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The New Antitrust History

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THE NEW ANTITRUST HISTORY*

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I. INTRODUCTION

In his review of legal history published prior to 1960, William Nelson concluded that almost all of that literature shared a common understanding of the uses of history.[1] Legal history, its practitioners agreed, was to be written by and for the legal profession. The source of their near unanimity was the conviction that—in contrast with all other historians—the product of their labor was of immediate juridical significance. Nelson turned to Max Radin to illustrate his point about the legal historians' conflation of law and history. "Lawyers [are] necessarily historians,"[2] Radin wrote. "[T]hey derive their law from precedent, which is pure history, and they . . . seek to interpret statutes by considering the conditions under which the statute arose and was framed, which is also pure history."[3]

Radin described what I will call "the professional paradigm" in American legal history.[4] Driven by canons of common-law, statutory or constitutional reasoning, the professional paradigm assumes that the legal past speaks authoritatively to the legal present. Sometimes historians writing in this tradition directly invoke the authority of the past, as in an appeal to the original understanding of a statutory or constitutional text. Sometimes the authority is more subtle and general, as when a legal historian discovers a "tradition" running through the American past and

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1. *See* W. NELSON & J. REID, THE LITERATURE OF AMERICAN LEGAL HISTORY (1985).

2. *Id.* at 1 (quoting M. RADIN, THE LAW AND YOU 188 (1950)).

3. *Id.*; *see also* Botein, *Scientific Mind and Legal Matter: The Long Shadow of Richard B. Morris's Studies in the History of Law*, 13 REV. AM. HIST. 303, 303-15 (1985) (recognizing the key role academic lawyers play in writing legal history); Gordon, *Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography*, 10 LAW & SOC'Y REV. 9, 34-35 (1975) (stressing the relevance of social, as well as legal, history in judicial decision making).

4. For the place of the paradigm in recent legal history, see Katz, *The Problem of a Colonial Legal History*, in COLONIAL BRITISH AMERICA 459-60 (J. Greene & J. Pole eds. 1984).

then deploys it as a rhetorical buttress for conclusions arrived at by other means.

In whatever form, the professional paradigm encourages legal historians to search out continuities between the past and the present. A finding that the past was fundamentally discontinuous with the present, that behind the smooth wall of the familiar in the past lay a vast cavern of difference, would undercut the persuasiveness of appeals to history. The more the assumptions of past legal actors are revealed as different from our own, the less convincing become the reasons for privileging their intentions. Good, legal-process-oriented grounds might remain for following old legal texts long after the death of the systems of meaning and interest in which they were fashioned, but an important part of the authority of the past would be lost.[5]

Since 1960, the professional paradigm has lost its hold on legal history, taken as a whole. In part, the toppling of "lawyers' legal history" was the work of professionally trained historians who discovered that our legal past could serve as an admirable staging ground for far-ranging explorations of American culture and society. The revolt was also part of a rebellion within legal academia against traditional canons of legal reasoning. Morton Horwitz's searing indictment of what he called the "conservative tradition" in American legal history is perhaps the best illustration of this development.[6] Horwitz accused devotees of the professional paradigm with turning the legal past into a weapon of legitimation and reducing legal history to "the pathetic role of justifying the world as it is."[7]

Long after the professional paradigm had been dethroned in the larger discipline, it continued to govern the legal history of antitrust. It has only been within the last five years that a burst of quite stunning work has revolutionized the field, bringing to it a methodological sophistication unsurpassed in legal history today. The work on the so-called formative era alone deserves a full-blown review essay, but my aims here are more limited. First, I want to show how the new antitrust legal history parts company with older work on the formative era. I then want to venture some thoughts on why the new work nonetheless offers valuable insight for anyone who seeks to formulate a public interest in antitrust law today.

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5. For the legal-process arguments in favor of an originalist approach to statutory interpretation, see Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1523-38 (1987). Eskridge convincingly rejects such arguments when the statute in question is "old and generally phrased and the societal or legal context of the statute has changed in material ways"—an apt description of the Sherman Act. *Id.* at 1481.

6. *See* Horwitz, *The Conservative Tradition in the Writing of American Legal History*, 17 AM. J. LEGAL HIST. 275 (1973).

7. *Id.* at 281.

