is too little. Sullivan's hornbook has now refuted the second part of this observation.

Sullivan attacks the conventional wisdom head on. With easy exposition, he indicates the principal economic concepts which inform antitrust analysis and does it well in ten pages of an appendix.[4] He stresses at the outset that while the essential contribution of economic theory is to elucidate the positive relationship between competition and promoting the efficient use of scarce resources, there is more to antitrust law than efficiency (some Chicago economists to the contrary notwithstanding). Rather, antitrust law should also concern itself with limiting concentrations of economic power, not merely because they may be inefficient, but also because they may be incompatible with our particular democratic ideals. This policy is sometimes thought of as essentially populist in nature (i.e., egalitarian), but probably better reflects a deep-seated American suspicion that power is an inherently corrupting force.

Sullivan is a talented synthesizer. Before discussing the cases, he suggests some of the underlying tensions contributing to the instability of antitrust law and correctly implies that much of the complexity and inconsistency of antitrust analysis can be explained by the fact that our society is both unwilling and unable to resolve these conflicts in a definitive fashion. Three sets of conflicts are fundamental. The first of these tensions involves a value conflict between the importance of effi-

4. L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 797 (1977).

ciency and the importance of the deconcentration of power. This conflict is nurtured by considerations such as the promotion of standards of fair dealing and justice in the market place even though these ideals may have little bearing on concentration or efficiency. The concept of antitrust law as an expression of social justice is distinctively American. Many believe that there is more social harm and immorality involved in price fixing than, for example, in selling pornography to consenting adults. However, the idea that competition is unseemly in some professions and ruinous in certain industries (especially when it comes from foreign products) is as viable in today's society as the idea that horizontal anticompetitive conduct constitutes felonious behavior subject to severe sanctions. This tension has been resolved neither in the antitrust literature nor in the sentencing practices of federal judges.[5] Unfortunately, it does not appear that the social justice aspect of antitrust has received sufficient attention in Sullivan's hornbook.

The second fundamental tension focuses on the degree of certainty required in judicial determinations of antitrust liability. Should the judicial process take shortcuts? Should it fashion simple rules resting heavily on legal presumptions? Should it limit the scope of relevant inquiry and speed decision-making? Or can justice be better served by comprehensive and meticulous analysis of the complex interrelationships among market structure, firm conduct, and firm and market performance? The greater the certainty required, the more antitrust becomes a policy science rather than a pragmatic legal art in the common law tradition, and the more difficult it is to render antitrust judgments within traditional legal guideposts.

The third tension is an outgrowth of the second. Assuming that the relationships among conduct, performance, and industry structure are relevant in determining antitrust liability, exactly what are those relationships? Some economists and legal authorities perceive them as clear, constant, and significant. Bigness necessarily leads to concentrations which nullify price competition and provide inefficient industry performance. Sullivan takes the contrary and better view that the relationships are more complicated than this. Antitrust analysis must depend upon crude theories and incomplete data. Although this openness and incompleteness is a great source of instability, it has the beneficial effect of encouraging flexibility and allows responsiveness to new findings and novel arguments.

The book stands or falls, of course, not upon this overview, but upon

5. *See, e.g., Reflections on White Collar Sentencing*, 86 YALE L.J. 589 (1977) (discussion among several commentators).

its analysis of existing doctrines. Professor Sullivan writes clearly, logically, and fluently. He is an acute analyst. Whereas casebooks leave a great deal of rough material in order to sharpen the readers' (usually law students') analytical abilities, Sullivan wields the knife himself. Beyond his skill in synthesis, he exhibits three talents rarely found in the same person. First, he has an appreciation of history. He shows the reader the line of development which has shaped the current law. While the time frame is relatively minute in comparison to other fields of law, it frequently suggests a measure of stability and continuity over time, such as the advancing and receding of mergers, proceeding almost rhythmically through the twentieth century.[6] This is not always readily apparent to the historical perspective of the practitioner. Second, he has mastered and incorporated the relevant legal and economic literature. Most of his citations are pertinent and are among the best of available scholarship. Moreover, they are fairly characterized. Finally, he shows his line of argument without gaps and usually without rhetoric. His judgment is sound and the reader is able to see how a good antitrust lawyer thinks through a problem.[7]

