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Then and Now: Teaching Antitrust for a New Generation of Law and Lawyers

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I. TEACHING ANTITRUST LAW: THEN

The antitrust professor of the mid-1970s worked with a palette of rules and decisions now barely recognizable. The principal cases of the day relied largely on *per se* rules and relatively undemanding burdens of proof that were applied through categorical sorting. A generation of lawyers was taught to begin the assessment of conduct by asking: Was it horizontal or vertical? If vertical, was it an intrabrand or interbrand restriction? Was it a "boycott," "price-fixing," or "division of markets"? Did it involve exclusive territories, resale price maintenance, or an exclusive distributorship, tying or exclusive dealing?

Like sorting mail, the initial task was to categorize the conduct, deposit it in the right slot, then apply the appropriate analysis from the most analogous cases. Casebooks were organized to present the cases in this fashion, further encouraging and entrenching the approach for students new to the field.

Not surprisingly, the practice of antitrust law reflected the state of the law. The breadth of antitrust rules commanded the attention of business firms, who regularly sought the advice of antitrust counsel on a wide range of conduct. Distribution-related practices, in particular, were a frequent source of concern and many antitrust lawyers learned their trade through a steady flow of counseling and litigation matters focused on dealer relations, dealer termination, price discrimination, or other kinds of supplier-dealer disputes. Antitrust lawyers also grappled with price-fixing, joint ventures, and the standards for proving concerted conduct, as well as the emergence of more robust concerns about criminal antitrust violations.

Other developments also influenced the making of the antitrust lawyer of the period. The Electrical Equipment antitrust cases of the 1960s, which led Congress to create the multi-district litigation system, and revisions to federal discovery and class action civil rules combined to locate antitrust lawyers on the cutting edge of the developing practice of complex litigation. Law firms of varied size could be players in this setting, advising clients that were themselves of varied size. Economists were engaged on occasion; very few antitrust lawyers or professors ventured outside U.S. law and U.S. borders.

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II. TEACHING ANTITRUST LAW: NOW

Today's antitrust world has been transformed in every dimension. Over the course of the last 40 years the rules of antitrust have been largely re-written by the Supreme Court to draw far more explicitly on economics and economic analysis. Throughout this period of doctrinal reassessment, professors have been challenged to teach against the older cases, a long-standing tradition in the academy that now seems well-suited to antitrust. A generation of lawyers have been trained based on the "new economic learning" and the "wrongly decided" case.

Reflecting these changes, today's casebooks retain few of the cases that would have been taught as "principal" cases a generation ago. As has been true in other fields, with the passage of time and the arrival of new cases, older cases have been crowded out of the casebooks, making it more and more difficult over time to teach the historical evolution of doctrine in a basic antitrust course. There is barely time enough to cover the current state of the law. But the challenge for teaching antitrust is not just the volume of newer cases, but also their analytical content and the evolving role of the antitrust lawyer.

The practice of antitrust law, too, has been transformed. Although like her counterpart a generation ago today's antitrust lawyer must still serve as both litigator and counselor, she is likely to interact and negotiate with the antitrust enforcement agencies on a regular basis, pursue competition advocacy before legislators and regulatory bodies, and be called upon to initiate or defend multi-district, and even multi-jurisdictional, antitrust litigation.

The distribution counselling and dealer-focused litigation that was once prevalent has dwindled, is more narrowly focused on the strategies of very large firms, and is more likely to be analyzed as unilateral conduct under prohibitions of monopolization or abuse of dominance. These stand-alone unilateral conduct cases, though relatively less frequent, can be substantial and vigorously contested, commanding significant resources, and presenting frequently challenging issues. Few matters proceed without the early and substantial engagement of economists.

Merger practice has been especially reconstituted—not by Supreme Court decisions, but by the combined impact of the Hart-Scott-Rodino ("HSR") pre-merger notification process and the Horizontal Merger Guidelines ("HMGs"). Before the HSR system was created in 1976, merger practice largely consisted of a relatively modest number of government-litigated challenges that were almost always won by the government. Today, the volume of transactions presented to the agencies for review has grown substantially, and proposed deals can be extremely large and frequently complicated. Most of these, however, are cleared.

Those few deals that present serious competition concerns are typically resolved through negotiation between the merging parties and the agencies, or the government challenges them seeking a preliminary injunction to block the deal from going forward. Only a handful of matters proceed beyond the district court and none has reached the Supreme Court since the 1970s.Whereas antitrust casebooks once focused on Supreme Court decisions from the 1960s that left little room for in-depth analysis of the probable harms and benefits of mergers, today's casebook treatment of mergers consists largely of narrative and statistical information about the HSR process, a detailed explication of the economic theory of merger enforcement focusing on the HMGs, and careful consideration of more recent cases decided by lower courts.