II. ANTITRUST HISTORY AND THE PROFESSIONAL PARADIGM

Five years ago, the antitrust lawyer looking for accounts of the formative era would be unlikely to find one premised on discontinuity between the past and the present. Even as rich an account as Hans Thorelli's landmark study *The Federal Antitrust Policy*,[8] published in 1955, looked to the years 1890 to 1904 for the "origination and institutionalization"[9] of a tradition that was still living and vital in Thorelli's own day. Indeed, Thorelli's antitrust was not simply *an* American tradition, it was a major component of "*the* American tradition," which Thorelli identified as the ideals of equality, opportunity, freedom of enterprise, individualism, and capitalist democracy.[10] Born of "generations of common law and frontier experience," the antitrust tradition did not simply survive the merger movement of the turn of the twentieth century, it "emerged substantially reinforced from the encounter."[11] By 1904 it had "conclusively established itself as an important institution in American life and public policy."[12] In Thorelli's day antitrust remained "a living symbol of economic egalitarianism" and "an accepted way of life in the United States to an extent rarely experienced elsewhere."[13] By asserting the exceptional nature of the American experience, by searching out "general norm[s]"[14] and "widespread concepts,"[15] and by simultaneously celebrating free enterprise and an activist state, Thorelli's book fit in perfectly with the consensus history and cold war culture of the 1950s.[16]

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8. H. THORELLI, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION (1955).

9. *Id.* at 3.

10. *Id.* at 608 (emphasis added).

11. *Id.*

12. *Id.* at 4.

13. *Id.* at 609.

14. *Id.* at 1.

15. *Id.*

16. *See generally* Lears, *A Matter of Taste: Corporate Hegemony in a Mass-Consumption Society*, in RECASTING AMERICA: CULTURE AND POLITICS IN THE AGE OF COLD WAR 38 (L. May ed. 1989) (the atmosphere was one of democratic interest groups competing in an extraordinarily fluid social structure, and an emerging cultural consensus based on the spread of affluence and promise of upward mobility); Noble, *The Reconstruction of Progress: Charles Beard, Richard Hofstadter, and Postwar Historical Thought*, in RECASTING AMERICA, *supra*, at 61 (at the end of World War II the history profession found a new way of comprehending the American past; Richard Hofstadter "served as a midwife" to the two reigning ideas in postwar academic thought: a national identity rooted in consensus and a polity best served by social scientists removed from an irrational democratic tradition).

Published a decade later, William Letwin's *Law and Economic Policy in America*[17] did nothing to challenge the professional paradigm. Letwin also thought the fundamental nature of antitrust policy was fixed within decades of its creation (by 1914, in Letwin's case),[18] but he presented a much less flattering account of the antitrust tradition. In Letwin's telling, the Rule of Reason cases of 1911[19] and the Clayton and Federal Trade Commission Acts of 1914[20] saddled federal antitrust policy with mutually inconsistent goals and a complex and fragmented scheme of enforcement.[21] By stressing the irremediably conflicted and incoherent nature of the antitrust tradition, Letwin's book, like Thorelli's, was also in keeping with its time. In particular, it joined a far-ranging attack on the pluralist model of the regulatory state mounted by economists, political scientists, and professors of administrative law.[22]

After Letwin, the professional paradigm and the presumption of continuity continued to dominate antitrust legal history. Robert Bork's depiction of the drafters of the Sherman Act as adherents to neoclassical economics[23] was only the most brazen and anachronistic resort to the authority of the past in a contemporary debate over antitrust policy. So strong were the attractions of the professional paradigm that even some of Bork's fiercest critics shared his understanding of historical utility and asserted a fundamental continuity between the formative era and the present. For example, Robert Lande quite effectively pilloried Bork for failing to acknowledge the variety of social, moral, and political goals held by the drafters of the Sherman Act, including the preservation of individual

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17. W. LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT (1965).

18. *Id.* at 278.

19. Standard Oil Co. v. United States, 221 U.S. 1 (1911); United States v. American Tobacco Co., 221 U.S. 106 (1911).

20. Clayton Act, ch. 323, §§ 1-26, 38 Stat. 730 (1914) (current version at 15 U.S.C. §§ 12-36 (1988)); Federal Trade Commission Act, ch. 311, §§ 1-11, 38 Stat. 717 (1914) (current version at 15 U.S.C. §§ 41-77 (1988)).

