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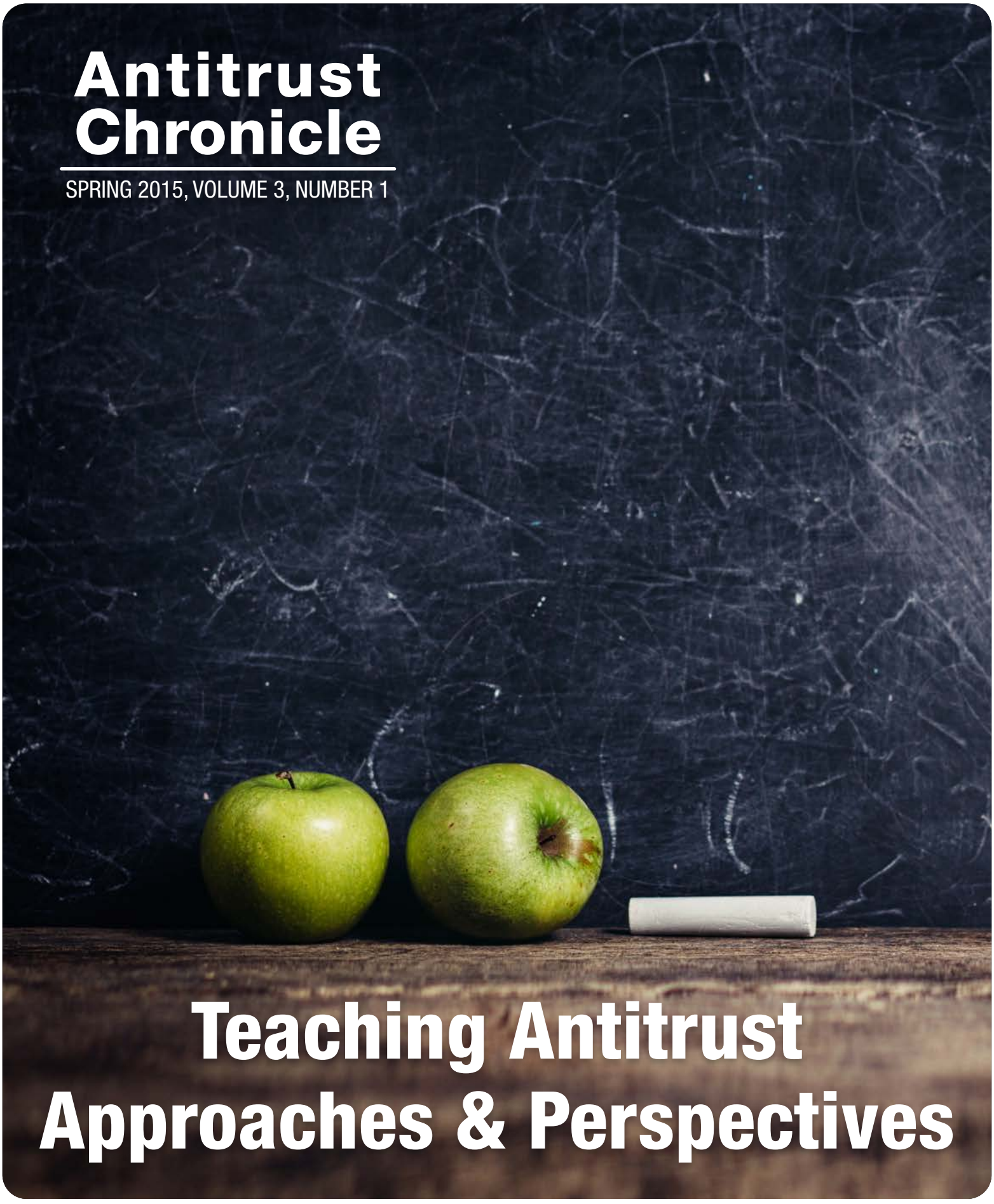

Teaching Antitrust Approaches & Perspectives

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Teaching Merger Law Through In-Class Simulations

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I. INTRODUCTION

This short article outlines how I have taught the mergers and acquisitions section of my basic antitrust law course for the past five years. Instead of relying on casebooks, the black letter law, and merger guidelines, I use an in-class simulation that moves the students from passive to active learning over a two- to three-week period. Having experimented with various formats for the simulation, I am convinced that adding such an exercise better conveys the content and process of modern merger practice and gives the students a taste of what the practice world holds in store for them.

In this article, I describe my general approach to teaching antitrust law and then discuss the process for the annual merger simulation. I follow with a description of the excellent argument students presented this year based on the now abandoned National Cine-Media ("NCM") acquisition of Screenvision. As fate would have it, our simulation concluded two days after the parties announced they had abandoned the transaction in the face of the complaint filed by the Justice Department's Antitrust Division ("DOJ"). This did not deter the students who pressed on with a spirited in-class hearing on a motion for a preliminary injunction. I conclude with brief thoughts about the value of such simulations in a rapidly changing environment for legal education.

