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# **PANEL I: PROFESSOR BRODLEY'S GENERAL CONTRIBUTIONS TO ANTITRUST SCHOLARSHIP**

## **INTRODUCTION**

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When I began teaching Antitrust, I was the junior colleague of a more senior antitrust scholar, teaching the course on opposite semesters to the relatively few students who were forced by scheduling conflicts to take the course with me as their teacher. After my senior colleague departed for another school – and after the departure of some other senior Law and Economics colleagues – I was for a brief period the senior antitrust scholar at the institution, and this was in only my fifth year of teaching law. Boston University soon approached me and my wife with the offer of appointments, and we decided to accept. I would again become the junior colleague of a more senior antitrust professor, this time Joe Brodley. Of course, I knew who Joe Brodley was, and the notion of quitting a post as the senior antitrust professor at a relatively highly ranked school to become the junior antitrust colleague to Joe Brodley struck me as uncontroversial. In today's status-obsessed market, such a move would strike junior professors as indefensible. But in those days, most scholars seemed focused less on rankings and more on the quality of work done by individuals – at least that was my perception then, however wrong it may have been. Joe had been a famous antitrust scholar for some time when I moved to Boston University, and I viewed the combination of myself as the junior scholar and Joe as the senior one as a potentially good antitrust faculty – if I could live up to my end of the bargain.

Joe and I have different preferences on antitrust issues. He prefers vigorous antitrust enforcement. Not long after I arrived here, I joked with a colleague that there appear to be few if any antitrust prosecutions that Joe would find ill-advised – obviously an unfair comment, but a quick way of getting across my sense of his policy reflexes. I have always been more cautious, to the point of

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being listed by one website as an “antitrust skeptic.”<sup>1</sup> The differences have less to do, I think, with our views on the competence of enforcers than with our assessment of the market itself. Joe is deeply skeptical of the market’s power to correct inefficiencies due to anticompetitive conduct. My prior beliefs have been more favorable toward unregulated markets.

Though it was not a reason for my move to Boston University, I thought this difference in views would be good for my own development as a scholar and good for the students at Boston University. I joked with colleagues that the students could take the anti-trust version of antitrust from Joe or the pro-trust version of antitrust from me. The large class sizes at Boston University at the time meant that the course could be offered both semesters with sizeable enrollments.

My thoughts about moving to Boston University to become the junior antitrust colleague to Joe Brodley reflected several aspects of antitrust scholarship and teaching that were relatively unusual in the legal academy, and are perhaps becoming more so. In antitrust, unlike many other areas of legal scholarship today, ideological differences do not tend to cause unbridgeable barriers between scholars. This is due in part to the contributions of scholars such as Joe Brodley.

Antitrust scholarship today reflects the full range of approaches seen in the Law and Economics literature: doctrinal, theoretical, and empirical. The doctrinal work consists of the most traditional type of legal scholarship: examining important court opinions, trying to understand what they mean, and seeking to reconcile them with earlier opinions. The doctrinal work is still the main type of scholarship produced in law schools. The theoretical work in antitrust consists largely of economic modeling of the effects of anticompetitive strategies or of antitrust law itself. The empirical work in antitrust consists of traditional empirical studies in industrial organization and more recent projects that attempt to measure the restrictiveness of antitrust laws and estimate their impact.

For a scholar outside of law, doctrinal scholarship is easy to recognize, and easily recognized as differing from most other types of research. The papers tend to be long and full of footnotes, and consist of case discussions tied together with an extremely general or vague thesis. The argument is more concerned with the consistency of the case law rules than with any sense of an external standard of evaluation.

In its early days, antitrust was no different from general legal scholarship. Although economists have written about antitrust issues for a long time, legal scholars have not always felt a need to pay close attention to what the economists said. Legal scholars remained safely within their own academies to focus on doctrinal consistency or the consistency of the doctrine with some

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<sup>1</sup> Clyde Wayne Crews, *Antitrust Skeptic’s Bibliography*, COMPETITIVE ENTER. INST. (Apr. 13, 2006), <http://cei.org/gencon/030,05269.cfm> (providing a reading list of articles that offer a skeptical view of the desirability of expansive antitrust enforcement).

factional interest – such as protection of consumer interests or protection of business incentives.

The useful external standards in antitrust have been introduced into the literature by economists. Indeed, one interesting feature of antitrust scholarship is that there are a large number of law review and economics journal articles on antitrust written by academic economists in the 1950s and 1960s. These articles were written back in the days when economics departments had many professors who did not use mathematical models. Their articles looked like those of law professors, though without as many footnotes and with a reliance on an external standard by which to judge the antitrust cases. Very few economics professors of this sort are in existence today. The mathematical modeling requirements of their discipline have led economics professors to invest their intellectual capital in the activity of modeling, which has left little time for them to study the law, as many economists of a previous generation did.

