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LAW AND ECONOMY. By *Kelvin Jones*. London: Academic Press. 1982. Pp. xvi, 190. \$31.

Whether the American antitrust laws have effectively accomplished their various goals has been the subject of much debate.¹ In *Law and Economy*, Professor Jones² sides with those who regard the antitrust laws as failures, but he differs from most critics in his approach to that conclusion. Professor Jones seeks to explain the ineffectiveness of the antitrust laws through a sociological analysis of the interrelationship between law and economy. He argues that the nature of this interrelationship and its place in the general social order renders antitrust law not only presently ineffective but inherently incapable of affecting the process of monopolization.

The root of Jones' analysis lies in a rejection of earlier views of law and economy. All of these views possess the same flaw of regarding law and economy as separate entities (pp. 18-43). From this assumption follows the conclusion that the law can serve as an independent regulator of economic relations and can mold these relations to conform with desired goals: "The mere existence of antitrust legislation implies that law and economy are interrelated in a manner which enables the relationship of regulation to be valid" (p. vii).

Rejecting the conventional assumption, Jones argues that law and economy are not distinct. According to Jones, both are aspects of the same overarching social relation of ownership. Analysis of ownership thus becomes Jones' focal point, since the idea of a relationship between law and economy constitutes a misleading approach to economic and legal questions.

In pursuing this analysis, Jones proposes a "typology of ownership" (pp. 71-104). Although different types of ownership exist, each type consists of three distinct relationships: title, control, and possession. Jones deliberately fails to define these terms precisely,³ but he does offer some hints as to their meanings. Title refers not only to formal legal title but also to "the sorts of calculations which govern the circulation of legal titles" (p. 77). In other words, the social relation of title involves not only the legal relationship that allows an

1. See, e.g., T. ARNOLD, *THE FOLKLORE OF CAPITALISM* 207-30 (1937); M. REAGAN, *THE MANAGED ECONOMY* 173-75, 237-39 (1963); Blair, *Antitrust Penalties: Deterrence and Compensation*, 1980 UTAH L. REV. 57; Breit & Elzinga, *Antitrust Enforcement and Economic Efficiency: The Uneasy Case for Treble Damages*, 17 J. L. & ECON. 329 (1974); Rashid, *What is Right with Antitrust?*, 5 ANTITRUST BULL. 5 (1960); Wheeler, *Antitrust Treble-Damage Actions: Do They Work?*, 61 CALIF. L. REV. 1319 (1973).

2. Kelvin Jones is a member of the faculty of La Trobe University, Victoria, Australia.

3. According to Jones, "Defining the relations in general is to some extent counterproductive since it would appear to belie their status as determinate relations of ownership dependent upon a specific context." P. 75.

owner to transfer his ownership but also all of his reasons for and his methods of doing so. Control is both the power to dispose of means of production or to direct them to a particular use as well as the manner in which this power is exercised. Possession, a narrower concept than control, is the power to regulate the relationship of labor to the means of production and the social calculations that go into such regulatory decisions. Thus, although an owner of a factory controls his means of production, the factory manager might possess those means. Jones attempts to explain further the meaning of the relations of title, control, and possession by describing their operation in four different, broad categories of forms of ownership: feudal, private (bourgeois), corporate, and Soviet.

The two forms of ownership relevant to Jones' discussion of the antitrust laws are private and corporate. The distinction between the two apparently resides in the calculations that underlie the relations of control and possession. In corporate ownership, these relations are divorced from each other to a much greater extent than they are in private ownership. But because the relations of control and possession are distinct even in private ownership, Jones in effect argues that a difference in the degree of separation between control and possession ultimately becomes a difference in kind.

The distinction between private and corporate ownership is vital for Jones' indictment of the antitrust laws. Although monopoly can arise only from corporate relations (p. 150 n.2), the antitrust laws are designed for a system based on the private form of ownership. The law in effect treats corporations as individuals by "attaching penalties to individual and corporate authors" (p. 147). By failing to recognize the distinction between individual and corporate ownership, the cure of the law does not match the disease of monopolistic behavior: "[I]n treating the corporation as if it would respond, either collectively or in person, in the way in which individuals are supposed to behave is to court disaster. Fines, imprisonment and decrees are, at best, inappropriate and, at worst, irrelevant mechanisms of regulation" (p. 177). Thus, although such sanctions may affect the corporate owners, they do not further the antitrust goal of preventing monopoly. Since the system of antitrust regulation is rooted in private ownership, the regulatory mechanism is inapposite to corporate ownership and is, therefore, doomed to failure.