The hornbook touches most of the relevant doctrinal bases. There is a 130 page description of monopoly, a 180 page description of horizontal restraints of trade, a 125 page description of vertical restraints between suppliers and customers, a 75 page description of the relationship between antitrust and patent law (the disproportionate length of which is justified by its especially high quality), 100 pages on mergers, 25 pages on price discrimination, and 60 pages on statutory coverage and exemptions from antitrust enforcement. It also includes an ambitious, but largely unpersuasive, forty page discussion of the trend of applying antitrust law to oligopolistic markets.

Understandably, there are omissions. Though much is written about patent licensing, nothing is said about the increasing importance of restrictive "know-how" licenses. There is no mention, even in passing, of the interlocking directorates proscribed by section 8 of the Clayton Act. This subject deserves attention because section 8 shows yet another theoretical approach to the problem of concentration—that of limiting aggregations of power by limiting opportunities for joint decisionmaking by members serving on boards of directors of competing corporations. As another reviewer of the hornbook has pointed out, the discussion of attempts and conspiracies to monopolize is incomplete,[8] and there is

6. *See* L. SULLIVAN, *supra* note 4 , at 576-91.

7. *See, e.g., id.* at 472-78 (Sullivan's analysis of Standard Oil Co. v. United States, 337 U.S. 293 (1949)).

8. Bauer, Book Review, 65 GEO. L.J. 1079, 1082 (1977).

virtually nothing regarding the increasingly important subject of antitrust jurisdiction, defenses, and enforcement in foreign commerce.

Professor Sullivan holds well-reasoned and straightforward, if not unerring, views on most of the open issues of antitrust, of which there are indeed many. As to some issues, such as the legality of territorial restrictions in patent licenses, for which present case law is a hash of mindless erosions of competitive principles, he presents a sound critique. Then, going beyond critique, he prescribes that such restrictive licenses should be per se violations. Even though there is something to be said for per se illegality of such licenses, no court has yet adopted this rule and this fact may mislead the reader. In discussions such as this one, there should be clearer guidance as to what the law is and what the law should be.

The analysis of territorial restrictions and patent licenses revives and reinforces the judicially neglected scholarship of William Baxter.[9] Baxter and Sullivan criticize the long-standing assumption that section 261 of the Patent Code[10] (which merely establishes that patents must be assigned in writing and may be assigned in parts) mandates territorially restrictive licenses. A per se rule, however, is probably not the best approach. There is much to be said for a rule of reason approach to territorial restrictions which, when limited in time, may tend to encourage the diffusion of technology and thereby promote future competition. He gives this position unduly short shrift.[11] At the very least, it makes sense for a patent holder to protect the licensee who is the initial developer of a new territory against competition that might prevent the licensee from ever effectively getting started.[12]

The hornbook's approach to territorial restrictions in vertical distribution relationships serves as an accurate explanation of the case law at the time it was written. However, Sullivan has proven to be a poor predictor. Subsequent to publication, in the *GTE Sylvania* case,[13] the Supreme Court overruled the twenty-year old *Schwinn*[14] rule upon which Sullivan

9. Baxter, *Legal Restrictions on Exploitation of the Patent Monopoly: An Economic Analysis*, 76 YALE L.J. 267 (1966).

10. 35 U.S.C. § 261 (1970).

11. *See* L. SULLIVAN, *supra* note 4, at 532.

12. *Cf.* Turner, *Territorial Restrictions in the International Transfer of Technology*, in M. Ariga (ed.), *International Conference on International Economy and Competitive Policy*, JAPANESE INST. BUS. L. INC. 151, 152 (1973).