II. TEACHING ANTITRUST LAW

I have taught the basic antitrust course at two different U.S. law schools for nearly 25 years. Depending on the year, I have had as many as 75 students and as few as 14. The students are almost all second- or third-year JD students with the occasional LLM or MBA student in the mix.

Most students in my course (and Loyola) come to law school with one to four years of work experience, although nearly 30 percent enter straight from college. Relatively few have any significant economic training or antitrust related work experience and many glaze over, or begin to twitch, when simple math is involved. I tell them on the first day that antitrust law inherently involves economic concepts and reasoning, but almost everything can be explained intuitively. I also offer to have a separate session to explore the more technical aspects of the material we will be covering, but students rarely take advantage of the opportunity.

Over the years I have rotated through various editions of most of the mainstream antitrust casebooks. This year I am using the third edition of Eleanor Fox's excellent *U.S.*

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Antitrust in Global Context.[2] I cover most of the material in the book in order, from the development and meaning of the rule of reason, the rise of the *per se* rule to deal with hard-core cartels, monopolization, and then mergers and acquisitions. After the merger simulation, the course continues with non-*per se* competitor collaborations, vertical agreements, and some closing materials on enforcement and institutions. I generally skip some more advanced material on intellectual property-antitrust issues[3] and the price discrimination section. By the time we arrive at the merger section, we have covered issues of market definition, market power, and entry barriers, setting the stage for the merger materials.

I teach the course through a fairly standard soft Socratic method. I designate two students to be on call for each class and begin the discussion with them before bringing the rest of the class into the discussion. We cover the assigned cases, some of the guidelines, and occasionally foreign materials as a comparison. We also discuss and role-play problems from the casebook and my original written problems and exercises. Students complete a four-page written answer to one problem of their choice during the semester, which effectively functions like a practice mid-term.

Merger law poses special challenges for classroom teaching. The Supreme Court cases are old and almost entirely unrepresentative of modern merger practice.[4] The handful of modern lower court decisions are the exception given that most mergers and acquisitions raising serious antitrust issues are resolved through negotiated settlements or abandoned.[5] It is hard to convey to students the administrative, negotiation, and lobbying nature of merger practice where the center of the gravity is the dialogue with the agencies rather than litigation. Of course, the law matters, but merger and acquisition practice is more often bargaining with the government in the shadow of the law.

III. THE STRUCTURE OF THE ANNUAL SIMULATION

The merger materials in any basic antitrust law course cry out for the students to learn by doing.[6] This type of active learning has two advantages over traditional lecturing and soft Socratic dialogue. First, active learning requires the student to apply material to problem solving rather than absorbing concepts in the abstract. As a result, students both learn and perform better than through passive learning.[7] Second, active learning, problem solving, and working in

[2] ELEANOR M. FOX, CASES AND MATERIAL ON U.S. ANTITRUST IN A GLOBAL CONTEXT (3d ed. 2012).

[3] We have a separate IP-Antitrust seminar that covers these issues in detail.

[4] *See* e.g., Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

[5] We do discuss such cases as FTC v. Staples, 970 F. Supp. 1066 (D.D.C. 1997); United States v. H&R Block, 833 F.Supp.2d 36 (D.D.C. 2011); United States v. Baker Hughes Inc., 908 F.2d (D.C. Cir. 1990); FTC v. H.J. Heinz, 246 F. 3d 708 (D.C. Cir. 2001); and the DOJ closing statements for the XM Sirius merger, which are excerpted in the casebook.

[6] Such techniques can be traced back to the general education theories of John Dewey. JOHN DEWEY, EDUCATION AND EXPERIENCE (1938).

[7] *See* ROY STUCKEY AND OTHERS, BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 90-92 (2007), *available at* http://www.cleaweb.org/Resources/Documents/best_practices-full.pdf; Patricia W. Hatamyar Moore, *The Impact of Active Learning Sessions on Law School Performance: An Empirical Study*, 3 J. MULTIDISCIPLINARY RES. 67 (2011); and Robin A. Boyle, *Employing Active-Learning Techniques and Metacognition in Law School: Shifting Energy from Professor to Student*, 81 U. DET. MERCY L. REV. 1 (2003).

teams more closely resembles what lawyers do in practice. So rather than lecturing and questioning the students on the 150 pages of merger materials, the students participate in a simulation of a currently pending merger investigation or an unresolved case.

I try to pick an industry that is not very technical and which the students will encounter in their daily lives. In past years I have based the simulations on then pending acquisitions involving American-U.S. Air, United-Continental Airlines, ATT-T-Mobile, and Anheuser Busch-Grupo Modelo.

I assign the students to two teams representing the government agency reviewing the deal and the respondent corporations. To add a degree of reality, I assign at least 60 percent of the students to the corporate side and no more than 40 percent of the students to the government team. I then assign each student to one of the standard issues in merger analysis: market definition, market share/market power, entry barriers, theories of harm, efficiencies, remedies, and failing firms when relevant. I frequently assign two students to some of the key issues for the corporate side. Obviously, many of these issues overlap and the students know they will be cooperating closely once they have mastered the law and publicly available facts for their issue.