The external standards that economists have introduced to antitrust are total welfare, efficiency, and consumer welfare in the long run. I refer to long-run consumer welfare because that standard allows an analyst to consider at least some of the efficiency effects of any legal standard. Short-run consumer welfare, on the other hand, is indistinguishable from a factional interest standard of the sort that law professors have typically used. I think most economists, when pressed on the issue, would reject an exclusive focus on short-run consumer welfare. An economist who believes in an exclusive focus on the welfare of the consumer would have to favor an antitrust enforcement rule that forgoes one thousand dollars in efficiency gains to squeeze out one penny more in consumer surplus. I think there are few economists who would favor such a tradeoff.

At some point between 1960 and 1970, antitrust scholarship from the law side changed, as did antitrust scholarship from the economics side, though the changes occurred for different reasons. Law professors began to adopt the external standards introduced by economists. Richard Posner is the most famous example of a law professor who promoted the use of economic reasoning in law scholarship. However, other scholars also played a role in introducing economic reasoning in antitrust. One of them was Joe Brodley. His 1967 article on oligopoly power reflected one of the early efforts by legal scholars to integrate economic analysis with antitrust law scholarship.<sup>2</sup> Although it was not cited in the more famous Posner piece on the same subject,<sup>3</sup> it presumably had some influence.

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<sup>2</sup> Joseph F. Brodley, *Oligopoly Power Under the Sherman and Clayton Acts – From Economic Theory to Legal Policy*, 19 STAN. L. REV. 285 (1967).

<sup>3</sup> Richard A. Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 STAN. L. REV. 1562 (1969). Both the Brodley and Posner articles respond to arguments in Donald F. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and*

Joe Brodley was by no means the first law scholar to merge economics into the discussion of antitrust law. He was preceded by others including, for example, James Rahl at Northwestern University, Eugene Rostow at Yale University, and Aaron Director at the University of Chicago.<sup>4</sup> However, the earlier writing on economics and antitrust by law academics (although Director was an economist by training) is not representative of the wave of Law and Economics scholarship in antitrust that later appeared.

For example, one observes in Rahl's work an effort to explain to economists the limits the law puts on the usefulness of economic analysis in antitrust.<sup>5</sup> Law has its own cumbersome machinery, which serves important purposes. One of the key points of Rahl's article on conscious parallelism, which was the first to identify the controversial issues parallel conduct raises under the Sherman Act, was that courts cannot always adopt the recommendations of economists without risking erroneous results from clumsy application of economic concepts or doing damage to the law itself.<sup>6</sup>

Similarly, Rostow's work on *The New Sherman Act* was an effort to explain that courts were going in a direction that economists such as Edward Chamberlin would prefer.<sup>7</sup> It was, in contrast to Rahl, an effort to make the law shape itself around the normative implications of economics, rather than an effort to show economists how the law could not always bend toward their preferences.

Director and Levi's work represents the most effective and famous integration of economics and law, though much of it took place in the classroom. Their classic article, *Law and the Future: Trade Regulation*, sets out the Chicago School analysis of antitrust.<sup>8</sup> At the time, however, their article had a greater influence within the Chicago Law School than outside of it. As a result, the first generation of Law and Economics scholarship in antitrust would not appear until a decade after the Director and Levi article.

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*Refusals to Deal*, 75 HARV. L. REV. 655 (1962). See Brodley, *supra* note 2, at 295 n.7; Posner, *supra*, at 1562.

<sup>4</sup> Obviously, this list is not complete. Ward Bowman, of Yale University, preceded Brodley. Bowman was trained as an economist and focused on criticizing the leverage theory adopted by antitrust courts in the 1950s. For an example of Bowman's work, see Ward S. Bowman, Jr., *Tying Arrangements and the Leverage Problem*, 67 YALE L.J. 19 (1957). Robert Bork, also of Yale, preceded Brodley by just a few years, and should therefore be viewed as a contemporary of Brodley.

<sup>5</sup> See, e.g., James A. Rahl, *Conspiracy and the Anti-Trust Laws*, 44 ILL. L. REV. 743, 768 (1950).

<sup>6</sup> *Id.* at 762.

<sup>7</sup> Eugene V. Rostow, *The New Sherman Act: A Positive Instrument of Progress*, 14 U. CHI. L. REV. 567, 567 (1947); *id.* at 567 n.1 (citing Chamberlin, *Theory of Monopolistic Competition* (5th ed. 1946)).

<sup>8</sup> Aaron Director & Edward H. Levi, *Law and the Future: Trade Regulation*, 51 NW. U. L. REV. 281, 282 (1956).

Joe Brodley is one among the first generation of legal scholars, including Posner, to carry out a sustained public campaign (in contrast to the private tradition of Director) to integrate economic analysis with legal reasoning, and this effort has been central to his work throughout his career. Perhaps the best example is his last major antitrust article, on predation, coauthored with Patrick Bolton and Michael Riordan.<sup>9</sup> The article is widely and justly recognized as a classic on predatory pricing law.

