NEW YORK LAW SCHOOL

NYLS Law Review

Volume 47 | Issue 1 Article 2

January 2003

The Dialogue between Students of Business and Students of Antitrust - A Keynote Address

Thomas B. Leary

THE DIALOGUE BETWEEN STUDENTS OF BUSINESS AND STUDENTS OF ANTITRUST

A KEYNOTE ADDRESS

THOMAS B. LEARY*

It is both a pleasure and a privilege to introduce this American Antitrust Institute program on "Stretching the Envelope" of our thinking about antitrust policy. The American Antitrust Institute provides a forum for people who question established wisdom and suggest new ideas, and if I have learned one thing in forty-plus years of involvement with antitrust policy, it is that we always should be willing to entertain new ideas. A good friend reminded me recently that all of us need to remain humble, particularly those who not only reflect on antitrust policies but also have some responsibility for implementing them. The best definition of humility, not found in any dictionary, is willingness to be taught. I want to approach my assignment here in that spirit.

A theme of this conference and the subject of this introductory speech is the potential for improved antitrust enforcement through a more active dialogue between the traditional antitrust community and the faculty and students in business schools. Here, as always, the word "dialogue" suggests a two-way exchange.

1. THE CHALLENGE OF INCIPIENCY STATUTES AND THE INEVITABILITY OF SUBJECTIVITY

I am not sure that business people understand what antitrust enforcement is all about. Commentators who draw an analogy between antitrust agencies and "cops" on a business beat do not help because it suggests that antitrust offenses, like street crimes, are obvious and readily identifiable. An analogy to "umpires" on a playing

* Commissioner, Federal Trade Commission. A preliminary and unwritten version of this speech was given at the Notre Dame Research Workshop and Conference on Marketing, Competitive Conduct and Antitrust Policy on May 3, 2002. These are individual views, not necessarily shared by any other commissioner. I acknowledge the assistance of my advisor Thomas J. Klotz in the preparation of this paper.

field is not much better because umpires do have to exercise some judgment about the existence of an offense or a "foul," but they are always reviewing events that have already occurred rather than incipient threats of future consequences.

Antitrust is different. With the exception of so-called "per se" offenses that are presumed to cause immediate consumer harm,[1] all antitrust is focused to some degree on incipiency concerns. Statutes like Sections 3 and 7 of the Clayton Act,[2] which refer to conduct that "may. . . substantially . . . lessen competition, or . . . tend to create a monopoly," expressly invite consideration of potential future effects. The rich rule-of-reason jurisprudence that gives content to Sections 1 and 2 of the Sherman Act, or Section 5 of the Federal Trade Commission Act,[3] similarly requires consideration of future consequences in appropriate cases.

Some have argued that the incipiency component of antitrust has been improperly ignored in recent years,[4] but I think it is more accurate to say that people have different views on the extent to which long-term predictions need to be discounted and, perhaps, different tolerances for errors of under-enforcement or over-enforcement (so-called "Type I" and "Type II"). For example, we really have no objective way to evaluate arguments that particular forms of competition, with immediate pro-consumer effects, will so adversely affect competitors that consumers will be harmed in the long run. Harold Demsetz summed up the problem succinctly about ten years ago, in a speech that never got the attention it deserved: "People with opposing views on this issue implicitly believe in different rates of transformation between competition now and competition in the future."[5]

---

1. *See* Northern Pac. R.R. Co. v. United States, 356 U.S. 1, 5 (1958)(per se offenses "are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry" and such practices include "price fixing, division of markets, group boycotts, and tying arrangements").

2. 15 U.S.C. §§ 14, 18 (2000).

3. 15 U.S.C. §§ 1, 2, 45 (2000).

4. See Robert H. Lande, *Resurrecting Incipiency: From Von's Grocery to Consumer Choice*, 68 ANTITRUST L.J. 875 (2001).

5. *See* Harold Demsetz, *100 Years of Antitrust: Should We Celebrate?*, Brent T. Upson Memorial Lecture, George Mason University School of Law, Law & Economics Center, at 8 (1991).

The inherently subjective nature of these judgements should not surprise students of business, whose work is prominently and appropriately featured here today. Even though corporate executives typically are required by governing state law[6] to focus on a single overriding concern, shareholder return, and they have available increasingly sophisticated tools to measure and to forecast, they would indignantly reject any suggestion that they could be replaced by a computer or a statistician. There is always room for the exercise of judgement. In particular, executives have the discretion to make investments that have an immediate adverse effect on earnings but the potential for a long-term payoff, and reasonable people can disagree about these predictions.