I limit my input to brief in-class comments and short recorded lectures posted on the class website laying out the essentials of each critical issue, but leave the majority of each 75-minute class session for the students to work on their issues and with their teammates. I remain in the classroom to provide feedback and answer questions as they arise.[8]

The simulation normally covers four class sessions after an introductory lecture on the development of modern merger law and setting up the simulation. The first class session is for students to get organized with their teammates, reread the material on their assigned issue, and discuss the public information on the deal, which I post on the website. I also ask the students to post on the class website any important publicly available information they uncover for both sides to use in their analysis and arguments.

During the second session the students share information and arguments with their teammates and begin to formulate their positions. The third session is devoted to the first round of negotiations between the government and the parties to the transaction. The students continue their work on their team issues outside of class as well, consistent with their other classes and obligations.

During the fourth and final session, the teams finalize any settlement and then present the proposed consent decree to me for approval as the presiding federal judge. Each side must prepare a collective powerpoint presentation of no more than two slides for each issue containing both law and facts from the public record. The students assigned to each issue briefly present their arguments and answer any questions from the bench in a mock Tunney Act hearing.[9]

In the event that the teams do not reach agreement on a consent decree and an appropriate remedy, the final session is instead a hearing on the government's motion for a

[8] This is a version of what has come to be known as a flipped classroom. *See* e.g., THINGS YOU SHOULD KNOW ABOUT...™ FLIPPED CLASSROOMS, *available at* http://net.educause.edu/ir/library/pdf/ELI7081.pdf.

[9] 15 U.S.C. § 16.

preliminary injunction before me as the assigned federal judge. In either format I always take the matter under advisement and issue my "decision" at a later class when I also provide feedback on the slides and arguments and answer any remaining questions.

Obviously one can only go so far in a classroom simulation in five sessions without access to the actual confidential documents and expert testimony that the parties and the government would have in the real world. However, the students for both sides take the exercise extremely seriously, present relevant and sophisticated arguments about the key issues in the merger, and usually reach an outcome strikingly similar to what occurs in the real world.

IV. THE NATIONAL CINE-MEDIA/SCREENVISION ACQUISITION SIMULATION

On May 5, 2014, NCM announced that it entered into a definitive merger agreement with Screenvision, for $375 million of cash and stock.[10] The two companies were already the two largest operators of in-theater digital media networks in North America. In-theater digital media networks is a fancy term for the 20- to 30-minute pre-movie packages of advertisements and behind-the-scenes features on upcoming television and movie productions that run on the screen prior to the trailers and the feature film.

The CEO of NCM stated that:

> We are very excited about our merger agreement with Screenvision as it will position the combined new company to be much more competitive in the expanding video and overall advertising marketplace, including the new online and mobile advertising platforms. With the investments we will be making to create one more efficient national network, I am confident that we will bring more advertising revenue to our theatre circuit partners and a higher quality pre show to their patrons.[11]

In November, the DOJ brought suit to enjoin the merger. According to the DOJ's complaint, NCM and Screenvision together serve 88 percent of all movie theater screens in the United States through long-term, exclusive contracts.[12] The head of the DOJ stated:

> The proposed combination of NCM and Screenvision is a bad deal for movie theaters, advertisers and consumers. This merger to monopoly is exactly the type of transaction the antitrust laws were designed to prohibit…. If this deal is allowed to proceed, the benefits of competition will be lost, depriving theaters and advertisers of options for cinema advertising network services and risking higher prices to movie goers.[13]

This semester's antitrust class began in late January 2015 and was ready to tackle the merger materials by late February. I posted on the class website the relevant public information to get the students started on their research. We had three sessions along the lines described

[10] National CineMedia, Inc. Announces Acquisition of Screenvision, (May 5, 2014), *available at* http://investor.ncm.com/releasedetail.cfm?ReleaseID=845350.

[11] *Id.*

[12] Justice Department Files Antitrust Lawsuit to Stop National Cinemedia from Buying Screenvision, (Nov. 3, 2014), *available at* http://www.justice.gov/opa/pr/justice-department-files-antitrust-lawsuit-stop-national-cinemedia-buying-screenvision.

[13] *Id.*

above[14] prior to the Loyola early-March spring break, and the first formal negotiations on Monday, March 16 immediately after the break.

At the end of class that day, the student teams informed me that they were unable to reach agreement on a consent decree. This year the parties were not close to reaching a settlement. Per my instructions, the government rejected a two-year price freeze as an inappropriate form of relief. In addition, the government team independently rejected an innovative proposal for the movie theater chains to diminish their existing partial ownership stake in NCM. However, both sides learned a great deal about what the opposing side would argue and were able to better preemptively address those issues in their own presentations. I therefore scheduled the mock hearing on the government's request for a preliminary injunction for Wednesday, March 18.