Antitrust litigation, too, has changed. It can often be uniquely demanding for clients, lawyers, economists, and courts, alike, and sweeping in scope. Typically, cases systematically proceed through a series of well-orchestrated phases: motions to dismiss, expert preparation and efforts to exclude experts, discovery, class certification, summary judgment, and—if they get that far—to settlement. Few will make it to trial; all are likely to involve copious amounts of electronically stored information and experts acting as both consultants and witnesses.

Finally, with over 100 competition enforcement agencies now operating around the world, American antitrust lawyers are far more likely to work on matters that cross borders and involve coordination with lawyers and economists in other jurisdictions, as well as interaction with multiple enforcement authorities, especially the European Union. The substantive prohibitions of various competition laws can vary, as can the procedures and institutions of enforcement. Antitrust diplomacy is no longer the sole responsibility of government officials.

Teaching competition policy in this new and still evolving setting is, to say the least, a challenge. Although discussions of teaching and teaching materials once focused on the ideology wars of the early 1980s,[2] denying the importance and role of economics in antitrust today would be simply irresponsible.

III. ASPIRATIONAL GOALS

Antitrust teaching materials will all struggle to face the challenge of the more nuanced, sophisticated, global, and economically informed antitrust law that is practiced by antitrust lawyers. They must continue to adapt to and keep pace with these changes, but will be forced of necessity to make difficult choices about coverage, especially in the basic course. Here are a few suggested aspirational goals.

A. Basic Coverage

It has become exceedingly difficult in a foundation three- or four-credit course to cover even the basics of U.S. antitrust law, especially all of the leading cases and all aspects of private litigation, such as standing and remedies. Different professors will choose to emphasize different topics and approaches, and will make varied decisions about how best to trade-off depth and coverage.

It is essential, however, to move beyond "categories" to focus on "concepts." To the extent categorization takes place today in antitrust practice, it begins by differentiating collusive from exclusionary theories of harm, with an eye to understanding how each might involve the creation, protection, or expansion of market power. This will include not merely harm to competition, but harm to the competitive process, taking into account cognizable efficiencies. Students also must take away an understanding of the sometimes conflicting views and definitions of consumer welfare and how they might affect the outcome of the analysis of effects.

Understanding the concepts, of course, is not a substitute for obtaining a working knowledge of the doctrine, but it informs it, and the cases can be presented as a vehicle for

[2] Andrew I. Gavil, *Teaching Antitrust Law in its Second Century: In Search of the Ultimate Antitrust Casebook*, 66 N.Y.U. L. REV. 189 (1991).

continually underscoring their importance. Students must, as they did in the past, confront the challenges of differentiating concerted from independent action, but with greater attention paid to the economic reasoning that today influences agencies and courts. They also should recognize the conceptual connections across the traditional categories; for example, between collusion and coordinated effects in merger analysis, and between vertical mergers and exclusionary distribution strategies. Although the courts have not entirely embraced the conceptual approach, they are moving in that direction, and today's teaching has to prepare antitrust lawyers for tomorrow's likely state of the art. Like harms and like efficiencies will be analyzed alike.

B. Critical Analysis

As is true for so many law school courses today, what will matter most for developing professionals is the honing of analytical skills. In antitrust, this does not mean that law students must be trained to be economists, but it does mean they must become comfortable with and adept at economic thinking and economic analysis.

There are two dimensions to the operation of economic analysis in antitrust, however. Although it directly informs our understanding of competitive harms and efficiencies, it also informs the process we use to evaluate alternative rules. Just as when agencies and courts ask how specific practices might be anti- or pro-competitive, so too they are invoking economic thinking when they express concern for the incidence and consequences of error and the costs of administering various rules—a decision-theoretic approach. But error cost analysis can be easily misapplied.[3] Concern for false positives considered in isolation and taken to its extreme could be invoked to justify repeal of all antitrust laws.

Students must appreciate that error cost analysis is a two way street, and that striking the right balance between over- and under-deterrence deserves thoughtful consideration. An appreciation for the efficacy of antitrust law and enforcement can temper abuse of decision theory to exaggerate false positives without due consideration for false negatives.

A related observation is that students also must be prepared to differentiate ideology from sound economic analysis. A pre-disposition for or against intervention—dressed up as error-cost analysis or catchphrases—is not a worthy substitute for genuine analysis.