Before evaluating Jones' thesis, three general deficiencies of the book are worth noting. The first deficiency is lack of clarity. Though the book may prove interesting to sociologists, it is largely incomprehensible to others. If nothing else, Professor Jones has proven that lawyers and economists do not have a monopoly on confusing jargon. The second general deficiency is lack of precision. Not only are title, possession, and control ill-defined, but so are the

social relations that ostensibly provide a contextual meaning for these terms. Moreover, Jones never identifies what must be changed in order to make the regulation of monopoly effective. The third deficiency is lack of novelty. Although Jones' sociological distinctions are arguably more comprehensive than previous systems — perhaps too all-encompassing to be useful for analysis — the distinctions do not produce any particularly startling results. Jones is not the first to argue that large corporations may behave qualitatively differently from small, closely-held firms. Galbraith is the best known and most recent expositor of this position.⁴ Earlier seminal thinkers include Thorstein Veblen and Berle and Means.⁵ With regard to the limitations of antitrust law, Turner⁶ has argued that no effective remedy exists for oligopolistic interdependence in pricing. Rather than present new ideas, Professor Jones has cloaked some old ones in a fog of ill-defined terms and placed them in a sociological context.

In addition to the general deficiencies of the book, Professor Jones' thesis — that the antitrust laws are inherently incapable of effectively regulating corporate behavior — is also suspect on at least two grounds. First, Jones erroneously assumes that the single goal of the antitrust laws is the prevention of monopoly power. Notwithstanding Professor Jones' history lesson (pp. 160-74), this tunnel vision as to the goals of the Sherman Act seems dubious in light of the values of the diverse groups that coalesced to enact the Sherman Act. The assumption of a single goal also seems unwarranted in light of the textual generality of the Sherman Act. The Act is in effect a delegation to the courts of the authority to formulate antitrust policy, and the common law process almost certainly adds new values and goals to antitrust policy.

Since Jones evaluates the effectiveness of the antitrust laws solely in relation to the goal of monopoly prevention, the existence of other competing goals seriously undermines his indictment. It is clear today, even if it was not clear in 1890, that other goals are involved. For example, the judicial "rule of reason" for deciding antitrust cases countenances monopoly power if other public interests are involved. Another possible goal, consumer welfare,⁷ is not necessarily the same as prevention of monopoly. For example, a very large firm

4. See, e.g., J.K. GALBRAITH, *THE NEW INDUSTRIAL STATE* (1967).

5. See, e.g., A. BERLE & G. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932); T. VEBLÉN, *ABSENTEE OWNERSHIP* (1923); T. VEBLÉN, *THE THEORY OF THE BUSINESS ENTERPRISE* (1904).

6. TURNER, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals To Deal*, 75 HARV. L. REV. 655 (1962).

7. Some have argued that consumer welfare ought to be the only goal of the antitrust laws. See, e.g., R. BORK, *THE ANTITRUST PARADOX* (1978).

might have lower costs due to economies of scale but might also have the market power to charge a price in excess of marginal cost. The efficiency consequences of replacing the giant firm with smaller, higher-cost producers are difficult to determine.

A second major difficulty with Jones' antitrust argument lies in his narrow definition of law. Jones limits his definition of law to rules arising from the private property relationship. This limitation, coupled with Jones' contention that legal regulation arising from a private property system cannot deal with monopoly, leads to the conclusion that the whole concept of law must be set aside as a means of controlling monopolies. The obvious response to this conclusion is that a law could be devised to deal with the relationship of corporate ownership. For example, Congress could dispense with the corporate relation and thereby with the problem of monopoly by forbidding the corporate form of ownership altogether. This prohibition would necessarily be a legal action and, one would think, an effective one. Of course, it is not surprising that Congress has not chosen to enact such drastic legislation.

Perhaps Professor Jones' sociological typology of ownership, with some refinement and clarification of the definitions, may become a useful device. Two important refinements would be a delineation of the conditions under which one relation of ownership becomes another and an explanation of whether the forms of ownership are mutually exclusive or, rather, points on a continuum. In *Law and Economy*, the vagueness of the definitions and the subsequent opacity of the argument render judgment as to the usefulness of the typology impossible. One suspects, however, that the analysis presented here is not only inadequate from a legal standpoint but also bad sociology. In ignoring the interrelationship of multiple values and in refusing to define terms with any precision, Professor Jones defeats the sort of encompassing scientific analysis to which sociology aspires. He also produces a remarkably unenlightening book.