

The Institutional Structure of Antitrust Enforcement:
Book Review
by Bert Foer¹

Daniel A. Crane
The Institutional Structure of Antitrust Enforcement
Oxford University Press 2011
252 pp. including index, \$75

This is a ticklish review for me to write. Dan Crane, Professor of Law at the University of Michigan, is a member of the American Antitrust Institute's Advisory Board. So is Harry First, Professor of Law at New York University, whose blurb on the back cover of Dan's The Institutional Structure of Antitrust Enforcement describes the book as "a well-done study of antitrust enforcement institutions" that is greatly needed. While I mostly agree with this and with Herb Hovenkamp's cover blurb that "This is a marvelous book that every antitrust scholar should read," I also note that although both Harry and Herb (and I) admire the institutional focus and intellectual sweep of Dan's project, neither of them actually says he agrees with the content. This strikes me as prudent because, as this review will make apparent, I have particular difficulty with the book's potentially influential and very negative treatment of private antitrust enforcement. I take the risk of offending one of my valued advisors because this is a topic of great importance to the antitrust enterprise.

Dan's project begins with the recognition that "institutions...are a critical and underappreciated driver of our antitrust policy that intersects in many subtle ways with substantive antitrust rules and decisions."² Importantly, "Just as important as institutions are *anti-institutions* –political or legal forces that arise to counter the directional pull of institutions."³ Institutions and anti-institutions are identified, depicted, and evaluated in three major divisions of the book: (1) origins and development of U.S. antitrust institutions; (2) optimizing institutional performance; and (3) comparative and international perspectives. I will comment in this review only on aspects of the first two categories.

Dual Enforcement by the DOJ and FTC

Dan raises many appropriate questions about how well the institutions of antitrust function. His analysis of dualism, i.e., the shared responsibility of the Antitrust Division and the FTC, is that it is "inelegant on paper and imperfect in practice."⁴ That actually understates the bluntness of his critique, with which I could quarrel but will not, because I agree with the proviso of Dan's conclusion that while the system seems to be broken, it is not broken *enough* to warrant fixing.⁵ "One conclusion," he says, "is that, on balance, there is

¹ Foer is President of the American Antitrust Institute, www.antitrustinstitute.org. As this review implies, the AAI Advisory Board, with over 115 members, contains a diversity of views, all directed toward the improvement of the antitrust enterprise, but without a single way of getting there.

² Daniel A. Crane, THE INSTITUTIONAL STRUCTURE OF ANTITRUST ENFORCEMENT (2011), xii.

³ Id., xii.

⁴ Id., 46.

⁵ Id., 46.

no good reason to commend the inelegant dual agency model to the rest of the world. The other is that there is wisdom in conservative impulse not to alter existing structures that seem to be working passably well even if their theoretical basis is shaky.”⁶

Populist Institutions and Technocratic Antitrust

“Conservative impulse” is frequently but not consistently reflected in the book. Dan traces the evolution of antitrust away from populist roots (bad) into a technocratic institution (good) that has become more or less removed from politics. In this sense, *conservative* has less to do with conserving the past than with applauding modern economic concerns with efficiency. Most contentious antitrust issues today, Dan claims, are non-ideological. (I would suggest to the contrary that there is a huge, if silent, ideological factor involved in taking certain ideas off the table, as the Chicago School and Dan have done, and that current public concern with the degradation of regulation, the “too big to fail” issue, and “Occupy Wall Street” may be reawakening a populist sentiment that is capable of finding its way back into the recognition that antitrust is about political economy and not merely a version of microeconomics.)⁷ Dan is concerned that there is a major glitch in his technocratic shift story, namely that antitrust’s populist institutional infrastructure remains largely unmodified, thereby creating a mismatch between ends and means.⁸

One implication of this mismatch is that antitrust today is subject to an adjudicatory process, with the only recognized alternative being regulation. Dan sees the need for an administrative alternative, focused on problem solving and negotiation rather than assigning blame. He points to merger review under the Hart-Scott-Rodino Act as a leading example of the desired administrative direction. This preference for administration comes into play later in Dan’s proposal for private enforcement. Meanwhile, I wonder how Dan views the recent DOJ revision of its merger remedies guidelines, in which behavioral remedies become more—and structural remedies less—presumptive. Are behavioral merger remedies essentially regulatory (bad) or administrative (good)? Or, as a recent AAI paper John Kwoka and Diana Moss argue,⁹ are they fundamentally problematic? The topic of administrative approaches to antitrust is a useful one, but Dan doesn’t carry his analysis of the embedded institutional questions far enough.

