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Review of *Antitrust Stories* (E. Fox & D. Crane eds., Foundation Press 2007)

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In the eye of the historian, published judicial decisions are badly incomplete

ceived volume with renewed intellectual curiosity and excitement about U.S. cases they have heard about, debated, or even read dozens of times.[2]

A second major contribution of *An r ˋ or e* is to inspire broader reflections about how an economic system evolves. Antitrust is a natural home for the social scientist. Extensive discussion about the influence of economics on antitrust has overshadowed the power of other social science disciplines to explain the development of law and policy. *An r ˋ or e* shows why literacy in history should be standard equipment for competition economists and lawyers.

This review assesses *An r ˋ or e* from two perspectives. It first considers how well the contributors met the editors' challenge "to scratch the legalistic surface and unveil the human dimension" of the cases.[3] This discussion considers the techniques the contributors have used to tell their "stories" and, more generally, discusses how one might best prepare histories of antitrust cases.

The second focus of this review is the interpretations that the authors give to their case histories. The main weakness of *An r ˋ or e* is the lack of a standalone, critical essay that identifies important themes that link individual chapters, assesses the soundness of the narrators' stories, and alerts the audience to important alternative interpretations. This omission matters most for the volume's three first-person accounts, where the narrators were contestan

and policy themes change over time or review them in topical categories along lines that the editors suggest in their Introduction.[17]

The cases examined in *An r ˋ or e*

versities or to individual readers. The editors of *Antitrust Stories* confronted the challenge of defining how the contributors should examine familiar cases, most of which have been extensively talked out. There is no shortage of readily accessible commentary—much of it with a historical bent—on the cases treated in *Antitrust Stories*. It is easier to name the North American antitrust academics who have not written about *Alcoa* or *Grinnell* than it is to list those who have. The older the case, the more likely it is that everyone has taken a shot at it, although many treatments that purport to offer history are written by economists or lawyers whose research techniques and interpretative methods make genuine historians weep.

Much of the existing commentary also appears in a form that is cost-free and easily available to the reader, be it free access to legal literature data bases that law students enjoy through their universities or free-of-charge postings available to the world on the web. An anthology of essays provides convenience and thematic treatment, but those traits might not induce adoption by instructors who are familiar with the existing literature, are energetic enough to rouse themselves to identify and organize the secondary literature to complement the themes of the course, and can add articles to the syllabus with links to databases that students can use at no cost.

To be compelling, *Antitrust Stories* had to offer something new, and the editors set out to do that. Professors Fox and Crane asked their contributors to provide fresh, engaging interpretations of familiar events with an emphasis on the human touch:

> "The cases on which [the contributors] write are casebook opinions—some interesting; many dense (as in *Standard Oil*) and give little hint of the humanity that lies behind them. We have encouraged our authors to scratch the legalistic surface and unveil the human dimension."[20]

The editors seem to have left decisions about how to "unveil the human dimension" to their authors. The desired "human dimension" seems to encompass elements such as the business context of the case, the spark that set off the dispute, the behind-the-scenes debates about the decision to prosecute, the personal traits of the advocates, the presentation of evidence in the courtroom, the public's awareness of the case, the deliberations of the judges, and the actual effect of the court's decision.

One way to evaluate the essays in *An Antitrust Primer* is to assess the breadth and intensity of the authors' efforts to illuminate these features in their narratives. A

Professors Carstensen and First believe commentators have unfairly damned *opco* as a wrongheaded application of per se rules to condemn. They sympathetically portray the DOJ's decision to prosecute and the Supreme Court ruling that found liability, but they do not get there by cheating the arguments of the defendant's advocates or by suppressing infirmities in the government's preparation and presentation of the case. Even those who scorn *opco* will find a lot to learn and admire in this essay. Any number of passages—such as the discussion of Donald Turner's crucial role as Assistant Attorney General in forming the theo-

Lewinsohn essay without marveling at how the authors used interviews to recreate the business ventures and personalities that transformed Aspen into a world-renowned ski resort and the subject of a formative Supreme Court antitrust decision. Particularly masterful is the painstaking reconstruction of the development of the skiing operations of the two litigants and relations between the antagonists. The account is so complete in many respects that one wishes the authors might have discovered why the defendant's trial counsel failed to lodge proper objections to jury instructions on market definition and left the defendant trapped on appeal with monopoly power in a relevant market confined to Aspen, Colorado. Further interviews also might have explored the dimensions of an earlier State of Colorado lawsuit, cited in the Supreme Court's *Aspen* decision and which had challenged the combined, all-Aspen area ticket as improper horizontal collaboration.