As I mentioned, I do not agree with Joe on every issue in antitrust. The predation article, though I am the first to say it is a classic, is an example of one of our disagreements. Bolton, Brodley, and Riordan use the game-theoretic “Post-Chicago” literature on predation to generate practical legal tests for courts to apply in predation antitrust cases. This is an extremely valuable contribution to the literature, and is precisely the goal of interdisciplinary scholarship in law and economics. The article implies that the Supreme Court was wrong in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*<sup>10</sup> when it set up a legal standard that makes it almost impossible for a predation plaintiff to prevail.<sup>11</sup> Its practical and theoretically rigorous analysis is a powerful indictment of many of the arguments supporting the *Brooke Group* standard.

But I believe the approach reflected in Bolton, Brodley, and Riordan ultimately gives short shrift to the problem of error costs, which is the core rationale for the Court’s decision in *Brooke Group*. Given the risk of error, legal tests that make it easier for plaintiffs to prevail in predation lawsuits threaten to impose punishment on firms that have engaged in pro-competitive price cutting. I think there is at least one additional step that needs to take place in the Post-Chicago economic analysis of antitrust, and that is to incorporate the risk of judicial error and the costliness of litigation into models of anticompetitive conduct in the presence of antitrust litigation. A paper by Dag Morten Dalen and Theon van Dijk shows, within a game-theoretic model, the comedy of errors (or more appropriately, tragedy of errors) that results when courts apply the more aggressive predation enforcement approach that exists now in the European Union.<sup>12</sup> The Dalen-van Dijk paper examines the effects of a predation rule that finds the dominant firm liable for predation when price is below incremental cost. The paper shows that the predation law discourages competition if damages are sufficiently high and weakens competition in all cases. Moreover, their model delivers a counterintuitive “you bought the cow so you may as well get the milk” finding that the law,

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<sup>9</sup> See Patrick Bolton, Joseph F. Brodley & Michael H. Riordan, *Predatory Pricing: Strategic Theory and Legal Policy*, 88 GEO. L.J. 2239, 2241 (2000).

<sup>10</sup> 509 U.S. 209 (1993).

<sup>11</sup> *Id.* at 226.

<sup>12</sup> Dag Morten Dalen & Theon van Dijk, *Imperfect Enforcement of Predatory Pricing Law* (Mar. 24, 2009) (unpublished manuscript), available at [http://ssrn.com/sol3/papers.cfm?abstract\\_id=1341804](http://ssrn.com/sol3/papers.cfm?abstract_id=1341804).

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enforced with error, encourages predation in some cases because the pricing of all firms is distorted by the threat of litigation.

In any event, disagreement on specific policies, such as the law on predation, is a bit easier to deal with in antitrust than in many other areas of legal scholarship because there is broad methodological agreement. Antitrust scholars from the law side and from the economics side all adhere to the same framework, which adopts economic analysis in search of an objective external standard by which to judge antitrust cases and statutes. The search for, and use of, such a standard requires a great deal of study. The exercise of modeling in antitrust scholarship has had the same effect as in economics generally. It has forced scholars to be clear about their premises and the connection between those premises and their arguments. It has forced scholars to attempt to make rigorous arguments. The use of economic models has constrained argumentation and led both sides to recognize the elements of truth in the position taken by the other side.

This practice is one reason why I think there is a great deal of respect within antitrust among scholars who have opposing views on the law, certainly more than one could ever observe in areas such as constitutional law scholarship. Antitrust law has been made rigorous through the widespread acceptance of an objective framework based on economic analysis. Constitutional law, as a field of scholarship, has never achieved the same rigor by the general acceptance of an objective, in contrast to factional-interest centered, framework of analysis.

Antitrust scholars today are fortunate to work in a field in which there is a commonly accepted vision of normal science and progress in understanding. Joe Brodley, as one of a small number of scholars who played a pivotal role in integrating economics and antitrust scholarship, thereby determining the course of modern antitrust scholarship, deserves a share of the credit for this development.

The purpose of this conference is to thank Joe Brodley for his contributions to antitrust scholarship. The contributors to this conference are among the most accomplished antitrust scholars today, and this is, if anything, an understatement. The conference papers have been contributed to three panels, moving from backward-looking to forward-looking. The scholars on the first panel chose to write their reflections largely on Joe Brodley's scholarship and its influence on their own work. The second panel of papers examines topics that Joe Brodley wrote about: predatory pricing, joint ventures, mergers, oligopoly, and the goals of antitrust law. The final panel, looking to the future, examines the normative question of what antitrust policy should attempt to do in the new presidential administration, which has announced plans to reject the monopolization law enforcement policies announced in 2008 by the previous administration.<sup>13</sup>

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<sup>13</sup> Compare U.S. DEP'T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT (2008), *available at*

The topic of the final panel is one that Joe suggested as the sole topic for this conference, after I told him that a conference in his honor was in the works. It is characteristic of his humility and focus on current problems that he would be reluctant, even standing at the threshold of retirement, to consider a conference in his honor. Unsurprisingly, I had no trouble finding great antitrust scholars who did not share that reluctance.