As fate would have it, the parties in the real world announced later that day, on March 16, that they were terminating the merger in light of the government's opposition.[15] However, our student litigators were not deterred and appeared before the Honorable Spencer Weber Waller of the United States District Court of Loyola on the morning of the March 18 to argue the motion for a preliminary injunction that would never be presented in open court in the real case.

The seven-member government team presented brief oral arguments on each relevant issue accompanied by a powerpoint for the benefit of the court, and opposing counsel followed by a similar presentation by the eleven-person corporate team.[16] Each side's total presentation was approximately 30 minutes long.

The government relied on the 2010 Horizontal Guidelines[17] to argue that the relevant market was a national market for in-theater pre-show advertising packages. The government then argued that the proposed transaction was likely to injure both advertisers and movie theater chains. The students argued that the merger would produce a new entity with 88 percent of the relevant market with only a small remaining fringe of competitors. The plaintiff invoked, but did not rely, on the *Philadelphia National Bank* presumption.[18] They calculated the relevant HHIs and cited examples from the FTC Merger Commentaries[19] in support of their argument that the merger would produce meaningful market power.

The government relied on a theory of unilateral effects where both advertisers and movie theater chains would likely be subject to price increases for which there were no reasonable alternatives. They also argued that the acquired company was a maverick within the meaning of

[14] *Supra* at III.

[15] David McNary, *National CineMedia, Screenvision Abandon Merger*, VARIETY (March 16, 2015), *available at* http://variety.com/2015/film/news/national-cinemedia-screenvision-abandon-merger-1201453742/.

[16] Copies of the student powerpoints are available on request at swalle1@luc.edu.

[17] U.S. Dep't of Justice & Federal Trade Commission, Horizontal Merger Guidelines at §3 (2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.html.

[18] United States v. Philadelphia National Bank, 374 U.S. 321 (1964).

[19] U.S. Dep't of Justice & Federal Trade Commission, Commentary on the Horizontal Merger Guidelines (2006), *available at* https://www.ftc.gov/sites/default/files/attachments/merger-review/commentaryonthehorizontalmergerguidelinesmarch2006.pdf.

the Guidelines and that publicly available company documents from NCM showed that Screenvision was a "direct threat" that would be eliminated by the merger.[20]

Anticipating the defendants' arguments, the government presented publicly available facts that the existing fringe competitors, advertising firms, and other potential entertainment industry firms were not viable entrants or able to expand sufficiently in a timely fashion to eliminate the competitive harm that would be created by the proposed merger. The government also argued any resulting efficiencies were not merger-specific and failed to justify a merger to near monopoly levels.

As to remedies, the government argued that it had demonstrated a likelihood of success on the merits and that no reasonable consent decree would cure the competitive injury of the acquisition. Partial divestitures were not possible given the structure of the industry and the lack of available buyers who could preserve competition. Other proposals to divide up the companies by region, like the Baby Bells, were unrealistic and probably would make matters worse.

Counsel were responsive to my questions and cited chapter and verse from the Guidelines and modern cases in support of their arguments. My favorite response came when I asked the government to describe the types of witnesses they would have called in a real PI hearing, they responded: "An economic expert, advertising executives, non-chain movie theater owners, and George Clooney."

Defense counsel argued in an equally professional manner. Not surprisingly, they focused on market definition. They argued that pre-show advertising packages in movie theaters were part of a broader general advertising market and the combined shares of the parties represented less than one percent of the broader relevant market. They argued the "economic realities" of advertising and the desire of advertisers to reach audiences across the broadest range of advertising medium. They cited publicly available documents of the acquired firm stating that it viewed itself as competing with television and cable networks, and cited the FTC's closed investigation of the Google/AdMob acquisition[21] in support of their broader market definition. They further argued that, even in a relevant market for demographically targeted advertising, in-theater advertising was an insignificant component of targeted web advertising which typically could be even more narrowly targeted than merely the nature of the film being shown (*Frozen* versus *Fast & Furious 7*).

The defendants' alternative argument was that they competed with advertising and other content on cell phones and tablets for consumers during the period of time while they were in the movie prior to the start of the show. I particularly liked their statement that "advertisers want eyeballs not channels." On the consumer side, the defendants argued that the revenues the theaters received from these ad packages were such a small percentage of their revenues that ticket prices were unlikely to be affected by the merger in either direction.

[20] The students also presented an argument based on raising rivals costs involving the vertical aspects of the merger, which are beyond the scope of this brief summary.

[21] Statement of the Federal Trade Commission, Google/AdMob, FTC File No. 101-0031 (2010).

The defendants further argued that entry barriers were low. They contended that there were no legal or regulatory barriers to entry, capital costs were low, digital technology made new entry reasonable, and that a host of international advertising holding companies, social media firms, movie and television studios, and other entertainment and marketing entities were capable of entering the field to both create and offer movie chains these pre-show packages.