We in government who are responsible to enforce antitrust laws are in many ways similar. It is now generally agreed that we also have a single overriding concern, though our focus is on consumer welfare rather than shareholder welfare (goals that are not necessarily in conflict). In some ways, our job is easier because we are not required to enhance consumer welfare across the board but rather to focus on particular business practices, which come to our attention one way or the other, and to determine whether they will have an adverse effect. In this sense, we are reactive rather than proactive. In another respect, however, our job is harder because the decisions we make in one case will inevitably have some impact on people who are not before us. We create *precedents*.

2. The Need for Predictability

I do not need to explain the role of precedents to an audience of people brought up in the common law tradition. But, we sometimes underestimate the critical importance of precedents or signposts in a field like antitrust, where the statutory standards are vague and enforcement is so diffused. The antitrust laws are not really enforced by bureaucrats like me; we in federal or state governments review only a minute fraction of the business strategies that are considered every day in areas of potential concern. The same is true of so-called "private attorneys general." The people

6. William Meade Fletcher, 3 Cyclopedia of the Law of Private Corporations §§ 837.50, 161-67 (2002) (Officers and directors of a corporation have a fiduciary relationship to the corporation and its shareholders).

who really enforce the antitrust laws, day-to-day, are private counselors employed either as "inside" or "outside" lawyers. When I was responsible for antitrust compliance at General Motors during the 1970s, I once told the then-head of the Antitrust Division—only half-jokingly—that I dealt with more potential antitrust problems before breakfast every day than he saw in a week.

Enforcement realities mandate that antitrust rules not only make sense to the deep thinkers present in this room, and people who judge business conduct after the fact, but also that they be transparent to the people who have the prime responsibility for applying them before the fact. It is not enough that the rules be as *accurate* as possible; they also need to be *predictable.*[7]

The competing claims of accuracy and predictability have been the subject of extended debate and compromise. When we apply rules of *per se* illegality to naked cartels, or rules of *per se* legality to sales above some measure of cost, we recognize that this inflexibility can adversely affect accuracy. Similarly, a full rule-of-reason analysis in the interest of accuracy can sacrifice predictability (not to mention economy). It may seem that there is some Heisenberg uncertainty principle[8] of antitrust lurking here; as we move toward one goal, we inevitably move away from the other.

I am, perhaps unreasonably, somewhat more optimistic. With your indulgence, let me refer to another example from personal experience. I once attended a meeting at General Motors where the president of the company instructed a project manager to work with suppliers to develop a tire that would dramatically improve both traction and durability. By then, I knew enough about the subject to understand that the objectives were inconsistent—an "aggressive" chunky design that maximizes traction is inherently less durable—and I asked the manager whether he was troubled by this apparently inconsistent instruction. The manager said: "Not at all. The president knows very well that the objectives tug in opposite directions. He's just telling me that I always need to be mindful of

7. *See* Thomas B. Leary, *Do the Proposals Make Any Sense From a Business Standpoint?*, 49 ANTITRUST L.J. 1281, 1285-88 (1980).

8. The Heisenberg uncertainty principle, familiar to students of particle physics, holds that you cannot simultaneously determine both the location and the motion of a particle with accuracy; the more precisely you measure one attribute, the less precise you can be about the other.

both." And that is what happened. The seemingly inconsistent goals were accommodated, not just by tweaking the tread designs, but by "stretching the envelope" and changing the ways that tires are made.[9]

This little incident has remained fresh in my mind for almost thirty years, because it illustrates the problem of thinking like a lawyer. As lawyers, we are used to "guilty" or "not guilty" outcomes, and our clients sometimes expect us to give bottom-line "go" or "no go" advice. Our training and the demands of our occupation encourage an "either or" view of the world but the antitrust problems we confront are not like that. We may be required to make "go/no go" determinations, but we should not delude ourselves into thinking that business conduct fits into such neat categories. For example, it is too simplistic to believe that conduct is either predatory and anti-competitive *or* efficient and pro-competitive, with no alternative possibilities.[10] In my experience, there is a likely alternative, namely, that a particular strategy will be efficient in the short-term and anticompetitive in the long-term. Business strategists are fully aware of these possibilities. Perhaps, we can do a better job as government enforcers and as counselors if we pay more attention to people who know how business people think, and business people will respond to advice more readily if antitrust rules are explained to them in language that they will understand.

This story, and some others that will be told below, help me to appreciate what this session is all about. It is not concerned with nice legal distinctions and refinements of doctrine. The conference is exploring whether there are some new ways of looking at antitrust problems that will improve both predictability and accuracy.