13. Continental T.V., Inc. v. GTE Sylvania, Inc., 97 S. Ct. 2549 (1977). Incidentally, Professor Sullivan discloses that he served as a lawyer for the unsuccessful plaintiff in this litigation. L. SULLIVAN, *supra* note 4, at 404 n.10.

14. United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

so heavily relies. It is no longer a per se violation for a supplier to restrict territories or customers, or to impose conditions governing the distributor's resale of the goods.

It is not a significant failing of the book that it has not anticipated post-publication developments, such as the Supreme Court's limiting of the state action doctrine in *Bates*[15] and its evisceration of the rights of indirect victims of price fixing conspiracies in *Illinois Brick.*[16] The book's strength lies in its analytical rigor and depth. Sullivan is pursuing the truth. His assumptions are not always those of others, especially the current Supreme Court, but if the reader thinks for him or herself and goes beyond the hornbook to read the cases, their successors, and some of the cited literature, Sullivan will not disappoint.

Professor Sullivan is not always predictable. In analyzing the conflicts between patent and antitrust policy, he follows his argument well and is unconcerned about being unconventional. His analysis of intracorporate conspiracy, however, is quite conventional, as well as incomplete and dubious. He concludes that if there are two separate commercial entities, even if one controls the conduct of the other as its agent, and together they plan and execute a course of action which restrains trade, they have violated section 1 of the Sherman Act.[17] While he is correct in saying that existing case law may sustain such a view,[18] the theory behind the law makes little sense, absent monopoly power. If an agent is truly independent, he is not an agent. If an independent agent is truly an agent, then he is not independent because of the nature of the agency relationship. The better rule is that controlled persons may not be deemed to conspire with those who control them as to activities directed by those in control. Such a rule would not exculpate a passive competitor of a dominant and independent co-conspirator. It would, however, remove liability in the situation in which one instructs his painting contractor not to use enamel paint imported from Eastern Europe in painting his home because of his opposition to communist regimes. Under conventional analysis this may well be an antitrust violation. A less conventional approach would have been welcome here.

What Sullivan refers to as "the oligopoly problem"[19] is currently a central concern of both lawyers and economists. The problem is two-fold, involving diagnosis and remedy. There are several important industries which are highly concentrated and in which there is apparently little

15. Bates v. State Bar of Ariz., 97 S. Ct. 2691 (1977).
16. Illinois Brick Co. v. Illinois, 97 S. Ct. 2061 (1977).
17. 15 U.S.C. § 1 (1970).
18. *See* L. SULLIVAN, *supra* note 4, at 325.
19. *Id.* at 331.

price competition. That is not at issue. Rather the question is whether a high degree of concentration is necessarily anticompetitive and/or inefficient. This is the diagnostic problem. Assuming that at least some concentrated industries exhibit behavior which suggests a "yes" answer to the first question, what can be done to make them more competitive and/or more efficient? What is the remedy?

Answering the first question with the typical policy-maker's out, Sullivan asserts a need for more focused and more sophisticated industry studies. He declares, apparently on faith alone, that:

> [W]e could expect to develop a series of industry studies each ending with an appraisal of the potential for, and recommendations about, remedial action. These recommendations would derive from an understanding of the dynamic of the industry and would take into account both the potential harms and the potential benefits of each remedial change considered.[20]

This is rhetoric and begs the problems of diagnosis. While good empiricism is very much needed, it is not clear that fresh empirical efforts will have an immediate dramatic payoff.

If each of the three firms in an industry can independently determine reasonably well the maximum price that it can charge, assuming that its competitors also charge that price, there is a good chance that the same price will actually be charged by all three firms. Most importantly, in many industries they can arrive at the same price without resorting to a direct or indirect agreement. This is often referred to as conscious parallelism, or administered or oligopoly pricing.