The defendants' efficiency arguments revolved around the notion of "a one-stop shop for advertisers." In addition to pointing to $30 million of projected cost savings, the defendants argued that the merger would allow the combined companies to develop more interesting interactive entertainment products and encourage moviegoers to come to the theaters earlier for a new and better type of entertainment that started well before the feature film.

The defendants used the remainder of their time to propose terms for a consent decree to remedy any potential harm if the court found in favor of the government. They proposed allowing the merger with a combination of:

1. Limitation on the time and scope of the exclusive contracts between the defendants and the movie theater chains;
2. A two-year prohibition on price increases with advertisers or revenue share decreases with theater owners;
3. Partial divestitures of the shares that movie theater chains currently owned in NCM to properly align incentives; and
4. Anti-retaliation provisions.

On rebuttal, the government focused on market definition and entry issues. It argued that the unique role of the defendants as brokers between two different industries made entry unlikely and harm inevitable. Tech startups, advertising firms, and even established social media firms lacked the connections and the incentives to enter this stagnant niche market. The government also pointed to the defendants' membership in the Screen Advertising Association, which defines itself as different from other types of advertising.[22] The government dismissed the defendant's proposal for a consent decree as inadequate and requested the entry of a preliminary pending trial.

The court took the matter under advisement and the students left for their other classes and to prepare for the next unit of antitrust the following week.

V. CONCLUSION

I am convinced that there are effective ways to introduce more simulations, role playing, active learning, and a greater air of reality to teaching antitrust law. The particular merger exercise I have described is only one of my efforts throughout the semester to go beyond the traditional teaching methods that remain the mainstay of most law school classes.

I hope that other professors have equally innovative ways of going beyond the cases and guidelines to teach the modern reality of antitrust law, policy, and practice. I look forward to

[22] The students probably were referring to the Screen Advertising World Association, http://www.sawa.com/.

trading best practices and responding to any suggestions that will help me improve this exercise and add others in future years. I would also urge any full-time or adjunct professors to try their own versions of this type of simulations.[23]

I am proud of how the students rise to the occasion and take their roles and arguments seriously. It is exciting and deeply gratifying to watch the students learn by doing and taking on a representative, though limited, version of the professional roles they will be expected to play after graduation.

[23] *See* also Steven Cernak, *Antitrust Simulations* (2014), which contains excellent materials for in-class simulations for several antitrust issues.

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Antitrust Courses Can Teach Valuable Practical Skills—If Taught Well

Steven J. Cernak[1]

I. INTRODUCTION

Law schools are being pushed by accreditation bodies, law firms, and students themselves to offer additional practical alternatives for students, all in the search for experiential learning. Antitrust law, with arcane concepts like economist's curves, Herfindahls, and two-sided markets, would not seem a good candidate for such learning. I believe, however, that antitrust law offers up several possible ways for professors to provide practical legal lessons useful to all future lawyers, even those who do not end up joining the antitrust community. In addition, antitrust courses can teach lessons about how the economy and businesses operate—and those lessons are valuable to the many students who have no real experience with either.

II. BACKGROUND OF PRACTICAL SKILLS

Fortunately for me, the push for more practice-based offerings fits nicely with my background. I spent more than 20 years as the in-house antitrust lawyer at General Motors. I continue to practice antitrust law, now assisting multiple clients while being Of Counsel in Schiff Hardin's Ann Arbor office. For the last several years, I have also served as an adjunct professor at three different Michigan law schools. At Wayne State University Law School and Western Michigan University Thomas M. Cooley School of Law, I teach the antitrust survey course. At the University of Michigan Law School, I teach two practicums: "Counseling & Advocacy in Antitrust" and "In House Counsel."

I have also written *Antitrust Simulations* for West's Bridge to Practice Series.[2] The book quickly summarizes key antitrust concepts and then provides realistic documents—emails, memos, presentations, deposition transcripts—that can be used to create real-world practice simulations. I use it as a secondary text in my survey courses and as the only text in my antitrust practicum.

III. THE PUSH TO TEACH PRACTICAL SKILLS—BUT WHICH ONES?

I support the move to provide more practical learning opportunities for U.S. law students. I think the three years of law school allows for such training while still leaving time for a broad array of required doctrinal courses, interesting if obscure electives, and otherwise learning to "think like a lawyer." But I fear that too much of this experiential learning is focused on litigation

[1] Steve Cernak is Of Counsel at Schiff Hardin LLP. He also teaches antitrust law as an adjunct professor at three law schools in Michigan. The views expressed here are his own and do not necessarily reflect the views of any current or past employers or clients.

[2] More information about *Antitrust Simulations* and other books in the series can be found at http://www.bridgetopracticeseries.com/.

in general and courtroom skills in particular. Arguments for a moot court and briefs for a clinic can show students the end game of many legal disputes; however, even litigators spend much of their time counseling and advocating for their clients in offices, conference rooms, and through email. Those are the skills I try to incorporate while I teach antitrust law.