3. THE BOX SCORE ON PREDICTABILITY AND ACCURACY

Merger law enforcement is, perhaps, the most important and the most challenging. Some weeks ago, I completed the draft of a

9. If anyone is interested, innovative steel-belted radial tires provided better traction and better durability.

10. *See* ROBERT H. BORK, THE ANTITRUST PARADOX 138-39 (1978) (arguing that these two possibilities "exhaust the possible motivations for profit-maximizing behavior"). Much as I admire Judge Bork's treatise, I think he is wrong on this one.

paper called *The Essential Stability of Merger Policy in the United States.*[11] This paper argues that, contrary to popular belief, there was not much difference between merger enforcement in the 1980s and the 1990s. For example, the ratio of mergers challenged to mergers notified remained surprisingly stable. Also noteworthy, however, is the fact that the incidence of challenged mergers is so low — year after year, with rare exceptions, less than one percent of the mergers notified have been challenged by the Federal Trade Commission and the Department of Justice! This means, at the very least, that a relatively small amount of private and public resources were devoted to the investigation of problematic mergers that were doomed from the start. I also believe that the low challenge percentages tell us something about predictability.

It is possible, of course, that a very low challenge rate evidences nothing more than a persistently low level of agency oversight, rather like the rate of traffic tickets given to red-light runners in the city of Washington. In this case, merger challenges would be essentially random events. This explanation is unlikely, however, in an environment where all mergers above a certain size must be prenotified, and I suspect most experienced counselors would dispute it. It is also possible that the low challenge rate is evidence that companies and their counsel are highly risk averse. Again, I regard this explanation as unlikely in an environment that rewards aggressive management and aggressive counsel.

I am inclined to believe that, notwithstanding a progressive weakening of numerical presumptions in successive versions of the merger guidelines, enforcement policy has somehow continued to be remarkably predictable. The combination of guidelines, decisions and consent decrees, speeches and informal discussions with an increasingly specialized merger bar seems to have effectively communicated agency intentions in this highly fact-specific area of antitrust.

The next question is whether merger enforcement policies are accurate. Challenge percentages are of slight relevance here because predictable enforcement may still be seriously misguided. I say "slight relevance" rather than "no relevance" because the per-

11. *See* Thomas B. Leary, *The Essential Stability of Merger Policy in the United States*, 70 ANTITRUST L.J. 105 (2002).

centages may tell us something about consensus in the public and private sector. If it is assumed that merger policy evolves in a two-way interchange and if it is further assumed that, to some degree, private parties (or the states) may be willing to challenge agency determinations in court, we may be able to draw some comfort from the fact that relatively few mergers appear to be controversial. It is still true, however, that the legal rules applied to mergers and other possibly anti-competitive business strategies are still the particular province of a small circle of lawyers and economists, who talk to one another incessantly—usually, in very nice places. The fact that people in this circle seem to agree so often is encouraging, but do our policies make sense to people outside the circle?

4. THE IMPORTANCE OF "STRETCHING THE ENVELOPE"

It is significant that the sponsors of this conference have seen fit to continue and expand on sessions sponsored by the Antitrust Section of the American Bar Association on January 11 and July 18, 2001.[12] There is a growing recognition of the need to examine some of the fundamental assumptions of our present antitrust regime and to consider the contributions of other disciplines.

I do not intend to revisit my own individual questions that are discussed elsewhere,[13] and I will not presume to paraphrase the far more significant contributions of others who are also concerned about the intellectual foundations of antitrust.[14] All I will say here, in summary, is that I believe our present methods of antitrust analysis are still mired too much in an obsolete view of what competition is all about and that they are likely to become increasingly unrealis-

12. *See* A.B.A. Sec. Antitrust Law, PERSPECTIVES ON FUNDAMENTAL ANTITRUST THEORY (2001); A.B.A. Sec. Antitrust Law, PERSPECTIVES ON THE CONCEPTS OF TIME, CHANGE, AND MATERIALITY IN ANTITRUST ENFORCEMENT (2001).

13. *See* Thomas B. Leary, *The Significance of Variety in Antitrust*, 68 ANTITRUST L.J. 1007 (2001); Thomas B. Leary, *Antitrust Economics: Three Cheers and Two Challenges* (speech before Charles River Associates Antitrust Conference, Washington, D.C., on Nov. 15, 2000), *available at* http://www.ftc.gov/speeches/leary/learythreecheers.htm.

