

BOOK REVIEW

FREE ENTERPRISE AND ECONOMIC ORGANIZATION:
LEGAL AND RELATED MATERIALS. BY LOUIS B.
SCHWARTZ. Second Edition. Brooklyn: The Foundation Press,
Inc., 1959. Pp. xxxiii, 1065. \$12.50.

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When I reviewed Professor Schwartz's first edition, I thought that it was the best casebook I had read.¹ I suppose that is a severe standard by which to measure a second effort. Nevertheless, measured against the first edition, the second suffers.

In both editions, the distinctive feature of Professor Schwartz's approach is its broad scope. Professor Schwartz seeks to avoid pseudo-specialization of the law student in one field of economic regulation with concomitant ignorance of the concepts in related fields. The student, he says, "needs broader integrations rather than more narrow specialties." (p. x).

Any practitioner worth his salt in this field will laud the objective. In an area of law whose concepts are still flexible and whose dependence on other disciplines is recognized but still largely untapped, the ability to view broadly, integrate one concept with another, employ analogy, cross-cut, relate and interrelate, is valuable if not essential.

In the first edition this objective was brilliantly pursued and admirably achieved. In the second edition, the objective is still pursued, but not so well achieved. The reason, I believe, stems from Professor Schwartz's radical change in the organization of the casebook.²

In the first volume, the structure followed the uses to which economic power was put. Dealt with were the two principal uses of economic power to which government regulation is directed: control of the right to do business and control of prices. Each of these principal uses was traced through a number of related fields. For example, in the section dealing

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¹ 100 U. PA. L. REV. 1275 (1952).

² Both editions exclude the material on unfair trade practices on the theory that such problems as misrepresentation of merchandise, interference with a competitor's contractual relations and similar abuses of over-competitive entrepreneurs are a kind of police problem (with overtones of tort and equity) presenting no inherent inter-relationship with antitrust problems. See Schwartz, Book Review, 58 YALE L.J. 198 (1948). *But cf.* Levy, Book Review, 1 J. LEGAL ED. 139, 142-43 (1948).

with control of prices, such control was seen operating in the context of private agreements, trade association suggestions, resale price maintenance, price control under patents and copyrights, labor union controls, agricultural controls, defense controls, and public utility rate-making. When the student finished this kind of treatment he had the wherewithal for a meaningful understanding of the price problem no matter in what context of economic organization and government regulation it might appear. In short, he was furnished the broad integration and the basis for comparative analysis of legal-economic controls which was the essential purpose of the book.

What we now have is a structure based not on the uses, but the sources of power.³ One section deals with agreements between competitors, another deals with relations between suppliers, dealers and customers, another deals with the patent field, another with utilities.⁴ If we want to see how power is used to control prices we must go to the appropriate portion of each section. The broad scope of the first edition remains, but lost is the integration that was its *tour de force*. Instead it is almost as if the book presented a number of separate courses, one in suppliers and dealers, one in patents, one in labor union market regulations, one in public utilities and so on.⁵

Nevertheless, the raw material of the first edition is still there, including the skillful and abundant use of economic material,⁶ the imaginative use of periodical and other nontechnical material, and the incisive note

³ Query whether the present structure will suggest to the law student that regulation heretofore chiefly aimed at the uses of power rather than its sources should now be redirected to strike at the sources? Or to borrow a theological analogy, doesn't such a structure (even if not so intended) result in emphasizing the alleged sinner, rather than the sin?

⁴ The present edition begins with an Introduction followed by Chapter II on the Size and Power of the Single Firm. Then follow three major headings. The first is Collaboration Among Competitors, which includes Chapters: (3) Agreement on Prices of Market Shares; (4) Trade Associations and Informal Collaborations; (5) Boycott and other Collective Coercion. The next heading is Relation of Suppliers to Dealers and Customers, which includes Chapters: (6) Resale Price Maintenance; (7) Dealer Franchises; (8) Exclusive Dealing and Tying; (9) Discrimination Among Dealers and Customers. The final heading is The Legal Monopolies containing Chapters: (10) Patent and Copyright; (11) Regulation of the Market by Labor Unions; (12) Certificates of Public Convenience and Necessity; Monopolies Granted in the Exercise of the Police Power; (13) Rate Regulation.