Beyond those legal skills, many of my students can use an antitrust course to learn needed lessons about how the economy and businesses function. For too many students, such concepts as distribution costs, product development, and even the setting of price through supply and demand are foreign.[3] Even for those students who know an X-axis from a Y-axis, a discussion of a case's facts, history, and context can help them better utilize their economics classroom learning. For instance, I like to emphasize that corporate decisions are made by real people who do not always act like a textbook's rational actors. I offer anecdotes of seemingly irrational pricing assumptions like inelastic demand, mixed personal and profit motives, and bureaucratic inertia that leave in place a program long after its original rationale is forgotten.

I hope that both sets of students leave my classes with a better sense of how to deal with real businesses, whether under the antitrust laws or any others. Below, I give some examples of how skills training can be incorporated into an antitrust law class.

IV. EXAMPLES OF PRACTICAL SKILLS TEACHING THROUGH SIMULATIONS

The concept of "agreement" is important in antitrust law; in some cases, it is the only real question. After covering the classic opinions for the key concepts, I use the material in *Antitrust Simulations* that describes an industry in which all the competitors have put in place the same restriction of their respective dealers. While each competitor has a good pro-competitive reason for this vertical restraint, hypothetical plaintiffs argue that the common action really is a product of a horizontal agreement—and they have some bad documents and evidence of meetings to help prove it.

In my practicum, a few pairs of students use these documents and cases to argue for and against a summary judgment motion to a judge (me) while the rest of the class listens in and later critiques the performances. After all the arguments, the non-participating students vote on the motion—and I have never had a unanimous decision.

In my survey courses, I take the hypothetical back to a time before any lawsuits and at the beginning of a government investigation. Before any of the students read any of the material in *Antitrust Simulations*, I give all the students the basic facts of the industry and the restraints, as well as some hints about where the investigation might be heading. Two of the students play in-house counsel at one of the competitors who are to gather more facts by interviewing another employee (me) who is the expert on the restraints and an attendee of the key meeting of competitors.

I test the students' interview skills by comparing the information they gleaned to the "deposition transcript" of that same employee in the later litigation. One of the key facts this witness reveals is that the meeting of competitors was organized by a group of dealers. This

[3] It is not true of all students—when one of my students also owned two gas stations, I was the one learning about vertical restraints and supplier power over distributors.

witness claims that he attended only to "show the flag" and placate his dealers. The class learns about the importance of supply and distribution relationships and then debates whether they believe the proffered explanation for the meeting or the conspiratorial one.

Rule of reason and *per se* are two concepts that antitrust lawyers must grasp and, like many complicated legal issues, then explain to clients without resort to legalese. Here, I use documents that describe a research and production joint venture between two competitors. In my survey courses, we explore the sections of the joint venture agreement and press release that an antitrust lawyer probably inserted. Then the students create either a short presentation or one-page handout to explain to the engineers of one of the participating companies what they can and cannot do—and why.

In the practicum course, teams of students prepare both of those documents and then actually present them to a group of company engineers, played by the other students, and a chief engineer, played by me. While all the students/engineers are allowed to ask questions, for each presentation I plant at least one difficult but realistic question. One such "engineer" remembers attending an earlier compliance presentation where he was told never to talk to this competitor and so demands to know why the law has changed. In another example, a sales executive has snuck into this meeting of engineers and asks how she can get the competitor to "play nice on the price" of the joint venture product. The participating students get a chance to practice preparing and providing a memorable yet professional compliance presentation.

Even though only a subset of antitrust lawyers regularly participate in merger reviews, I cover merger law in all my classes because it provides an opportunity to teach several important antitrust concepts as well as practical skills. As to the former, it is an obvious way to teach the important concept of market definition and, through both the Hart-Scott-Rodino ("HSR") procedures and the Horizontal Merger Guidelines, illustrates how "law" often is made outside the courtroom. As for the practical skills, in my practicum course we simulate the first meeting between two merging parties and the reviewing agency as a way to practice the persuasion skills necessary in many regulatory and negotiation settings.

After studying recent merger opinions, HSR procedures, and agency guidelines, the students are assigned to represent either the buyer or seller. They then prepare for an initial meeting with the lead attorney at the reviewing agency (usually played by me). The students learn to cooperate with other attorneys as they present their best story based on company documents, confidential information memos, and other typical HSR Item 4(c) and (d) documents.

To add some variation and provide more teachable moments, I often add a few wrinkles to the exercise. For some "meetings," another student plays an agency economist who arrives at the meeting halfway through and loudly slams the door and sits down. To mimic the sometimes less-than-complete cooperation provided by the other side, I sometimes secretly tell one of the student/lawyers to be unavailable to meet with her counterpart until the day before the meeting (after the meeting, I explain my instructions and take the delay into account in my evaluation).

Finally, most of the students expect the agency lawyer to be antagonistic—if not hostile—which I think is unrealistic for this initial meeting. To drive home that point and show that other forms of behavior might upset the best-laid plans, for one of the presentations I play an overly-

friendly reviewing attorney who talks a lot and wastes time telling the parties how interesting their products and industry are.