14. *See Perspectives on Fundamental Antitrust Theory*, *supra* note 12; See *Perspectives on the Concepts of Time, Change, and Materiality in Antitrust Enforcement*, *supra* note 12; David T. Scheffman, *Making Sense of Mergers*, Antitrust Bulletin (forthcoming); Federal Trade Commission Bureau of Economics, Empirical Industrial Organization Roundtable (Sept. 11, 2001), *available at* http://www.ftc.gov/be/empiricalioroundtabletranscript.pdf.

tic. We still focus primarily on price competition and on relatively short-term competitive effects—in part, I suspect, because they are easier to model and to measure. In this respect, we are like the apocryphal drunk who looks for his lost car keys under the lamppost because that is the only place that he will be able to find them.

I further suspect that criticism of our present methodology is relatively muted today because a lot of keys may still be under the lamppost. We might be deciding some cases "right" for the "wrong" reasons, but someday our luck could run out. Hence, the need for conferences like this one.

When we consider a possible research agenda for the future, it may be helpful to start by looking at some of the similarities and differences between the situation today and the situation that existed some thirty years ago, when a vanguard of academic thinkers were attacking the very foundations of antitrust jurisprudence. These academics argued that the courts improperly focused on non-economic issues and that the economic principles they did apply were simply wrong.

Empirical research had cast doubt on the commonly accepted notion that concentrated industries performed poorly.[15] Emerging economic theories suggested that previously suspect practices like tying, exclusive dealing or resale restraints—could be pro-competitive. Existing antitrust policy was viewed as wrongheaded and inconsistent, literally "A Policy at War with Itself."[16]

The situation is different today than it was thirty years ago, in that mainstream critics do not argue that antitrust policies are fundamentally flawed or that most cases are wrongly decided. Disagreements tend to be more fact specific and a great deal less ideological. The once-lively debate about the relevance of social and political factors seems to have subsided, and people typically viewed as "conservative" or "liberal" are found on both sides of the argument in particular cases.[17] The situation is similar, however, in

15. *See, e.g.*, John S. McGee, *Efficiency and Economies of Size, in* INDUSTRIAL CONCENTRATION: THE NEW LEARNING 55 (Harvey J. Goldschmid, et al. eds., 1974). *But see* F.M. Scherer, *Economies of Scale and Industrial Concentration, in* INDUSTRIAL CONCENTRATION: THE NEW LEARNING 16 (Harvey J. Goldschmid, et al. eds., 1974).

16. *See* Bork, *supra* note 10. Ironically, by the time this immensely influential book was published, the tide had turned.

17. *See* Leary, *supra* note 11, at 50.

that a great deal of empirical and theoretical work remains to be done. There are a lot of things we still do not know. In my view, business school scholarship can make a contribution in both the empirical and the theoretical areas.

5. Qualitative Issues in Empirical Analysis

In the vast body of commentary about antitrust issues, there appears to be very little empirical evidence on whether enforcement has been overly aggressive or not aggressive enough, either at the macro or the micro level. We do not know much about the effects of antitrust policies on the economy as a whole or on individual industries that have (or have not) been the focus of antitrust activity. I am not sure how you would even begin to assess macro effects, but, initially, it might seem that studies at the micro level could readily be done. However, further thought suggests that, even here, the job is formidable.

It is particularly difficult to test for Type II errors of over enforcement because it is hard to identify the appropriate parameters of a study. In the merger area, for example, the relatively small number of transactions challenged does not represent the universe of transactions that failed for antitrust reasons. Anyone who has counseled clients on merger matters knows that a lot of deals are killed in lawyers' offices. There is no public record of these events, and business people are highly unlikely to supply information voluntarily.[18] For a variety of reasons, they do not want to talk about the roads not taken.

Type II errors of under enforcement should be somewhat easier. Significant mergers, for example, are likely to be a matter of public knowledge, even though agency filings are not. But, there may be serious data collection issues in this area, as well.[19] Even more important, perhaps, a retrospective assessment of consummated transactions is not just a mathematical exercise; it requires considerable industry-specific expertise. A recently proposed joint

18. I have, in the past, found that it is impossible to get businesses to supply this information, even in aid of legislative or executive initiatives that the businesses might favor.

19. If, for example, efficiencies are an issue, it becomes progressively more difficult with the passage of time to isolate merger-related effects.

venture that the Commission's staff recently reviewed may provide a hypothetical illustration of why this is so.

A group of doctors in Denver asked for a staff opinion on a proposal that they be permitted to bargain as a unit with payers, even though they did not integrate their practices financially. What they intended to do instead is develop and implement protocols for clinical practice. The issue for staff was whether this kind of "clinical" integration would avoid condemnation *per se* and justify rule of reason treatment.