To read these essays is to wonder how excellent individual chapters might have become still better if the authors collectively had discussed possible methodological approaches and had read each other's drafts as the project unfolded. A regular and more extensive sharing of research methods might have induced each author to use techniques that yielded excellent results in one or more of the other essays. Here are a few examples of how common discussion about methods and research conventions might have strengthened the final product.

- Adopting the technique that Spencer Waller used to revisit *Aco* ,

and during World War II became the head the Office of Special Services, a forerunner of the U.S. Central Intelligence Agency.[23] As Professor Crane indicates, *App c.h n Co* played an important part in *ocony*. Partly owing to Donovan's advocacy earlier in the decade, the Supreme Court in *App c.h n Co* accepted the idea that the exigencies of the Depression in the early 1930s could shield an agreement of rival coal producers to set prices and otherwise cope with "overproduction". In approaching the Court in *ocony*, Donovan hoped the argument that had succeeded only a few years before in *App c.h n Co* would work again in *ocony*, at least to shield the firm from criminal liability. Professor Crane brilliantly dissects the *ocony* majority's contorted efforts to explain away its earlier decision in *App c.h n Co* and skillfully juxtaposes teaif;4)"0MRk(kTM)DexplaC(RR0 aari

their presentation of the defense.[25] Baker's revealing treatment of these tensions suggests a warranty that all first-person narrators ought to give their readers: a commitment to tell what the insider knows of the good and the bad, alike.

In practice, first-person narrators may not be entirely reliable scribes. The sirens of personal reputation constantly beckon first-person storytellers to exaggerate their accomplishments, diminish the contributions of others (especially perceived rivals against whom readers might measure the narrator), and omit information that would cloud a preferred memory of events. Only the fairest-minded and ruthlessly disciplined first-person narrators can resist the temptation completely. To account for distortions that can arise from conscious and unconscious filtering, conference organizers and book editors often pair first-person narrators with discussants who either are neutral observers or advocates for the narrators' adversaries.

The Melamed & Rubinfeld essay on the DOJ's monopolization lawsuit against Microsoft is an illustration of a first-person narration that foregoes opportunities to discuss issues that would reveal important human dimensions of the case but might be awkward to address. The two former DOJ officials played major roles in the *Microsoft* case, and the plaintiffs' success in attaining a substantial degree of success in this difficult and path-breaking endeavor owes much to their contributions. Their analysis of the doctrinal features and policy implications of the litigation is informative and thoughtful, especially in their well-considered efforts to recall the commercial and policy setting in which the government plaintiffs

trial, Judge Jackson gave private interviews to journalists on the condition that the writers could report the conversations only after the judge issued his decision on remedies. The first story based on the interviews appeared in the *New York Times* the day after Jackson released his remedy decision. The *Times*'s story recited, as many subsequent reports would do, the judge's memorably unfavorable views of the defendant and its top officials.[27] One writer later quoted Jackson as likening Microsoft to a gang of murderous drug dealers whose trial Jackson had overseen.[28] The U.S. Court of Appeals for the DC Circuit concluded that the animus in Jackson's remarks required his removal from the case. To the relief of the government plaintiffs, the court did not require a re-trial.[29]

Nothing about Judge Jackson's indiscretion, and the grave hazard his behavior posed for the case, appears in the Melamed & Rubinfeld essay. One can imagine the dismay and swings of emotion within the government's case team on the morning they learned of Jackson's reckless behavior. Only one day before, the plaintiffs had won exactly the relief they wanted: a breakup of Microsoft into two companies. The authors declined to recreate the sensation of seeing an astonishing victory tarnished—perhaps, endangered—by an unimaginable lapse by the trial judge.

There are other noteworthy, but less dramatic, instances in which the

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II. The Quality of Interpretation

A second way to assess *An r ⟩ or e*, beyond asking how the authors prepared their case studies, is to examine the quality of their interpretation of events. Two

power on the side of the FTC Goliath attacking the legal service Davids who are trying to help the poor.

This volume attempts to bring a baker's dozen of great antitrust cases to life in the story-telling tradition. At least sometimes, the story is in the eyes and mind of the teller; for story-telling depends on perspective and in nearly all of the great cases there are the proverbial two sides to the story. We have assembled an exciting group of authors—historians, legal scholars, economists, scholarly l

The serious blind spot in Baker's essay can be summed up in two words that do not appear in his

countless other service providers which have been the target of hundreds of DOJ

briefs, was *n ed* \ *e* *A er c n A r ne nc*,[46] a Section 2 attempted monopolization case filed by the Reagan Administration's DOJ well within the 20-year period mentioned in the Melamed & Rubinfeld paper. Take away *A er c n A r ne*, and the government's narrative on facts and liability in *M cro of* changes materially.