⁵ Professor Schwartz has sent me the following memorandum which he sent to the publisher and which expresses his rationale for his reorganization of materials: "The first edition was divided into two main parts, one dealing with control over entry, the other with control of prices. There were artificialities in such an arrangement, particularly in relation to patent laws. The new edition is arranged according to the nature or source of power rather than the particular use to which it is put. Thus, the first concern is with the problem of excessive size of the individual firm. Chapters 3-5 deal with power (over entry, prices, production, etc.) derived from collaboration of firms. Chapters 6-9 cover the relation of the single firm, not necessarily of excessive size, to its suppliers and customers. Finally are four chapters on 'the legal monopolies,' patent and copyright, labor unions, carriers and public utilities."

⁶ The excellent and particular uses of economic materials made by Professor Schwartz are described in my review of the first edition, 100 U. PA. L. REV. 1275, 1280 (1952).

and question. And since nothing prevents one who teaches the course from following his own organization or from referring to the first edition for the structure and the second for the material, this remains an excellent teaching tool.

Anyone familiar with Professor Schwartz's philosophy expressed in his dissents to sections of the Report of the Attorney General's National Committee to Study the Antitrust Laws (1955), will marvel at how well he has kept his personal views from creeping into the casebook. They are there, of course, since professors are human, in such places as the wording of some section headings, in over-use of somewhat obsolete TNEC material, and in the selection of material for some of the areas where Professor Schwartz must feel particularly strongly such as the use of consent decrees.⁷ Nevertheless, on the whole, the advocate is subordinated to the professor.

In a book of this scope it is, of course, difficult to treat all subjects with equal definitiveness and in a few areas there emerges a fragmented picture. One example is the section dealing with patent law. This is not said by way of criticism. The subject of patents and the antitrust laws involves highly complex interrelationships of technology, law, economics, and social policy which are difficult, if not impossible, to probe deeply within the confines of a general casebook.⁸ Professor Schwartz shows courage in even undertaking to cover the patent field. Like the bear dancing, it is wondrous that he has done it at all; one should hardly expect that it be done well.

In most of the other areas, however, it is astounding how many facets of a subject Professor Schwartz has been able to include in relatively few pages. The extensive material of the past seven years is admirably covered both with respect to cases and noncase material such as excerpts from periodicals, economic reports and even speeches. Likewise, innovations in fair trade legislation, in the Communications Act of 1934, in the Atomic Energy Act of 1954, and in other business regulatory enactments, are fully treated. Happily, the discipline of critical comparative analysis of statutes, which Professor Schwartz initiated in his first edition, is taught even better in the second.

Apart from the important element of structure, there are many improvements in this edition. Professor Schwartz has wielded his blue pencil well. Some of the all but outdated, so-called landmark cases, previously set forth at length, now properly find their place in a note.⁹ The editing is careful, the type is improved, and an expanded table of contents is useful.

⁷ See, *e.g.*, the selection of the material at pp. 143-47.

⁸ *But cf.* Levy, Book Review, J. LEGAL ED. 139, 142 (1949).

⁹ *E.g.*, United States v. Elgin, J. & E. Ry., 298 U.S. 492 (1936); Interstate Commerce Comm'n v. Chicago Great W. Ry., 209 U.S. 108 (1908). Likewise, Professor Schwartz has sharply condensed subjects which have less vitality today than seven years ago; *e.g.*, functional discounts are treated in four pages as compared with twenty-four in the first edition.

There is also more attention paid to techniques of counselling¹⁰ and there is a welcome increase in introductory notes, in problems, in economic and marketing material and in the probing interrogatory which Professor Schwartz does so well. And Professor Schwartz, waging his own war against bigness, has been able to prune some 150 pages, although even so, the teacher will be hard pressed to cram so much as remains into the three hours usually allocated to the course.

In a field as dynamic and as new to law teaching as this one, it is inevitable that a casebook will not long remain current. This edition, even if less satisfying structurally than the first one, is necessary and valuable. Undoubtedly, there should and will be a third edition before too long. And like this volume, if undertaken by Professor Schwartz, it will represent an advance in the art.

¹⁰ See, *e.g.*, the excerpt from Davis, *A Trial Lawyer's Viewpoint*, 30 WISC. BAR BULL. 46, 52-5 (1957), at pp. 357-61 of the casebook. I would have preferred even more counselling material, as well as some how to problems of proof, pre-trial considerations and other unique aspects of the preparation of technological and economic issues of fact for trial. With due respect for the problem of casebook size, such stuff of daily practice seems too much slighted in the curriculum.