Commission staff advised that the proposal would be evaluated under the rule of reason,[20] advice that I think is correct for reasons not relevant here. However, in preparation for a speech that I gave on this subject,[21] I considered the issues that might arise if we decided to revisit this venture after the fact to determine whether, on balance, it had turned out to be beneficial or harmful to consumers. The more I thought about it, the more complex the hypothetical inquiry appeared to be, and the exercise brought home to me some of the difficulties involved in an after the fact assessment of innovative business arrangements.

If, for example, we tried at some time in the future to evaluate the competitive effects of this loose consortium of doctors, under the rule of reason, it would not be enough simply to show that their prices had increased. An initial question would be "prices compared to what." Medical services are provided in an unusual economic setting,[22] and it might be that extraneous factors have caused prices of medical care to increase throughout the Denver area or the country as a whole. Moreover, how would you adjust for quality differentials in a field that is evolving rapidly, in light of the fact that the whole purpose of the venture is to improve the quality

20. FTC Staff Advisory Opinion Letter to John J. Miles (Feb. 19, 2002), *available at* http://www.ftc.gov/bc/adops/medsouth.htm (last visited Feb. 22, 2003). Commissioners do not formally vote on opinion letters of this kind, but we are familiar with them and do have the opportunity to voice opinions about them.

21. The speech itself has not yet been published—indeed, has not yet been written out—but was reported at length. *See* Thomas B. Leary, *The Antitrust Implications of "Clinical Integration:" An Analysis of FTC Staff's Advisory Opinion to MedSouth*, 47 ST. LOUIS U. L.J. 217 (2003).

22. For one thing, the people who receive the services typically do not pay for them. *See generally, e.g.*, David M. Cutler, *A Guide to Health Care Reform*, 8 J. ECON. PERSPECTIVES 13 (1994).

of care? Better-quality care might dictate more preventive medicine, which means more costs up front and lower costs later on, other things being equal. But, other things will not be equal if people live longer as the result of better care, resulting in higher costs overall. Other complications abound.

The point here, obviously, is not to provide a definitive analysis of the issues involved in this particular venture. The point is to demonstrate that an analysis of competitive consequences after the fact involves a lot more than simple mathematical computations; it requires the application of a lot of specialized knowledge about the "industry" under study. The issues appear to be particularly difficult to the extent that the products or services are non-homogeneous and innovation is an important factor—complications that are becoming more, not less, significant. And, if this knowledge is required simply to assess the competitive effects of one venture after the fact, imagine the further complexity of the effort to do a retrospective analysis of a number of ventures in a variety of industries, to help determine whether we are generally dealing with incipiency issues in a sensible way. For one thing, the analysis would have to consider whether the experience with any particular venture is typical enough to inform policy. The message for students of business, then, would be that their familiarity with particular industries could be important, even when we are simply undertaking empirical studies of consummated transactions.

6. A Different Perspective on Theoretical Assumptions

The advice of people familiar with business strategies is obviously important when policy-makers are trying to evaluate the potential effects of particular practices. I have already mentioned the profound impact of scholarly literature, which pointed out that there were legitimate pro-competitive reasons for various restraints that had always seemed suspect. Other, more recent literature has tilted antitrust policy in the opposite direction, by describing business strategies that could make predation pay off.[23]

23. *See generally* Janusz A. Ordover & Garth Saloner, *Predation, Monopolization and Antitrust*, *in* 1 Handbook Of Industrial Organization 537 (Richard Schmalensee & Robert D. Willig eds., 1989).

We need to better appreciate what the competitive landscape looks like to the people who do battle on it. I mean that literally. It is helpful to think in pictures because our views of competition are subtly shaped by our mental image of what competition is like. For example, after about ten years of firsthand experience in the automobile industry, I realized that I was looking at competition in a new way. My early antitrust training gave me the impression that the ideal form of competition was some kind of unruly scrimmage, where people struggled for some high ground on the same field, subject to assaults on all sides, and the more players the better. The image that came to me later was that competition, at least in the industry where I worked, was more like the rivalry of different hunting bands—who had a home territory, secure in the short term, with major battles confined to the borders. That home territory could be understood as a geographic space, or a product space, or a collection of particularly loyal customers (and, of course, there could be more than one), but protection of the home territory is just as legitimate a competitive objective as doing battle everywhere, all the time.[24]

I believe that the image of hunting bands is increasingly a more fruitful one than the image of a scrimmage, but need the help of more learned people in order to think about it systematically. The image might suggest, for example, that the possession of some market power in particular areas is natural and not cause for concern; it also might suggest that we should be concerned about aspects of competition at the fringes, even if other important business strategies are unaffected;[25] it may even suggest that strategic alliances of relatively distant neighbors can be more important in the long term than alliances between those who live alongside one another (the "next-best substitutes").