21. W. LETWIN, *supra* note 17, at v-vi, 278, 281-82.

22. *See generally* McCraw, *Regulation in America: A Review Article*, 49 BUS. HIST. REV. 159 (1975) (surveying the understanding of regulatory commissions in American history and evaluating relevant literature in history, economics, political science, and law).

23. R. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 61-63 (1978); *see also* Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966). I intend by the brevity of my treatment of Bork's interpretation to second Rudolph Peritz's call for a halt to Bork-bashing, made in Peritz, *A Counter-History of Antitrust Law*, 1990 DUKE L.J. 263, 282 n.72. For able examples of the genre, see Flynn, *The Reagan Administration's Antitrust Policy, "Original Intent" and the Legislative History of the Sherman Act*, 33 ANTITRUST BULL. 259 (1988); Millon, *The Sherman Act and the Balance of Power*, 61 S. CAL. L. REV. 1219, 1228-35 (1988).

entrepreneurship, local control over business, and a political process untainted by the giant business enterprise.[24] Yet Lande was too wedded to the professional paradigm to be satisfied with such an unruly historical record. He insisted that "Congress intended to subordinate all other concerns to the basic purpose of preventing firms with market power from directly harming consumers."[25] Thus, no less than Bork, Lande fashioned a usable past and asserted its controlling authority for present-day antitrust cases.[26]

III. THE NEW ANTITRUST HISTORY: A SAMPLING

Change finally came to the writing of antitrust legal history from scholars who were willing to engage in a less one-sided and exploitive dialogue with the formative years. The professional paradigm encouraged legal historians to overlook the fact that the meanings of words and actions were in important respects fixed by the time and place in which they transpired. Encountering some historical debate, adherents to the professional paradigm picked a winner and enlisted it in a contemporary controversy. In contrast, the new antitrust historians tried to learn from the debate as a whole and to take it on its own terms, to ask why it ran the course it did, who pushed it along, who opposed it, and what structures guided the participants' perceptions of their needs and interests.[27]

James May's work is one illustration of my point. Like Thorelli and Letwin, May investigates a "formative period" defined by developments in antitrust doctrine and enforcement.[28] His period, however, is somewhat wider, running from 1880 to 1918, because he wants to take in what he calls "the other half of antitrust."[29] This is antitrust as it was promoted by judges and legislators in the states, where aggressive policy making and enforcement started earlier and lasted longer than on the federal level.[30] More important than May's chronology, however, is his search for difference in the past. This started as an attempt to rescue late nineteenth

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24. *See* Lande, *Wealth Transfer as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 83 (1983).

25. *Id.* at 68-69.

26. *See id.* at 81. Others who have noted the shared premises of Bork and Lande's work include Flynn, *supra* note 23, at 291, 304-06, and Millon, *supra* note 23, at 1235 n.64.

27. For a general discussion of this methodology, see D. RODGERS, CONTESTED TRUTHS: KEYWORDS IN AMERICAN POLITICS SINCE INDEPENDENCE 3-16 (1987).

28. *See* May, *Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880-1918*, 135 U. PA. L. REV. 495, 495-97 (1987).

29. *Id.* at 497.

30. *Id.* at 497-507.

century jurists from the condescension of Robert Bork and Thomas McCraw, who implied that the judges lacked any "real" economic theory.[31] May concluded to the contrary: the judges of the late 1800s employed a powerful overall theoretical conception of the economy, but its meaning and persuasiveness were lost on modern judges and economists.[32]

At this point, May was principally interested in demonstrating the distinctive nature of highbrow economic theory in the formative era. This is, to be sure, a useful and important window on the history of antitrust in the late nineteenth and early twentieth centuries, as the work of Herbert Hovenkamp, Rudolph Peritz, and David Millon also demonstrates.[33] Yet considered apart from more diffuse cultural assumptions and the circumstances that attracted proponents to a particular economic theory, highbrow economic thought can provide only a partial view on antitrust. Such an approach might well miss the extent to which nineteenth century Americans saw in trusts an immediate threat to the democratic process.[34] It might also miss an insight that Richard Hofstadter made central to his writings on antitrust: middle-class Americans thought of the economy as something other than an abstract, amoral construct and something more than an efficient producer of goods and services.[35] It was also, Hofstadter wrote, "a kind of disciplinary machinery for the development of character," a teacher of virtues, like diligence, thrift, and calculation.[36] Trusts

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31. *Id.* at 555-58 (discussing R. BORK, *supra* note 23, and T. MCCRAW, PROPHETS OF REGULATION (1984)).