There is certainly more that we do not know about administered pricing than we do know. For example, why does it develop in some concentrated industries but not in others? Why doesn't deconcentration of an industry reduce its impact? Experience with the oil industry since World War I and the aluminum industry since World War II demonstrates that simple deconcentration does not end administered pricing. Why isn't price competition from imports more effective in undermining administered pricing? Are some, or most, oligopolistic industries technologically backward? Why are firms in some oligopolistic industries poor performers while those in other such industries stellar performers? Why do some yield consistently high profits while others do not?

Without theory or data, it is very difficult to prescribe remedies. Notwithstanding the lack of a diagnostic foundation, Sullivan proposes two broad strategies for attacking bad oligopoly. One is to challenge interdependent administered pricing patterns in a concentrated industry

20. *Id.* at 349.

as a combination in restraint of trade under section 1 of the Sherman Act.[21] The other is to develop the reasoning employed in the *American Tobacco Company* case,[22] which states that joint conduct among leading manufacturers in violation of section 2 of the Sherman Act can be inferred from a pattern of parallel anticompetitive practices.[23]

Both strategies have defects. First, many oligopoly markets, on close inspection, prove sufficiently competitive in practice as to preclude the drawing of an inference of collusion from essentially parallel conduct. In addition, true conscious parallelism is not collusion in the ordinary sense of that concept. Will courts accept an Alice in Wonderland theory that a thing is what it is not? Next, it is difficult to fashion judicial relief, without government intervention in the form of price controls, to deal with administered pricing which will not require corporate managers to behave irrationally, such as compelling them to lower prices, thereby reducing profits they could otherwise obtain noncollusively. Those committed to competition should put little credence in a system of price controls, because it both facilitates price fixing among competitors and misallocates resources. The present English experience and our own experience with such controls in the early 1970's should be sufficiently disillusioning.

But what happens if one doesn't regulate prices in oligopolistic industries? Sullivan would put antitrust enforcers in the uncomfortable position of imposing non-price regulatory decisions as to how much advertising or how much innovation is appropriate in a particular industry at a particular time,[24] a task much better left to businessmen than to government bureaucrats. This notion is more antithetical to the concept of a free market than is oligopoly. There is indeed little reason for believing that government regulators will promote greater efficiency and greater competitiveness than now exist in oligopolistic industries. For proof we need only look at the effects of the Interstate Commerce Commission on the trucking industry and the Federal Maritime Commission on the shipping industry.

A final defect in Sullivan's proposals for fighting bad oligopoly is that the legal precedents upon which he relies are somewhat infirm. His section 1 theory derives from the rule in *Interstate Circuit*.[25] In that case the Court held that a combination among film distributors could be

21. *Id.* at 355.
22. American Tobacco Co. v. United States, 328 U.S. 781 (1946).
23. *See* L. SULLIVAN, *supra* note 4, at 361.
24. *Id.* at 363.
25. Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939).

inferred from the following facts: (1) each distributor was advised that its competitors were asked by a theater chain to participate in a restrictive plan; (2) each knew that the plan, if executed, would restrain commerce and, (3) knowing it, all participated. But Sullivan does not give sufficient attention to two additional facts weighed heavily by the Supreme Court in that case. First, the Court concluded that, absent a successful conspiracy, it would have been irrational for any individual distributor to have agreed to the plan. The distributor would have foregone profitable opportunities. It will be very difficult to argue in an oligopoly case that it is irrational to follow a price leader and not undercut him. Also, the defendants in *Interstate* failed to avail themselves of the opportunity to rebut the plaintiff's inference of combination. Such a rebuttal will not be so difficult for defendants in a section 1 oligopoly case. As indicated, in many oligopoly industries there are discrete incidents of price competition which make it difficult to prove a consistent pattern of administered prices.