Another implication of the mismatch between modern technocratic antitrust and populist institutions is the availability, however rare in practice, of antitrust juries. “The

⁶ Id., 48.

⁷ President Obama’s Osawane speech, which was built around capturing the progressive vision of that great trust-buster, Teddy Roosevelt, is further evidence a populist reawakening. See Remarks by the President on the Economy in Osawatomie, Kansas, Dec. 5, 2011 (“Roosevelt also knew that the free market has never been a free license to take whatever you can from whomever you can. He understood the free market only works when there are rules of the road that ensure competition is fair and open and honest. And so he busted up monopolies, forcing those companies to compete for consumers with better services and better prices. And today, they still must.”).

⁸ Id., 89.

⁹ John E. Kwoka and Diana L. Moss, *Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement*, http://www.antitrustinstitute.org/~antitrust/sites/default/files/AAI_wp_behavioral%20remedies_final.pdf.

antitrust jury,” Dan writes, “sticks in the modern craw not merely because factual evidence suggests that antitrust juries systematically underperform, but also because the very democratic-populist justification for the jury conflicts with the modern account of antitrust law.”¹⁰ He worries that the entire system of civil antitrust adjudication “is animated by the spirit of jury avoidance that affects the shape of both the substantive and procedural norms.”¹¹ Dan is less concerned about criminal antitrust juries and his conclusion on the question of juries is conservative in the non-economic sense:

There is no silver bullet that will instantly solve the problem of civil antitrust juries, given its constitutional foundations. Further...it is not even clear how deep the problem really is—to put it bluntly, how either incompetent or biased civil antitrust juries really are. For now, then, the best that can be done is to systematically study the behavior of performance of antitrust juries and continue to experiment with procedural mechanisms to bring their judgments more in line with the modern, technical, and economic concepts of antitrust.¹²

Private Enforcement: Compensation to Purchasers

I will pass over chapters on enhancing federal enforcement and dealing with antitrust federalism, both focused on relatively technical suggestions for improvement, not because they are uninteresting but because I want to focus on Dan’s chapter titled “Rethinking Private Enforcement” which deals with problems he considers to be “existential” rather than technical. The two goals of private antitrust enforcement, compensation and deterrence, are not served very well, he says. While private antitrust enforcement should be retained, he concludes, it must be reconceived.¹³

How is it that the compensation goal is not satisfied? Dan points to victims or harms that are not compensated under the current system and suggests this is a reason to scrap the whole effort rather than to reform the system to make it work better. Dan starts with static injuries, i.e. the effect on consumers of an increase in price. The primary victims, he says, are not the class of people who paid the overcharge, but the class of people who stopped purchasing the product because the non-competitive price was too high.¹⁴ Moreover, the injury to those who were overcharged is only a wealth transfer from consumers to producers, which is not necessarily economically inefficient.¹⁵

¹⁰ Crane, op. cit., 115.

¹¹ Id., 115.

¹² Id., 124. I do not want to be taken as believing that there are no problems with private enforcement, because surely there are. I think many of these are overstated while the benefits are understated, leading to the kind of generalization that has been fed to the Europeans to the effect that private antitrust enforcement in the U.S. is a toxic litigation cocktail.

¹³ Id., 163.

¹⁴ Id., 165.

¹⁵ Id., 165.

This analysis begs the question of why we have antitrust laws. Readers of this review are aware of the arguments, which I won't rehearse here. In simple terms, if antitrust creates a right to competitive markets, there should be a remedy for one who is damaged by deprivation of that right, if such a remedy is practicable.

Dan recognizes the difficulty of reshaping litigation so that deadweight loss could be calculated and damages paid to non-consuming victims of antitrust violations, but that is hardly grounds to reject the goal of compensating those who *can* be identified and whose harm *can* be more or less accurately determined.