32. *Id.* at 570-71, 589-90.

33. *See* Hovenkamp, *The Antitrust Movement and the Rise of Industrial Organization*, 68 TEX. L. REV. 105 (1989); Hovenkamp, *The Sherman Act and the Classical Theory of Competition*, 74 IOWA L. REV. 1019 (1989); Millon, *supra* note 23, at 1263-75; Peritz, *The Rule of Reason in Antitrust Law: The Property Logic in Restraint of Competition*, 40 HASTINGS L.J. 285, 305-13 (1989).

34. David Millon's work, which reveals a great appreciation of the political side of antitrust, is discussed *infra* notes 44-48 and accompanying text.

As good as the legal historians' recent work on antitrust and the history of economic thought is, it could have been better had it more carefully specified the structures through which the new economic learning passed into legal or general discussions of antitrust. Without some investigation of this issue, we cannot assess claims of a causal relationship between changes in economic and legal thought which might, after all, result from independent but parallel developments in the two disciplines. This is another respect in which legal historians have something to learn from M. SKLAR, THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890-1916: THE MARKET, THE LAW AND POLITICS (1988).

35. R. HOFSTADTER, THE AGE OF REFORM FROM BRYAN TO F.D.R. 10 (1955).

36. *Id.* at 10-11; *see also* R. HOFSTADTER, *What Happened to the Antitrust Movement?*, in THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS 188, 199-200 (1965).

threatened this engine of economic morality by upsetting its mechanism of rewards and penalties.[37]

What makes May's second major article so exciting is its location of antitrust within the fullest possible context in American culture.[38] May ranges across state and federal antitrust law and the major landmarks of laissez-faire constitutionalism to show how they all shared "a widely accepted general frame of reference," embodying "fundamental perspectives on politics, economics, and judicial methodology."[39] He captures the extent to which Victorian and many Progressive Era judges were judicial moralists, "guardians of a free political and economic order," which they thought "naturally tended to produce harmonious, just, and optimal results for both individuals and society at large."[40] In both antitrust and constitutional cases (and, as I can attest from my own work, cases involving the law of industrial disputes), the judges repeatedly affirmed "the basic, traditional rights of labor, property, and exchange, and the fundamental, related principles of competition and 'nondiscretionary' adjudication."[41]

For my purposes, the important thing to note about May's work is how clearly it breaks with the professional paradigm and how thoroughly it must disappoint the lawyer in search of an immediately usable past. May writes that "none of the differing 'schools' of antitrust analysis and practice can accept even implicitly the full formative era vision";[42] the best they can do is appropriate one part or another of it and inflate it into a distortion of the original intent. His principal finding is discontinuity with the so-called formative era—changes "so fundamental and so pervasively accepted that it appears impossible now to adopt an 'original intent' jurisprudence embracing the full range of formative era hopes and assumptions."[43]

David Millon updated Hofstadter's insights in this respect, by relating the passage of the Sherman Act to recent work on the republican and free-labor ideologies in eighteenth and nineteenth century America. *See* Millon, *supra* note 23, at 1236-47.

37. R. HOFSTADTER, *supra* note 35, at 10-11.

38. *See* May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918*, 50 OHIO ST. L.J. 257, 258, 391-92 (1989); *see also* D. Ernst, The Lawyers and the Labor Trust: A History of the American Anti-Boycott Association 11-46 (1989) (Ph.D. dissertation, Princeton University).

39. May, *supra* note 38, at 258.

40. *Id.*

41. *Id.* at 392.

42. *Id.* at 394.

43. *Id.* at 395.