As to attacking the leading firms in an oligopoly industry for joint monopoly, it should be noted that the *American Tobacco* case provided no significant structural relief to oligopolistic patterns in the tobacco industry. That industry is still dominated by a few large firms engaging in limited price competition.[26] To exceed what the Court did in *American Tobacco*, which was merely to impose a fine, again raises the issue of excessive and inappropriate government regulation.

There is a schizoid quality to Sullivan's discussion. His heart tells him that something must be done about oligopolies, hence his faith in future research and his commitment to bold but insufficiently grounded legal theories. But his head tells him that we should proceed carefully because a bad remedy may do more harm than the status quo. Thus, he is appropriately critical of current legislative approaches to industry deconcentration.[27]

Perhaps a more modest view as to the oligopoly problem should be assumed while we wait for the economists to lift the scales from our eyes. This approach would focus on two limited strategies both of which are discussed rather unenthusiastically by Sullivan. First, a harder search should be made for actual conspiracies, focusing not upon parallelism but upon offer and acceptance or a meeting of minds, established through sometimes indirect and subtle forms of communication. Assume, for example, that key firms in a concentrated industry, through a trade association, advise each other to adopt a standard pricing clause in

26. W. NICHOLLS, PRICE POLICIES IN THE CIGARETTE INDUSTRY 401 (1951).
27. *See* L. SULLIVAN, *supra* note 4, at 367-71.

requirements contracts which fixes prices for future delivery at the average price (determined and published by the trade association) in the geographical market during the week the order is tendered. Depending upon the origins of this arrangment, the ways in which it is implemented, the nature of the industry and the efficiency justifications that could be made for it, the arrangement might appropriately be found to be a conspiracy, albeit an indirect conspiracy in restraint of trade, just as conscious parallelism may be, on closer scrutiny, a sophisticated and overt conspiracy. One difficulty with this approach is that trial courts appear increasingly reluctant to infer nonexplicit agreements from circumstantial evidence. But such judicial reluctance[28] must change if common law doctrine under Section 1 is to develop.

An alternative strategy, assuming that specific, nonregulatory remedies can be fashioned, is to utilize section 5 of the Federal Trade Commission Act[29] to attack particular practices which, although not necessarily the outgrowth of a conspiracy, unjustifiably promote oligopoly performance under the rule of reason. Such an approach could be used successfully in dealing with, for example, zone pricing systems. This market practice found in some oligopoly industries requires customers to pay the same delivery surcharge for goods shipped within geographic zones regardless of whether they are 10 or 500 miles from the place of shipment. Zone pricing and its analog, delivered pricing, can be ended by prohibition or by requiring producers to offer customers the alternative of making purchases f.o.b. the point of shipment.[30] Although Sullivan's treatment of the oligopoly problem is ultimately unpersuasive, this fact does not diminish his overall accomplishment, for there has never been a truly successful analysis of the oligopoly problem.

By focusing on these relatively few significant difficulties, this review has necessarily refrained from praising the greater part of this outstanding hornbook. Sullivan is to be commended for his discussions of the relationship between per se rules and rule of reason analysis[31] and of the distinction between trade restraints resulting from the partial integration of economic entities which ought to be legal, and those which ought not.[32] Moreover, the chapter on mergers is, as a whole, elegant.

28. *See, e.g.*, United States v. AMAX, Inc., [1977-1] TRADE CAS. (CCH) ¶ 61,467 (N.D. Ill. 1977); United States v. General Motors Corp., 369 F. Supp. 1306 (E.D. Mich. 1974).

29. 15 U.S.C. § 45 (1970).

30. *See, e.g., In re* Boise Cascade Corp., 3 TRADE REG. REP. (CCH) ¶ 21,244 (1976) (initial decision to cease and desist).

31. *See* L. SULLIVAN, *supra* note 4, at 195.

32. *Id.* at 265-66.

The book is a major accomplishment. It probably establishes an antitrust hornbook monopoly, albeit a legal one. Its scope, scholarship and style should prove significant barriers to entry for potential competitors.