Dan is critical of an AAI study by Robert Lande and Joshua Davis that is the only empirical study of the benefits of private enforcement.¹⁶ The study covers 40 major antitrust cases that were settled with significant recoveries, \$18 to 19.6 billion in total. Dan largely dismisses these results because more than two-thirds of the recoveries went to direct purchasers, and “[s]ince direct purchasers often pass along a substantial portion of any overcharges downstream, over two-thirds of the recoveries studied likely failed to compensate the parties who ultimately absorbed most of the economic injury.”¹⁷ Of course, the *Illinois Brick* rule has been criticized since its adoption in 1977 precisely because, by denying indirect purchasers a cause of action, it gives short shrift to the Sherman Act's compensation objectives. But before concluding that the solution to the *Illinois Brick* problem is to deny direct purchasers a cause of action as well, as Dan implies, or to dismiss the \$12 to 13.4 billion in direct purchaser recoveries documented by Lande and Davis, one would surely want to know how much of the direct purchasers' actual recoveries was a windfall; Dan does not say, but there is little reason to believe that direct purchasers recovered more than their actual injuries.¹⁸

Dan also suggests that it is not cost effective to return overcharges to victims in antitrust settlements. He says, “After lawyers' fees and administrative fees are accounted for, each consumer's share of the recovery is negligible, even though the harm to the class is

¹⁶ Robert H. Lande & Joshua P. Davis, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F. L. REV. 879 (2008). The research project culminating in this article has been extended to twenty additional cases and an updated report will soon be available. Nearly all large cases get settled if not dismissed prior to trial, but there is no central data base for settlements, so labor-intensive case-by-case research is needed. The research and its extension cited elsewhere in this review, was funded by the AAI.

¹⁷ Crane, *op cit.*, 169.

¹⁸ That is largely because, although the law provides for nominal treble damages, the absence of prejudgment interest reduces real damages substantially. See Robert H. Lande, *Are Antitrust “Treble” Damages Really Single Damages*, 54 Ohio St. L. J. 115 (1993). Indeed, it has been estimated that the direct *and* indirect purchaser private recoveries in the vitamins case, one of the most heavily sanctioned cartels in history and the largest of the 40 cases in the Lande and Davis study, amounted to only about two-thirds of the overcharges in real terms. See John M. Connor, *The Great Global Vitamin Conspiracies, 1985-1999* at 139, Table 20A (Apr. 9, 2008), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120936. Thus, while indirect purchasers were surely undercompensated, it is not clear that direct purchasers were overcompensated. See also Antitrust Modernization Commission, Report and Recommendation 246 (2007) (“in light of the fact that some damages may not be recoverable (e.g., compensation for interest prior to judgment, or because of the statute of limitations and the inability to recover ‘speculative’ damages) treble damages help ensure that victims will receive at least their actual damages.”); John Connor, *Private Recoveries in International Cartel Cases Worldwide: What do the Data Show?* 10 (Nov. 16, 2011) (in sample of 33 international cartel cases, settlements amounted to 30% of nominal damages), available at www.antitrustinstitute.org.

great.”¹⁹ What is his support? He cites only to a 2005 article,²⁰ which itself provides only anecdotes and hypotheticals involving the use of coupons, but not the size of any actual administrative costs. What is the frequency of coupon settlements? What percentage of settlements comes from administrative costs and attorneys’ fees?

The role of coupon settlements, Dan acknowledges, has probably been substantially reduced as a result of Congress passing the Class Action Fairness Act in 2005. Lande and Davis, in any event, conservatively excluded coupon settlements from their report on the benefits of antitrust enforcement. Their study also provides some real empirical data about attorneys’ fees and administrative costs., although some of the information I will report below was not available when Dan wrote.

Lande and Davis have ascertained that, at least in their sample of cases, attorneys’ fees averaged either 14.3% or 25.6%, depending on whether a weighted average is used (because larger cases tend to produce attorneys’ fees that are a lower percentage of the settlement).²¹ Lande and Davis also found that administrative costs averaged 4.1% of the recovery and all were less than 10%, based on a limited set of 31 modestly-sized cases for which they were able to obtain information. Using their information, the legal fees plus the administrative costs would be approximately 15% to 31% of the settlements, depending upon which average figures are used, and this would result in the victims receiving 69% to 85% of the settlement.²² While this information is not presented as a random sample or free of other methodological weaknesses, it is strongly suggestive that Dan and his fellow critics have greatly overstated their case.

Dan also focuses on the difficulty of identifying the real economic victims in situations where there are both direct and indirect purchasers. No doubt there are difficulties in some cases, but Dan’s single illustration of the problem comes in the context of a particularly complicated exclusive dealing case involving hospitals and group buying organizations.²³ Most significant private recoveries, on the other hand, come in illegal collusion cases that are usually far simpler to analyze.²⁴

¹⁹ Id., 168.

²⁰ Edward Cavanagh, *Antitrust Remedies Revisited*, 84 OR. L. REV. 147, 214 (2005).