V. PRACTICAL EDUCATION WITHOUT FULL SIMULATIONS

Not all the practical points need a simulation to expose them to students—some can be illustrated through a discussion of key facts in the opinion or the context of the case. For instance, I tell all my classes that to understand antitrust law you must pay attention to facts, context, and history. Before extracting a phrase from an old opinion and blindly applying it to today's situation, you should understand the facts surrounding that opinion because facts change.

This point is illustrated every semester when I stare out at my students' sea of Apple products and explain how, not very many years ago, Microsoft was considered the most dominant firm in the world as it fended off various challenges, including an existential one from a now-forgotten Netscape. (It still surprises me how "old" the U.S. and EU Microsoft cases[4] seem to my students—I can more easily understand IBM, AT&T, General Motors, and Standard Oil seeming like ancient history.) Of course in the merger context, we have an even more recent set of matters to show the importance of new facts: I contrast the DC Circuit's 1997 blocking of the Staples/Office Depot merger with the 2013 Federal Trade Commission approval of the Office Depot/Office Max merger.[5] (As of this writing, we do not yet have a Staples/DepotMax approval.)

I use the 1977 *Sylvania*[6] opinion as a jumping off point to discuss different distribution methods and restraints and the customer benefits and antitrust issues each might provide. Given my background and the latest headlines, recently those discussions have ended with Tesla and its quest to sell cars directly to consumers.

1985's *Aspen Skiing*[7] offers a variety of practical lessons, especially when combined with Priest & Lewinsohn's article on the surrounding facts in Fox and Crane's *Antitrust Stories*.[8] For instance, the case and article can show that a company's actions often are driven by multiple motives. Did defendant Ski Co. effectively end its joint effort with Highlands because it wanted to put Highlands out of business? Or because Highlands' down-to-earth product and image hurt Ski Co.'s appeal to upscale destination skiers? Or because the Highlands owner seems to have been a difficult person? Or some combination? Of course, another practical legal lesson from *Aspen Skiing* is that, while all facts are important, the most important facts are those that make it into the court's opinion.

The most important practical lesson of all is that these lawyers-to-be will not be using this antitrust knowledge just to opine on some theoretical possibility—they will be using the knowledge to help some client meet its goals. So in the context of advising a business, it is not

[4] U.S. v. Microsoft, 253 F.3d 34 (D.C.Cir. 2001); Microsoft v. Commission, (T-201/04), 2007 WL 2693858 (CFI 2007).

[5] FTC v. Staples, Inc., 970 F.Supp. 1066 (D.D.C. 1997).

[6] Continental T.V. v. GTE Sylvania, 433 U.S. 36 (1977).

[7] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 US 585 (1985).

[8] *Aspen Skiing*: *Product Differential and Thwarting Free Riding as Monopolization* in ANTITRUST STORIES (E. Fox & D. Crane eds. 2007).

appropriate to just say "no, you cannot do that because there is antitrust risk." Instead, the lawyer needs to understand the law, the facts, and the client's business goals well enough to offer advice like "that way raises serious antitrust risk but this other method can still meet your goals."

One case I use to help the students practice this art is the 1941 *Fashion Originators' Guild of America*[9] case. You might recall that there the U.S. Supreme Court upheld the FTC determination that this trade association and its members—designers and manufacturers of dresses—violated the antitrust laws when they agreed to boycott retailers who sold knock-offs of their creations. So, I ask my students, if this trade association or group of competitors came to you after the case and asked how they could get the word out about "genuine dresses," what options would you offer? The students eventually come up with several possible industry image campaigns, like the dancing California Raisins campaign.[10] In some classes, I get students old enough to at least remember the "look for the union label" song when they find it online.[11] (I know the campaign was on behalf of the International Ladies Garment Workers Union but I think the example still works.)

We then move to another action that competitors must join together to accomplish—standard-setting—and discuss how and why auto companies might work through the Society of Automotive Engineers to develop standards for using flammable materials in the engine compartment. All these discussions are designed to get students thinking like antitrust lawyers and applying the lessons of the cases to other sets of facts in ways that clients would find useful.

VI. PRACTICAL CONCLUSIONS

The argument here is not that antitrust law should join, say, contracts as a required course for all law students; however, I do think that for students who plan to deal with companies in their careers, antitrust law is as important as enterprise organization and commercial transactions because, when taught properly, it can introduce the students to how the economy and businesses operate.

Beyond those practical points, antitrust law courses taught with simulations can provide experiential learning opportunities that go beyond the litigation focus of many clinics and moot courts. A practice meeting to discuss a proposed merger with the Federal Trade Commission will help the future environmental lawyer years later when she meets with the Environmental Protection Agency. Boiling down complicated antitrust topics for a simulated antitrust compliance program will help later when explaining the Foreign Corrupt Practices Act to a roomful of executives. Offering alternative pricing programs to a pretend General Counsel to fend off complaints of anticompetitive bundling will help years later when counseling with a real General Counsel about the terms of a supplier contract.