David Millon's fine study of the Sherman Act has the same effect.[44] Like the other new antitrust historians, Millon effectively pillories Robert Bork's interpretation of the formative era and summarizes the highbrow economic thought on the problem of monopoly.[45] Like May, Millon updates Hofstadter's interpretation of antitrust law with ample references to the large literature on republicanism and free labor produced by American historians.[46] Millon rejects the professional paradigm no less emphatically than May. He investigates the Sherman Act, not to locate the origins of present policy, but to discover "the dying words of a tradition that aimed to control political power through decentralization of economic power, which in turn was to be achieved through protection of competitive opportunity."[47] His aim is "to describe the Sherman Act's meaning within its contemporary intellectual context, rather than to hypothesize about how Congress as a group thought it should be applied in the future," and he lists objections to the premising of a historical work on the "fictitious construct" of legislative intent.[48]

A final exemplar of the new antitrust history, and by any reckoning the most important, is Martin Sklar's *Corporate Reconstruction of American Capitalism*.[49] Perhaps our best approach to the book is through the question of periodization. As we have seen, the conventional reason for treating the decades around 1900 as a distinct period in the history of

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44. *See* Millon, *supra* note 23.

45. *Id.* at 1231-35, 1263-71.

46. *Id.* at 1238-47; *see also* May, *supra* note 38, at 272-83. For an earlier interpretation of antimonopolism as a part of the republican and free-labor traditions, see Gerstle, Book Review, 27 LAB. HIST. 289 (1986) (reviewing S. PIOTT, THE ANTI-MONOPOLY PERSUASION: POPULAR RESISTANCE TO THE RISE OF BIG BUSINESS IN THE MIDWEST (1985)).

47. Millon, *supra* note 23, at 1220.

48. *Id.* at 1223-24. One potential pitfall in May's and Millon's attempts to reconstruct the "shared understandings" of antitrust policymakers in the formative era is the danger of exaggerating the degree of consensus of late nineteenth century Americans on the problem of monopoly. Though both are aware of this problem (see in particular *id.* at 1224 n.13), Rudolph Peritz is surely right to alert readers to the "neoconsensual" implications of May's and Millon's work. Peritz's own studies make clear that legal apologists of industrial concentration did not need to await the arrival of some massive paradigm shift in economic and political thought to find arguments for their corporate clients. *See* Peritz, *supra* note 23, at 313, 316; Peritz, *supra* note 33, at 291-313. Thus, the eminent Wall Street lawyer William D. Guthrie argued that the Sherman Act, as interpreted by the Supreme Court in United States v. Trans-Missouri Freight Association, 166 U.S. 290 (1897), was an unconstitutional violation of liberty of contract by turning the rhetoric of "free labor" back upon the advocates of vigorous antitrust law. Guthrie, *Unconstitutional!: The Sherman Trust Act is in Conflict with the Fifth Amendment of the Constitution of the United States*, N.Y. Sun, Apr. 11, 1897, § 2, at 1, col. 1.

49. M. SKLAR, *supra* note 34.

antitrust turns on developments *within* the legal system. Thus, Thorelli ended his work in 1904 because by that time the judiciary had decisively interpreted the commerce clause so as to pose no fundamental bar to antitrust policy, the *Northern Securities* case[50] had established "the wide scope and great potentialities"[51] of the Sherman Act, and the federal executive had committed itself to the vigorous enforcement of the nation's antitrust laws.[52] By adopting the label "formative era," antitrust historians implicitly endorse this "internalist" scheme of periodization.

May's and Millon's work shows that alternate schemes of periodization exist. May, for example, implicitly adopts an internalist scheme of periodization by using the label "formative" and looking to state law and practice to set the temporal bounds of his study.[53] Yet his finding that those same years were a time when distinctive cultural assumptions reigned suggests an alternate basis for treating his years as a unique period in antitrust history. By looking beyond the law, May and Millon suggest that the three or four decades around 1900 were distinctive less for the clearing of a constitutional hurdle or the creation of the Antitrust Division[54] than for (in May's words) the "powerful, widely shared vision" of the lawmakers and law enforcers.[55] This approach suggests a periodization based less on the *formation* of key legal doctrines and institutions than on a *transformation* in American culture. If the years marked the formation of one period in antitrust policy, they also marked the conclusion of another.