---

24. *Cf.* Howard A. Shelanski & J. Gregory Sidak, *Antitrust Divestiture in Network Industries*, 68 U. CHI. L. REV. 1, 11-12 (2001)(Schumpeterian competition where firms compete through innovation for temporary market dominance, from which they may be displaced by succeeding developments in products); *see also*, United States v. Microsoft Corp., 253 F.3d 34, 49-50 (D.C. Cir. 2001)(market dominance may be transitory in rapidly changing markets).

25. *See* Robert H. Lande & Howard P. Marvel, *The Three Types of Collusion: Fixing Prices, Rivals and Rules*, 2000 WIS. L. REV. 941 (2000).

There are other ways in which a better understanding of business reality can enrich our antitrust analysis. We tend to assume, for example, that business organizations seek to maximize their profits.[26] It may be the most practical assumption to make in most cases, but we should not deceive ourselves that an organization can "seek" anything. It is individuals in organizations who actually seek things and they are no more exclusively focused on company welfare than public officials are exclusively focused on public welfare.[27] We all are influenced, in some measure, by purely individual concerns.[28] In addition to this "agency" problem, I also believe that students of business methods are beginning to question whether "profit maximization" is a sensible business strategy, even assuming that all the employees could really be motivated to seek it.[29]

Other working assumptions of the antitrust community do not necessarily comport with business reality. When we demonstrate, for example, that price predation almost never is a rational corporate strategy, this may help prove that it is unlikely to cause consumer harm but it does not necessarily prove that it is unlikely to occur. (I know because I have seen it.) Similarly, when we theorize that a rational company will decide to "make" or "buy," based on whether the inside or the outside supplier is more efficient, we are not taking account of real-world factors like government relations, labor relations, insufficient information or the human tendency to favor the home team. When we theorize that some real-

26. *See* Clayton Act Committee, *Time, Change, and Materiality Under the Clayton Act*, *in* PERSPECTIVES ON THE CONCEPTS OF TIME, CHANGE AND MATERIALITY IN ANTITRUST ENFORCEMENT 19, 75-76, *supra* note 12.

27. *See generally* Bengt R. Holmstrom & Jean Tirole, *The Theory of the Firm*, *in* 1 HANDBOOK OF INDUSTRIAL ORGANIZATION 61, 86-94 (Richard Schmalensee & Robert D. Willig eds., 1989) (separation of ownership and control).

28. I have observed a number of situations where CEOs who negotiate mergers are looking at personal upside benefits if the merger succeeds that vastly exceed the personal downside consequences if the merger fails. I leave it to others, with better tools, to consider whether these apparently skewed incentives may significantly affect corporate decisions, and whether it should matter to antitrust policy.

29. *See* Norman W. Hawker, *Antitrust Insights from Strategic Management*, Remarks presented at Research Workshop and Conference on Marketing, Competitive Conduct and Antitrust Policy, University of Notre Dame Mendoza College of Business, South Bend, Indiana, (May 3, 2002). Of course, it is possible that words like "sustainable competitive advantage," used by students of strategy, are just another way of describing "long-term profit maximization," familiar to students of antitrust. *See* discussion *infra*.

world conspiracies are unlikely because of the ability and the incentive to cheat, we forget that even a conspiracy of cheaters can soften the sharp edges of competition. My favorite example here is the agreement of Ivy League schools not to award athletic scholarships (which would be illegal outside the context of college athletics).[30] Cheating is rampant and obvious, but the agreement clearly has an effect—as demonstrated by the generally inferior performance of Ivy League teams.

7. Some Cautions About Overreaction

"Stretching the Envelope" and opening the antitrust dialogue to other disciplines will not necessarily have a dramatic impact on antitrust policy. We may continue to do a lot of the same things, but with a richer understanding of why we do them. When I claim, for example, that a better appreciation of complex business motivations is important, I do not mean to suggest that we should necessarily attach greater significance to evidence of "motive" when deciding cases.[31] Attribution of a single "motive" to an organization where decision makers are likely to have a variety of motives is an arbitrary exercise and, besides, evidence of motive can be too readily manipulated by lawyers. I imagine all of us with counseling experience have advised clients about the best ways to characterize their objectives on paper, in the same way that lawyers prepare witnesses for testimony. Skepticism about evidence of motive can, therefore, cut both ways. It may cause us to discount self-aggrandizing claims that a proposed strategy will yield market dominance, but it may also cause us to discount predicted efficiencies.

For another example, consider the policy implications of the fact that business people do not always select profit-maximizing strategies. Students of business decisions tell us that a relatively large number of strategies fail,[32] something that is obvious to any-

30. *See* United States v. Brown Univ., 1993-2 Trade Cas. (CCH) § 70,391 (E.D. Pa. 1991) (Section IX(A) of consent decree).