Another first-person narrative in *An r* \ *or e* that relies on a similar technique to magnify the authors' work is the Jonathan Baker & Robert Pitofsky essay on \ *p e*

Commission clearly won the round. Judge Hogan's opinion blocking the merger took pains to praise Painter and rely on his testimony.[50] The botched cross-examination of Painter underscores a human dimension theme that Professors Baker and Pitofsky might have developed more fully. The visible contempt that defense counsel sometimes showed toward the FTC helped galvanize the agency's litiga-

"was that the Staples/Office Depot challenge would be David versus Goliath."[56] David slays the giant, sets the FTC and its merger program on a path to future success, and helps redeem the agency from a past in which "[f]or most of its history, a succession of independent scholars and other analysts have consistently found the FTC wanting in the performance of its duties."[57]

B. AN INTERPRETATIVE ESSAY: SYNTHESIZING THE ESSAYS

An r \ ore would be a still more impressive volume with the addition of a critical essay that surveyed the thirteen case studies. Such an essay could have improved the book in at least two ways. The first is to exert valuable discipline on the contributors in their treatment of specific topics and to press individual contributors to address difficult issues that they either sidestepped entirely or treated superficially. The second is to identify common themes that connect the essays.

To some degree, the Fox & Crane Introduction serves this purpose by drawing some connections between the individual essays. For the most part, the Introduction is descriptive. It is difficult for the editors to serve as critics. One cannot easily expect editors to recruit contributors—especially contributors of the stature of the An r \ ore essayists—and then write an essay that criticizes their work.

The Fox & Crane Introduction does not raise questions about the contributions to the volume. In some places the Introduction is inexplicably careless, as when it amplifies, without qualification, the most debatable interpretations of the contributors to An r \ ore. To the editors, Donald Baker's essay on \ per or Co r r L yer "shows that the FTC's action against a small, competitively insignificant group of criminal defense lawyers grew out of a conservative agency's desire to turn antitrust enforcement away from business interests and toward a traditionally left-leaning constituency."[59] The defendants are said to have "reason to understand the antitrust enterprise as a nakedly ideological assertion of political power."[60] Like Baker, the authors do not mention the public procurement implications of the case.

To preview the Jonathan Baker and Robert Pitofsky paper on \ pe, the editors repeat and accentuate the state of enforcement malaise that Professors Baker and Pitofsky say they inherited on arriving at the FTC in 1995. Professors Fox and Crane write:

> **"Beginning in the 1980s, we entered a period of calm on the merger front. This was particularly true at the Federal Trade Commission, which was seen as a sleepy agency. Then along came the appointment of Bob Pitofsky as Chair of the FTC, the appointment of Jon Baker as Director of the FTC's Bureau of Economics, and the announcement that Office Depot and Staples, [. . .], planned to merge."[61]**

59 Fox & Crane, **Introduction**, **supra** note 3, at 4.

60 **Id.**

61 **Id.**

If there was any sleepiness among the FTC's merger units in the 1980s, it was probably because the agency's attorneys and economists were fatigued from spending so much time litigating merger cases, often at concentration thresholds that were more ambitious than the perimeter that the Pitofsky Commission chose to police.[62] In the Fox & Crane summary of the Baker & Pitofsky narrative, one casualty is the Chairmanship of Janet Steiger. In the Introduction, the story of FTC merger policy jumps from the 1980s directly to the Baker & Pitofsky era. Janet Steiger's chairmanship, a period in which the FTC achieved several noteworthy litigation victories in merger cases,[63] vanishes.

A standalone critical essay would do more than challenge specific propositions in the essays. It could derive overarching themes from the individual essays. Consider the application of antitrust policy to the petroleum industry. As Professor May's essay points out, the Standard Oil case led to one of the most important divestitures in the history of U.S. monopolization litigation. Professor Crane discusses how the DOJ in Socony punished some of the prominent successor companies to Standard Oil for combining with each other and with other firms to stabilize gasoline prices. Professor Crane concludes that "Socony's conviction did not bring long-term harm to the company"[64] and notes that in 1999 Exxon merged with Mobil to create Exxon Mobil Corporation. "In January of 2007," he writes, "Exxon Mobil announced a record profit for any U.S. company—$39.5 billion on revenue of $377.6 billion in 2006, or more than $75,000 for every minute in the year. Harold Ickes and Thurman Arnold both rolled over in their graves."[65]

Under whose chairmanship did the FTC permit Exxon to merge with Mobil, albeit with significant divestitures, and create the firm whose earnings Professor Crane suspects seiaraw

industry mergers of the 1990s (transactions that combined a number of the successors of the original Standard Oil trust, including defendants in *Exxon/Mobil*) and could have discussed why deals that were thought to be impossible on any terms in the 1980s made their way through the Commission with modifications in the 1990s.