One example of the catchphrase problem is the over-used "antitrust protects competition, not competitors." Although useful as a reminder that the principal concern of antitrust laws is impact on competition and consumers, not merely the fate of a single rival, the phrase is often presented as an unqualified principle of antitrust law—as an article of faith. Almost always urged on courts by defendants in monopolization cases to justify non-intervention, it embodies an implicit narrative that presumptively denigrates the importance of single competitors and portrays them as somehow unworthy. In monopolization cases, however, by definition the dominant firm faces few competitors. Obviously, there can be no "competition" without competitors. Uncritical reliance on the slogan without reference to the specific context of the case can obfuscate, not illuminate, the likely competitive consequences of conduct by dominant firms.

[3] *See, e.g.*, Jonathan B. Baker, *Taking the Error Out of "Error Cost" Analysis: What's Wrong with Antitrust's Right*, 80 ANTITRUST L.J. 1 (forthcoming 2015).

C. Institutional, Regulatory, and Procedural Awareness

Casebooks not surprisingly emphasize cases. So much of modern antitrust practice focuses on government policies and practices, however, that students also need to be attuned to the role and importance of institutions. To accomplish that, it is necessary to go "off book." Students need at least some working familiarity with agency websites, the most relevant agency guidelines, speeches, policy statements, and press releases—the full range of sources used by today's antitrust lawyers to ply their trade.

Another way to introduce students to both the varied dimensions of competition policy and the role of institutions is through examples of competition advocacy work—agency policy papers, workshops, advocacy comments, or speeches. Greater familiarity with at least some of these materials can expose students to additional non-litigation aspects of competition policy practice. Workshops are often streamed live over the internet and can be assigned in whole or part.

Students also ought to appreciate the importance of procedural conventions in antitrust. Undeniably, the Supreme Court has been influenced in its antitrust decision-making by its perceptions of the antitrust private right of action and the characteristics of the U.S. civil litigation system. Moreover, antitrust cases have been integral to the development of burdens of pleading, production, and proof, as well as class certification and the admissibility of expert witnesses. And the outcome of cases often turns on the treatment of circumstantial evidence, inference, and presumption, as well as standards for appellate review. Such procedural conventions can be outcome determinative in antitrust litigation and examples of their importance abound in the cases.

D. Global Perspective

It is likely unreasonable to expect a foundation course to provide a comprehensive comparative understanding of the laws and policies of multiple jurisdictions. But a modern antitrust course that fails to include some comparative dimension will likely be deficient. In lieu of attempting to teach comparative cases and doctrine for all areas of the course, specific examples can be highlighted. Again, internet-based resources can help to familiarize students with the global dimension of today's practice, and at least one in-depth examination of a case—perhaps one that reflects use of another jurisdiction's guidelines or block exemptions—should be a standardized component of a good introductory course.

Students can also be exposed to the work of international competition policy organizations, such as the International Competition Network and the Organization for Economic Cooperation and Development. U.S. antitrust lawyers no longer practice in isolation and U.S. antitrust law ought not to be taught in isolation either.

E. Broader Skill Set

Teaching lawyering skills has long been an interest of law schools and many techniques have been used to offer students something beyond the doctrinal casebook. Beyond the obvious clinical education options, more and more casebooks include problems, skills exercises, and other kinds of opportunities for students to gain insight into the practice of law in each field.

Antitrust teachers, even in foundation courses, should actively and creatively identify opportunities to expose students to the varied and challenging elements of antitrust practice. Drafting exercises, chapter-concluding problems that vary the student's role as adviser, advocate, and litigator, and mock issue arguments between students can all introduce aspects of antitrust practice that will supplement the typical casework. Students might also be exposed to the notion of "risk assessment" and antitrust compliance, both essential services provided by antitrust counselors.

Students might also be asked to track specific antitrust developments, such as cases undergoing briefing and new competition advocacy comments, and present them to the class. And when we professors are asked to sign-on to *amicus* briefs, as we are increasingly asked to do, we might consider seeking the input of our students, if only to share with them the existence, role, and content of such briefs.

IV. CONCLUSION

There is, of course, no single way to teach any subject, and that is equally true of antitrust law. One absolute requirement ought to be sharing with our students the enthusiasm for the subject matter that so often characterizes antitrust lawyers and professors. We will bring different strengths, preferences, and judgments about coverage and style, but we can also plan our courses with the full understanding that the antitrust practice has changed and we will need to keep up.