Like May and Millon, Sklar breaks with the periodization of the professional paradigm by looking beyond the law to find what was distinctive about antitrust during the years 1890 to 1916. As I read it, his answer subsumes May's and Millon's work by treating the vision they recover as the expression of a retreating social order placed on the defensive by a rising class of managerial capitalists. Once again, the years around 1900 appear as a *trans*formative era—a corporate *re*construction of American capitalism from a stage characterized by proprietary firms and

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50. Northern Sec. Co. v. United States, 193 U.S. 197 (1904) (holding merger of previously competing firms an illegal combination in restraint of trade under the Sherman Act).

51. H. THORELLI, *supra* note 8, at 4.

52. *Id.* at 3-4.

53. *See* May, *supra* note 38, at 259, 392, 395.

54. The Antitrust Division of the Department of Justice was created in 1903 to empower the United States Attorney General to bring criminal and civil proceedings in the federal district courts pursuant to the Sherman Act. J. BURNS, A STUDY OF THE ANTITRUST LAWS: THEIR ADMINISTRATION, INTERPRETATION, AND EFFECT 65 (1958).

55. May, *supra* note 38, at 391.

fierce competition to one dominated by corporations and oligopolistic, "administered" markets.[56]

Sklar's great contribution to the new antitrust history is his convincing specification of the mediating structures between social and cultural change and developments in the law of antitrust. To date, most antitrust historians have been content to point out simultaneous developments in "law" and distinct economic, social, and cultural spheres, and to assert rather than demonstrate a causal connection between the two. This approach gives the impression that legal change is the result of an essentially consensual and functional swapping of one paradigm for another, rather than the product of human agency or a social movement.[57] Not so with Sklar. The corporate reconstruction of American capitalism was the conflict-laden project of a group of self-conscious, struggling individuals who shared a common social outlook—no less than the revolution in gender roles in the 1960s was the project of the women's movement. Corporate liberals fought their struggle on many fronts: in economic markets, law and jurisprudence, party politics, governmental policy and legislation, foreign policy making, highbrow economic theory, and popular culture.[58] Though they accommodated and made limited concessions to the older, proprietary forces and such new centers of power as organized labor, they succeeded in convincing a decisive portion of American society that the public interest lay in a system of administered markets and in governmental regulation that was fundamentally supportive of the new corporately organized order.[59]

IV. LEGAL HISTORY AND THE CONSTRUCTION OF THE PUBLIC INTEREST

The sweep and subtlety of Sklar's book deserve much more comment than this bald summation, but perhaps even this account suffices for my main point: the history of antitrust law has decisively broken with the pursuit of legislative intent which had so long characterized the field. Given that the new antitrust historians no longer premise their work on the immediate juridical significance of their findings, what alternate

56. M. SKLAR, *supra* note 34, at 3.

57. Mark Tushnet has also remarked on this aspect of recent structuralist legal history, which produces a "'comparative statics' of legal thought," but no "truly historical understanding of the dynamics of transformation." Tushnet, *Introduction*, 1990 DUKE L.J. 193, 196 (introduction to an issue of essays on the "Frontiers of Legal Thought"); *see also* Tushnet, *Critical Legal Studies: An Introduction to Its Origins and Underpinnings*, 36 J. LEGAL EDUC. 505, 512 (1986).

58. M. SKLAR, *supra* note 34, at 11-14.

59. *Id.* at 431-41.

understanding of historical utility do they endorse? And if the new antitrust historians do not claim to have produced "something a future court may need or use,"[60] why should lawyers and other policy makers bother with it?

As it happens, Oliver Wendell Holmes, Jr., provided one answer to these questions in *The Path of the Law*,[61] when he sketched out a critical, delegitimating place for history in legal education. Holmes saw history as a vehicle for recognizing contingency in the legal system. It fostered an "enlightened skepticism" toward law and the "deliberate reconsideration of the worth" of legal rules.[62] Legal history, Holmes wrote, was a way of luring "the dragon out of his cave" so that one could "count his teeth and claws, and see just what is his strength."[63] The fact that things were not always as they appear implies that things are not as fixed and determined as they seem. A timeless, rock-solid certainty can suddenly become a time-bound and artificial convention. Claims, explicit or otherwise, that a particular regime is simply a natural outgrowth of the past are revealed as problematic, and a defense of the continuing utility of the regime can be demanded.[64]

One aim of the new antitrust history, then, is negative and critical. It aims at debunking positivistic claims on behalf of present-day antitrust policy by revealing alternate understandings of the aims of antitrust, and then investigating why some understandings succeeded while others were marginalized or cast aside.[65] Valuable as this debunking function is, can some stronger claim be advanced on behalf of the new antitrust history? Is it simply a serviceable implement for clearing ground, but of no help in reconstructing the goals of antitrust law?