31. *See* Richard A. Posner, Antitrust Law: An Economic Perspective 189 (1976) ("the availability of evidence of improper intent is often a function of luck and of the defendant's legal sophistication, not of the underlying reality").

32. *See, e.g.*, Max M. Mabeck et al., After The Merger: Seven Rules For Successful Post-Merger Integration 1 (2000) (58% of all mergers fail to increase stock prices and profitability over 3 year post-merger period).

one who reads the financial news. We should not jump to the conclusion that tougher antitrust enforcement is needed because business people make mistakes. We in government do not have any mandate to interfere, just because we think a particular transaction is likely to fail, and the market itself disciplines mistakes. Better information on these issues may, however, cause us to revisit some assumptions about the pro-competitive or anti-competitive potential of various business strategies. It may also affect our assessment of the risks associated with Type I or Type II errors.

We in the antitrust community need to better understand what competition is like in the real world if we are going to make judgements about it. I am not saying that we make decisions in an ivory tower today. There is considerable embedded expertise in our own professional staff of lawyers and economists. Moreover, we can, and do, appreciate industry facts when we interview customers or other interested parties in investigations. But, it is useful to know whether snippets of information that we hear, from people who may or may not have individual agendas, represent views that are widely held by scholars who specialize in the study of business organizations. We need to test our theoretical models of competitive harm, or our assumptions about efficiencies, against the views of dispassionate scholars with practical experience.

When we engage in this dialogue, it is important to remember that differences in language do not necessarily signify differences in content. The centerpiece of the ABA Conference on "Fundamental Antitrust Theory," held in January 2000, was a provocative paper on a "Productivity-Based Approach" to merger analysis, presented by Michael Porter of the Harvard Business School.[33] I partly agree with those commentators who argued that Porter was simply using different language to describe familiar economic concepts that are embedded in existing merger guidelines.[34]

---

33. *See* MICHAEL E. PORTER, *Competition and Antitrust: Towards a Productivity-Based Approach to Evaluating Mergers and Joint Ventures, in* PERSPECTIVES ON FUNDAMENTAL ANTITRUST THEORY 125.

34. *See, e.g.*, Gregory J. Werden, *Merger Policy for the 21st Century: Charles D. Weller's Guidelines Are Not Up to the Task, in* PERSPECTIVES ON FUNDAMENTAL ANTITRUST THEORY 355-367. (Porter's "Five Competitive Forces are standard industrial organization economics slightly repackaged."); Jonathan B. Baker & Steven C. Salop, *Should Concentration Be Dropped From the Merger Guidelines?, in* PERSPECTIVES ON FUNDAMENTAL ANTITRUST THEORY 339, 352.

I only partly agree with this critique because some elements in Porter's particular analysis are genuinely different.[35] What is more important, even if I were to make the counter-factual assumption that Porter has nothing new to say, is the fact that we can always benefit from a fresh restatement of familiar ideas. We understand the ideas better when they are presented in a different way in a different setting, and when the practical consequences are manifest.

Let me illustrate the point with another personal anecdote. In the infamous *Fortner I*[36] decision, the Supreme Court held that uniquely favorable financial terms offered by a credit subsidiary of U.S. Steel to buyers of its prefabricated homes could support a tying claim by the plaintiff, a builder who had bought a large number of them. This seemed silly to me at the time but I really never understood how silly it was until I had the opportunity to participate, as one of the lawyers for U.S. Steel, in the trial that followed in Louisville, Kentucky. The high point of the plaintiff's case was Mr. Fortner's own lavish description of the extraordinarily generous financing terms that had been extended to him by the people he was suing![37] (Try explaining to clients why this generosity could give rise to antitrust liability.) That experience of populist antitrust in action helped me to understand the later academic criticism of tying law in a way that would not otherwise have been possible.

I personally would like to know what people like you in the business-school community think about some of our more controversial decisions. We hear from lawyers and eminent forensic economists all the time, but we do not hear much from you. But, you are training the people who will have to live with the competitive rules that we create.

---

35. *See, e.g.*, PORTER, *supra* note 33, at 154-55 (emphasis on the productivity of the local business environment); Baker & Salop, *supra* note 34.

36. United States v. Fortner Enters. Steel Corp., 394 U.S. 495 (1969).

37. Mr. Fortner was an engaging and candid man. He once confided to me outside the courtroom: "I don't really understand all this antitrust talk—I just didn't think the houses were any good." Just so. Fortner's perhaps-valid breach of warranty claim had been transmuted into a tying case by imaginative counsel and, of course, he wound up with nothing after a decade of litigation. United States Steel Corp. v. Fortner Enters., 429 U.S. 610 (1977)(Fortner II).