²¹ I am relying on a draft of a forthcoming paper by Lande and Davis, *Defying Conventional Wisdom: The Case for Private Antitrust Enforcement*, that extends their findings to 60 cases, quoted with permission.

²² Id.

²³ Crane, *op. cit.*, 166.

²⁴ Lande and Davis, *op. cit.* n 19 *supra*. Dan says at 167 of his book that his complex scenario “has countless analogs in the world of manufacturing, sales, and distribution,” but provides only a citation to a 1979 article and no empirical support.

Private Enforcement: Harm to Competitors

So much for harm to consumers. What about harm to competitors caused by antitrust violations? Dan says harmed competitors are like ordinary tort victims and it is usually not hard to identify them or to calculate their lost profits, so in principle it is generally cost-effective to award them damages.²⁵ However, Dan is critical of compensating competitor-victims because “competitive plaintiffs frequently use antitrust laws for anticompetitive purposes,”²⁶ the purpose of the antitrust laws is to protect competition, not competitors, and most antitrust violations (which involve collusion), do not harm competitors. But none of these points, which are hard to take issue with, provides any explanation for what is wrong with compensating competitors who are excluded from the market where the effect of such exclusion is likely to harm consumers. The best that Crane can muster is that, “While antitrust may do a comparatively better job of compensating them than other classes of victims, this is not the major purpose of antitrust law.”²⁷

Private Enforcement: Harm to Innovation

More important than static injuries, Dan writes (and I would agree, at least in terms of economic growth though not in terms of justice), would be whether antitrust meaningfully advances dynamic efficiency.²⁸ But he finds private antitrust litigation “no better at compensating consumers for dynamic injuries than for static injuries.”²⁹ This is because “measuring the amount of dynamic efficiency loss and quantifying this loss in dollars often amounts to little more than guesswork.”³⁰ As a result, very few plaintiffs seek compensation for dynamic injuries and thus antitrust fails to compensate the consumers who most likely suffer most of the dynamic injuries. Once again, Dan has set up an impossible goal of perfection and then hammered private enforcement for its failure to achieve that goal, while giving no credit for the imperfect achievements that can be attained. His logic appears to be that if there are two possible worthwhile goals and one is more valuable than the other but it cannot be achieved, then the less valuable goal should be ignored. This is nonsense.

Private Enforcement: Deterrence

Assuming the compensation objective is stricken as a failure, what about the deterrence objective? Dan finds the argument that private antitrust litigation provides effective deterrence “is increasingly doubtful.”³¹ First, because it takes a long time for an antitrust case to be processed and managers have increasingly short tenures, the manager

²⁵ Crane, *op. cit.*, 171.

²⁶ *Id.*, 171.

²⁸ *Id.*, 172.

²⁹ *Id.*, 173.

³⁰ *Id.*, 173.

³¹ *Id.*, 175.

who enters an anticompetitive agreement is not likely to be around to suffer the consequences, if liability is ultimately determined.³² Very little evidence is provided to support these supposedly factual observations, but from them it follows that, “it is difficult to see how the threat of a future damages judgment disciplines managerial decision-making.”³³ Moreover, Dan cites evidence that the filing of a case by a federal antitrust agency reduces a firm’s share price by 6 percent on average, but the filing of a private case has only about a tenth of the effect (0.6 percent) of a public suit.³⁴ This minimal drop in capitalization, he says, is unlikely to engender ruinous consequences to most managers, particularly if the gains from challenged behavior were large.³⁵

There are problems with this argument. First, Dan’s argument that high managerial turnover rates thwart the deterrent effect of private damages actions would apply to government fines as well; fines may be imposed long after the responsible manager has left the company. However, the theory of optimal deterrence of corporate misbehavior is not to change employee incentives directly, but rather to incentivize companies to put systems in place to discourage and prevent employees from engaging in misbehavior. Other penalties to increase personal deterrence (such as prison terms, debarment, and so forth) may be necessary or desirable to supplement corporate sanctions, but that does not obviate the need to ensure that the unlawful behavior is not profitable for the firm *ex ante*.

Second, assuming that the studies cited by Dan support a 10 to 1 ratio of impact of government versus private suits,³⁶ that would not be surprising and would hardly suggest that the impact of private suits is minimal. It is logical that the stock market would give more credence to a federal agency suit, which follows what can be assumed to be a careful subpoena-based investigatory process, and carries the potential not only of fines, but possibly imprisonment for executives and *follow-on private cases, including possible class actions*. In short, some significant percentage of stock price declines in response to government suits is

³² *Id.*, 175-78.