Holmes's answer in *The Path of the Law*[66] is not heartening for a legal historian who aspires to some more dignified function than dragon bait. For once the creature was out in the open, Holmes would leave it to

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60. The quoted language is from a classic statement of the professional paradigm, J. GOEBEL & T. NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK: A STUDY IN CRIMINAL PROCEDURE (1664-1776) at xxxiii-iv (1944).

61. O.W. HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167 (1920).

62. *Id.* at 186-87.

63. *Id.* at 187.

64. Robert Gordon and Morton Horwitz subtly explored what Horwitz termed "the essentially destabilizing and subversive" function of legal history in Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017, 1020-24 (1981), and Horwitz, *The Historical Contingency of the Role of History*, 90 YALE L.J. 1057, 1058 (1981).

65. As Peritz writes, the new work "historicizes the prevailing view and then reaches back in time to recover arguments, policies, and visions eclipsed by the ascendancy of new views and by the passage of time." Peritz, *supra* note 23, at 314.

66. O.W. HOLMES, *supra* note 61.

that "man of the future . . . the master of economics, [to] kill him, or to tame him and make him a useful animal."[67] Richard Posner, for one, was quick to accept Holmes's offer of the role of St. George. As Posner has recently written, today the Sherman Act "means, not what its framers may have thought, but what economists and economics-minded lawyers and judges think."[68] Can legal historians concede that the Sherman Act means other than what its framers thought it meant and still assert some role for themselves in the formulation of antitrust law and policy?

They can, though their contribution is one that lawyers have not always prized since Holmes defined their task as the prediction of judicial behavior.[69] The professional paradigm reigned so long because it professed to help lawyers with that job, premised as it was on the assumption that the authority of the drafters, framers, or precedents should control the decisions of today's lawmakers. Economics and the other social sciences also claim predictive power, so their assimilation into legal academia was quite rapid. To my mind, what makes the new antitrust history new is its embrace of what I consider the basic premise of the humanities—that expanding our understanding of the way life can go can provide us with insight which, while lacking direct predictive power, is nonetheless invaluably suggestive.[70] To paraphrase Clifford Geertz, the basic aim of the new antitrust history is not to answer once and for all the fundamental questions of antitrust policy, but to discover how others have answered those questions and why they chose to answer as they did.[71]

Almost a decade ago, Robert Gordon suggested that the new approach to legal history, which has been so long in coming to the history of antitrust, accepted what he called "a kind of reverse Faustian bargain": the "sacrifice of immediate influence in the councils of the great for a potentially enormous increase in understanding of our condition."[72] The new antitrust historians have made a similar pact. By giving up the professional paradigm, they have eschewed legal history's traditional role

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67. *Id.* at 187.

68. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 209 (1986).

69. *See* O.W. HOLMES, *supra* note 61, at 167; *see also* Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787 (1989) (noting Holmes's specific account of legal rules as predictors of judicial decisions).

70. In this it is similar to the so-called new labor history, which also jettisoned a professional paradigm (that of industrial relations experts) for a more humanistic approach to the past. *See* Brody, *The Old Labor History and the New: In Search of an American Working Class*, 20 LAB. HIST. 111 (1979); Ernst, *Working-Class Heroes and Others*, 17 REV. AM. HIST. 586 (1989).

71. *See* C. GEERTZ, THE INTERPRETATION OF CULTURES 30 (1973).

72. Gordon, *supra* note 64, at 1056.

as fodder for footnotes and a makeweight for arguments fashioned out of present-day concerns. By showing that antitrust must be thought of as part of a larger and historically contingent culture, and by reminding us that antitrust has been, is now, and will remain the project of social movements seeking to define the boundary between state and society, they make a persuasive claim for the attention of those who would formulate a public interest in antitrust law.