Book Review

You Had Me at Hyphen: A Review of Daniel Crane’s *Antitrust*

Daniel A. Crane

*Antitrust*

Aspen Student Treatise Series 2014

Reviewed by Steven J. Cernak

Many of us spend much of our careers trying to simplify and enliven complicated and dry antitrust concepts, whether in compliance presentations to clients or lectures to students (or, for some of us, both). I am often asked for recommendations for short books or articles that summarize and simplify these concepts while providing just enough context to make those ideas understandable. There are not many; most of the casebooks or treatises dive into the details of hundreds or thousands of cases while the articles focus on arcane topics like “multiple equilibria” or “endogenous compatibility choice.” A great new option for our inquisitive clients and flustered students is *Antitrust* from Dan Crane.

Crane is a professor and assistant dean at the University of Michigan Law School, where he teaches various courses in antitrust as well as first year courses like contracts. His long list of articles and books—ten written or edited in this year alone—shows that he can debate reverse payments and search neutrality and other specific antitrust topics with the best thinkers. In this book, however, he uses his prodigious talents to write for a different audience: an “Illyrian Renaissance Sheepherding Fiction major” (Crane’s hypothetical example of a student who has studied little, if any, economics) just entering the wonderful world of economics and antitrust. And Crane does a masterful job of shepherding that reader through key antitrust terms and concepts while avoiding the twin dangers of over- and under-simplification.

The result is an easy-to-read, relatively short soft cover book that assures the student (or client) that she can understand and even enjoy learning the basics and context of antitrust law. The writing style is breezy with liberal use of contractions and vernacular rather than the standard dialect of the antitrust faithful. Periodically, key antitrust concepts are described in humorous—and memorable—ways. For instance, the FTC’s recent non-enforcement of the Robinson-Patman Act is described as “treating it like a crazy old uncle that one calls on his birthday but doesn’t invite to dinner.” Crane has a cogent discussion of both market power and monopoly power, and then writes that where “the dividing line [between them] falls is unclear—which is why antitrust lawyers can afford to charge lots of money for their services and drive BMWs.” (Probably the right reference for the antitrust community, even if some of us would have appreciated a Cadillac shout-out.)

Finally, just like the best children’s films, which aim their humor both at the youngest members of their audience and their parents, *Antitrust* has parts that will be appreciated more by antitrust veterans than neophytes. The first example, from the first paragraph of Chapter 1, inspired the title of this review:

(By the way, please, please, please don’t make the mistake of hyphenating *antitrust*—i.e., *anti-trust*—on your exam or in your brief. This is a clear marker to your professor or the judge that you’re an outsider to the field, that you haven’t learned the secret handshake. No one in the know has hyphenated *antitrust* for fifty years.)

This one caught my eye because, as even my kids know, my favorite epithet for an old-fashioned or misguided lawyer is “he probably still spells antitrust with a hyphen.” Each of my antitrust classes hears on the first day that antitrust has no hyphen; that students wanting a good grade will not write “anti-trust” on the exam; and that there has been a student in every survey class I have ever taught that, somehow, forgot that instruction. Now, I can cite to *Antitrust* for further support.

The other story that had me nodding and smiling describes the quixotic search for definitive antitrust rules:

Every year in my student evaluations, one or two students include a comment to the following effect: “I wish he had taught us more of the black letter law.” This is the marker of the student who has not “gotten it.” There is relatively little black letter law in antitrust law. (Some would say there is relatively little law in antitrust law.)

Antitrust clients also often seek such certainty—“so you’re saying that if our combined shares are X percent or below, the merger will be approved?” Crane uses gentle humor to tell both students and clients that *Antitrust* will be able to simplify the law but not reduce it to a formula.

Of course, the engaging writing style only keeps the reader reading; it is the outstanding substance that improves her understanding of the field. The core of the book, roughly chapters 4 through 13, cover the usual topics and in a standard order: horizontal and then vertical restraints, exclusionary practices, Robinson-Patman, mergers, and immunities. While that coverage is fantastic, it is the material that comes before and after it that not only helps the reader see the forest for the trees, but provides a map to get through the woods alive.

Chapter 1 covers antitrust’s foundational economic assumptions in a way that those sheep-herding fiction majors will understand. Yes, there is one graph showing the wealth transfer and deadweight loss from a price above a competitive level. But, it appears to be included not for the econ major readers but for the visual learners who need a pictorial complement to Crane’s explanation of the same topics. Many economic concepts key to antitrust law—competition, marginal costs, productive and allocative efficiency, barriers to entry, even Bertrand and Cournot competition—are not only explained, but their importance to the antitrust concepts to follow are foreshadowed.

Chapter 2, titled “Triage of Antitrust Problems,” is designed to get the reader to focus on the key questions (for example, “agreement or monopolization or merger?” “horizontal or vertical?”) and, therefore, to begin the antitrust analysis headed in the right direction. Having laid the economic and legal foundations in the first two chapters, *Antitrust*’s third chapter combines them to illuminate the key concepts of market definition and power. For the first concept, Crane explains

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2 In my most recent survey course, one smart-aleck—but smart—student began his response to the first exam question with “Anti-trust (b/c why not keep the streak going?).” He got an A.
and applies the analyses used in *Cellophane*, *Grinnell*, and *Brown Shoe*—in fact, his explanation of the infamous “*Cellophane fallacy*” is the clearest I have seen. For the market power explanation, Crane starts with the importance of market share and entry barriers, but then moves on to more complex yet still important concepts like power buyers, future capacity constraints, and changing demand. It is a credit to these foundational chapters that by the book’s discussion on page 37 about why demand elasticity might be important to market definition and power, the reader—even those shepherding fiction experts—will not only be comfortable with the concept, but will be able to apply it and explain its importance to the question at hand.