³³ *Id.*, 178.

³⁴ *Id.*, 179.

³⁵ *Id.*, 179.

³⁶ There are reasons to be dubious. The study showing a 6 percent average abnormal return for government cases is based on a sample of 14 cases brought between 1937 and 1974, and appears to include many of the most prominent cases from that era (including for example, DOJ’s cases against United Shoe (1947), IBM (1969), and AT&T (1972)). See Kenneth D. Garbade et al., *Market Reaction to the Filing of Antitrust Suits: An Aggregate and Cross-Sectional Analysis*, 64 *Rev. Econ. & Stats* 686 n.2 (1982). In contrast, a more recent article examining the impact of government price-fixing indictments in a sample of 57 conspiracies found average negative abnormal returns of only 1.08%. See Jean-Claude Bosch & E. Woodrow Eckard, Jr., *The Profitability of Price Fixing: Evidence from Stock Market Reactions to Federal Indictments*, 73 *Rev. Econ. & Stats.* 309 (1991). The study showing that defendants’ stock drops on average by 0.6 percent when a private suit is filed is based on data from the Georgetown study of private antitrust cases from 1973-1983, and includes both “horizontal” cases (defined as price fixing, joint ventures, mergers, predatory pricing and monopolization) and vertical cases (resale price maintenance, exclusive dealing, tying, dealer terminations and the like). Horizontal cases alone resulted in average abnormal returns of 1.45 percent. See John M. Bizjak & Jeffrey L. Coles, *The Effect of Private Antitrust Litigation on the Stock-Market Valuation of the Firm*, 85 *Am. Econ. Rev.* 436, 444 (June 1995). Moreover, the cases in this study tend not be significant ones; MDL cases are excluded, *id.*, 441 n. 10, and few were reported in the *Wall Street Journal*, *id.*, 442.

due the expectation of follow-on private damages suits. At the same time, in follow-on private cases, it would be surprising to see *any* appreciable market reaction; the impact of private suits has likely already been discounted by the government suit.³⁷ Moreover, filing a non-follow on private case usually is associated with much less publicity and has less credibility at the outset. For such cases, one would want to test the stock market reaction later in the case when a class is certified or a motion for summary judgment is denied.

In sum, Dan's critique of the deterrence value of private actions is unconvincing.

Private Enforcement: Concluding Comments

Dan sounds like he is future-oriented. "Rather than looking backward toward remediating or punishing past bad acts, private antitrust enforcement should be oriented toward the future by preventing exercises of market power that harm consumers."³⁸ In his view, a "nimble and quick" process would focus on objective economic facts: "specifically, the need for and feasibility of adjusting contractual terms in order to remove entry barriers."³⁹ So, this is what private enforcement would come down to: the search for entry barriers that can be removed. We should focus on convincing managers not to construct entry barriers?

This is a curious position for one so committed to the interaction of institutions and substance. How many current varieties of antitrust violation would this eliminate by definition? What private cases would likely be brought in the absence of available damages? Who are the plaintiffs that would step forward and who are the attorneys that would represent them? Dan does not address the world of contingent fees, a central feature of the institutional structure of U.S. antitrust, or raise questions about how private cases are likely to be funded in the absence of damages. On this reading, Dan fudged when he said that private enforcement should be both retained and reconceived, because there is so little retention and so much reconception.

But, not so fast: Dan has also pulled his punches by recognizing that the current system "is not so obviously broken that there is a great demand for reform."⁴⁰ He can therefore promote his reform as something that ought to be tried out on a small scale⁴¹ -- whatever this means.

Dan's focus on institutions is important and suggestive in many positive ways. I have chosen to call attention primarily to the private enforcement chapters in which many generalizations that reflect the conventional wisdom do not seem to be supported by the admittedly limited empirical data that now exists. Perhaps a stronger case for the

³⁷ Oddly, Dan suggests "there is some cause to be optimistic about the deterrence potential of private lawsuits in cases brought as follow-ons to government criminal prosecution against cartels." Crane, *op cit.*, 181. That is because payments will often be made quickly after guilty pleas are entered.

³⁸ *Id.*, 182.

³⁹ *Id.*, 184.

⁴⁰ *Id.*, 186.

⁴¹ *Id.*, 187.

conventional wisdom could have been made at an earlier time; today, when a realistic understanding of private enforcement is particularly important both for domestic and foreign policymakers, it conveys a misleading story.