8. Closing Thoughts

The ultimate objective of this richer dialogue is to test whether our present enforcement policies are adequate or whether we can make improvements that will serve the twin goals of accuracy and predictability. This is no easy job, even if we could agree on what the relevant factors might be. In his oral presentation at the Conference Board meeting in New York earlier this year, Robert Pitofsky read out the factors listed in Michael Porter's famous "Five Forces" chart,[38] and questioned how they possibly could be considered and weighed in a manageable proceeding. This exercise was not intended to denigrate Porter's work at all; Pitofsky acknowledged that we all benefit from exposure to it. The point is simply that it is very difficult to translate this kind of learning, created for an entirely different purpose, into manageable legal rules that will be both credible and capable of being enforced by the myriad private counselors who really must do the job.

We only seek improvement, however, not perfection. We will never be able to decide whether enforcement policies are accurate in an absolute sense. The most careful attention to the lessons of the past may improve our tools for predicting the future but there will always be an element of uncertainty. Given this uncertainty, different people will always have different tolerances for risks of various kinds, and they will disagree about the amount of "insurance" that is needed to guard against them. This disagreement is evident in debates about subjects as diverse as global warming, nuclear power, electricity deregulation or antitrust policy.

Even if people can agree on the relevant facts (no small matter), their views will still vary, depending on their value judgements and their inherent tendency to be pessimistic or optimistic. These fundamental differences are not worth arguing about. People who worry a lot and have an activist disposition cannot be talked out of it by people like me, who tend to think that a lot of things work out alright if you leave them alone and rather admire Presidents who keep regular hours. But whatever our basic dispositions and preferences, we can always benefit from the common pursuit of knowledge.

---

38. *See* Porter, *supra* note 33, at 161 (diagram illustrating "Five Forces").

The American Antitrust Institute, which is hosting this conference, is most actively supported by people who probably have different risk tolerances on antitrust issues than I do. Specifically, I suspect that they are more concerned about risks of under-enforcement than I am. However, there also are people who worry a lot more about over-enforcement than I do. I personally have such a strong belief in the potency of the entrepreneurial drive that I think our system can adjust to the consequences of a few Type I or Type II errors.[39] The common consensus on antitrust is so broad today that the controversial cases are very close calls.

If I believe that today's close cases can go either way without significant harm, why do I keep asking questions and encouraging research and dialogue? There are three principal reasons. First, the injunction to be humble, acknowledged up front, reminds me that my relatively relaxed attitude could always be wrong—even if not wrong today, it could be wrong soon in a fast-changing world. Second, ongoing communication and participation in common projects tend ultimately to reduce the areas of disagreement because some factual disputes may be resolved or some misunderstandings clarified. Third, it is important that our policies are perceived to be realistic by business people most directly affected by them.

This emphasis on perception looks like, but differs from, the more familiar argument that a credible antitrust policy is needed to head off pervasive government controls.[40] I would argue that a credible antitrust is also important because it lends weight to the compliance efforts of those myriad private counselors whom we rely on to enforce the antitrust laws every day. Business people are a lot more likely to understand and to follow advice if it can be couched in terms that fit their intellectual framework. A dialogue can serve the twin goals of predictability and accuracy.

---

39. This fundamental faith helps to explain why I think the *GE/Honeywell* controversy has been overblown. *See* Thomas B. Leary, *A Comment on Merger Enforcement in the United States and in the European Union*, Prepared Remarks Before the Transatlantic Business Dialogue Principals Meeting, Washington, D.C. (Oct. 11, 2001), *available at* http://www.ftc.gov/speeches/leary/tabd010111.htm.

40. *See, e.g.*, Robert Pitofsky, *Commentary*, Brent T. Upson Memorial Lecture, *supra* note 5 ("without antitrust, without that powerful symbol . . . the alternative of more intrusive forms of government regulation would have been much more attractive.")

This conference and others with a similar theme serve an important public purpose. Even though some fundamental differences cannot be resolved, we can at least narrow the areas of dispute and build consensus support for antitrust policies. In fact, this has happened in antitrust throughout the last thirty years, here and throughout the world. Conferences like this one continue the tradition of the momentous Airlie House event that was held in the Fall of 1973.[41] We meet in a spirit of open inquiry today, as others did then, to explore New Learning.

41. The papers from the conference were collected and published in INDUSTRIAL CONCENTRATION: THE NEW LEARNING (Harvey Goldschmid, et al. eds., 1974).