The final substantive section of the book is a glossary of what Crane calls “terms of art” or what I have called “cocktail party terms.” Some of the terms covered are basic: Sherman Act, horizontal, and interbrand, for example. Others are much more advanced: Foreign Trade Antitrust Improvements Act, double marginalization, and profit-sacrifice test. All of the terms are italicized when used earlier in the text. Each term’s explanation is brief and clear and puts the term in context to explain its importance. Because understanding and proper use of antitrust’s unusual vocabulary can be key to a good exam answer, accurate client advice, as well as a pleasant cocktail party conversation, the glossary alone might be worth the price of the book.

This focus on the introductory chapters and glossary is not meant to belittle the substantive chapters in between. They too walk the reader through complex and increasingly detailed topics in a friendly manner. For example, in Chapter 4 Crane has the reader focus on Sherman Act Sections 1 and 2 and Clayton Act Section 7; the horizontal/vertical distinction; and collusion, exclusion, and merger forms of conduct.

Crane’s substantive explanations include brief coverage of many of the key antitrust opinions likely to be covered in any survey course. However, that coverage is not there just to make this book a great companion for any of the much larger casebooks. Instead, the cases are used to illustrate how antitrust law would approach a complicated set of facts. For instance, the D.C. Circuit’s opinion in *Polygram* (or *Three Tenors*) is described in Chapter 4 to help explain modes of analysis like per se, rule of reason, quick look, and “inherently suspect.” Later in the same chapter, the facts are rewritten in “antitrust legalese” (“Horizontal competitors in a joint venture agree to suspend price discounting outside the joint venture for a limited time while jointly promoting the joint venture”) so that the reader can better focus on the aspects of the case that drive the antitrust analysis.

These core chapters also cover just enough old cases and history to provide context that makes the explanations more useful. This coverage of history is not unusual, given some of Crane’s prior writings. Still, the abbreviated historical references are in Antitrust not because Crane finds them interesting—though I am sure he does—but because they provide a context that will help the reader better understand some antitrust concept. So the history of the passage of Robinson-Patman and the decline in its enforcement are covered in just over a page. Von’s Grocery, Philadelphia National Bank, and General Dynamics are covered in a few pages, not as historical curiosities, but as counterpoints to modern merger analysis and as part of the explana-

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3 That is, terms that students and then practitioners should be comfortable using during (and even after) any of the law firm receptions at the ABA Antitrust Section Spring Meeting, described as “the antitrust community” by Edwin Rockefeller in *The Antitrust Religion* (2007), which was ably reviewed by Ky Ewing in the April 2008 edition of this publication. Ky Ewing, *A Challenge to Orthodoxy*, Antitrust Source (Apr. 2008), http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Apr08_EwingRev4_22t.authcheckdam.pdf.

4 See *Antitrust Stories*, (Daniel Crane et al. eds., 2007), which has the backstories for 13 classic antitrust cases, and *The Making of Competition Policy: Legal and Economic Sources* (Daniel Crane et al. eds., 2012).
tion for the passage of the Hart-Scott-Rodino Act. *Alcoa* is linked a page later to *Trinko* to emphasize both that a Section 2 violation requires that the alleged monopolist is monopolizing and how difficult the conduct element can be to describe.

Certainly, magisterial treatises and casebooks, along with law review articles on, say, non-reservation price equilibria have their places and audiences. But so, too, do client alerts, blog postings, and op-ed pieces that help the laity understand and appreciate antitrust concepts. Perhaps we in the antitrust community have over-celebrated the former and neglected the latter. The public discourse on recent high-profile antitrust matters shows a public at best befuddled, if not downright hostile, to basic antitrust principles. And as reported in *Antitrust*’s introduction, even Justice Breyer, a former antitrust professor, got a good laugh during a recent oral argument by describing a mythical “great, wonderful, really original method to teach antitrust law that kept 80 percent of the students awake.” Perhaps those students would be alert, and members of the public sympathetic, if we spent more time explaining the importance of antitrust law to their everyday economic lives.

So, consider this positive review of *Antitrust* by Dan Crane as a small attempt to correct that imbalance. We should celebrate his successful attempt to boil down complex antitrust principles to understandable prose while showing their real-world importance. I am sure that many future Illyrian Renaissance Shepherding Fiction major readers of *Antitrust* will be intrigued by the subject and become great antitrust lawyers. Even those readers who do not join the antitrust community will have a much better appreciation of antitrust’s logic and importance. At least, they will never spell it “anti-trust” again.

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5 Chris Sagers explored this issue and its possible causes in an as yet unpublished paper, tentatively titled “Apple, Antitrust, and Irony,” available at [http://www.luc.edu/media/lucedu/law/centers/antitrust/pdfs/events/apple_anticompetition_and_irony.pdf](http://www.luc.edu/media/lucedu/law/centers/antitrust/pdfs/events/apple_anticompetition_and_irony.pdf) (presented at the 14th Annual Loyola Antitrust Colloquium, April 2014). My discussion here is informed by my exchange with Professor Sagers but the views are mine alone.