Those who teach antitrust law—tenured or not—serve their students best when they connect antitrust law's concepts to the real world and prepare their students for the types of work almost all of them will do, whether or not those students ever practice antitrust law.

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[9] Fashion Originators' Guild of America v. FTC, 312 U.S. 457 (1941).

[10] If you have forgotten, *see* http://en.wikipedia.org/wiki/The_California_Raisins.

[11] If you are not old enough to remember these ads, check out an example here. Trigger warning—you might end up whistling the tune the rest of the day: https://www.youtube.com/watch?v=7Lg4gGk53iY

CPI COMPETITION POLICY INTERNATIONAL

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

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

Andrew I. Gavil[1]

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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[1] Professor of Law, Howard University School of Law. Professor Gavil is also a co-author of ANDREW I. GAVIL, WILLIAM E. KOVACIC, & JONATHAN B. BAKER, ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY (2d ed. 2008). The third edition is expected later this year. Professor Gavil notes with appreciation the helpful comments and suggestions he received from his research assistant, Marcus J. Bandy, as well as Jonathan B. Baker and Robert T. Joseph.

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.

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Teaching Antitrust Online

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Teaching Antitrust Online

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I. INTRODUCTION

Antitrust is enjoying a renaissance in national economic policy and in the academy. When I began teaching a decade ago it was common to hear that antitrust was dead or at least unimportant. It was a mistake on the teaching job market to list antitrust as one's first-choice course to teach. When I joined my institution, the largest law school in the nation's 16th largest state, antitrust was not on the course list at all.

The academy took its cues from the courts and the federal enforcement agencies. The Rehnquist Supreme Court heard few antitrust cases and, famously, the defendant always won. After some exciting years in the 1990s, the 2000s saw significant retrenchment in federal enforcement everywhere but in the criminal arena. Competition law schemes existed overseas but outside of the western world were largely undeveloped and unused.

In 2015 the picture is very different. Vigorous enforcement by the Obama administration and the Federal Trade Commission, active and sophisticated state agency enforcement, eager participation by regulatory agencies such as the FCC, and a practiced class-action bar give much to study in U.S. antitrust. The Supreme Court has been more active in the field than at any time since the 1970s. Cross-border business puts the relevance of foreign and cross-border enforcement on a par with purely domestic antitrust. In addition to long-standing competition policy enforcement in Europe and the former British colonies there is now a record of enforcement to study in China, Latin America, Eastern Europe, and the Middle East.

The academy has followed suit. For one example, in my home state of Indiana, three of four accredited law schools offer antitrust on a regular rotation with six tenured faculty teaching the courses. There are specialty courses on the menu, including Antitrust and IP, Healthcare Antitrust, and Comparative and International Antitrust. This past spring semester, my institution had four antitrust courses on the schedule—one in the day program, one in our evening program, Health Care Antitrust, and Comparative and International Competition Law offered online. We also have two classes in Sports Law, which one might call "antitrust in the sports industry."

II. THE CURRICULUM AS A RELEVANT MARKET

As an early exercise in each presentation of my antitrust class I point out to the students my status as a monopolist, "the one guy teaching antitrust in Indiana north of Bloomington and south of South Bend." (The exercise worked marginally better before our curriculum deepened. I now have to go with "the one guy teaching at this day and time.") The students quickly grasp that

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my status as a literal monopolist is not meaningful—it does not permit me, in the language of the exercise, to charge each student a jelly doughnut as admission to each class meeting. The discussion is a helpful reminder to me, as well, that my course competes against courses in other subjects—criminal procedure, bankruptcy, patent law, civil rights.

As competitors in a market for student registrations, antitrust professors suffer a disadvantage. During a stint on the admissions committee, I read innumerable applicant essays announcing interests in criminal law, civil rights, constitutional law, international law, even corporate law, as well as more abstract ideas such as "social justice." No student stated an interest in competition policy or antitrust, or even in an abstract idea like "economic regulation" or "industrial policy." Possible reasons for this are many:

1. outside of the few largest legal markets, firms tend not to have antitrust practice groups, so community role models may be few;
2. *LA Law* (or modern television serial counterparts, whatever they are) tend not to see antitrust law as a fruitful topic for a script;
3. even attention-grabbing antitrust-law news headlines go over many undergraduates' heads; and
4. many bear a false, or at least overstated, impression that antitrust law is the province of the mathematically, financially, and economically trained, inaccessible to students lacking those backgrounds.

Whether for the same or different reasons, I also see a frustrating dearth of diverse students in my antitrust courses. In a recent semester, three of 22 students were women. It is rare that I have more than one student from a minority ethnic background in antitrust class. (This demographic description does not include the excellent foreign lawyer LLM students, frequently from China or the Middle East.)

Antitrust professors must innovate to compete. The list of "antitrust and" courses promises some success. Students with interests in an intellectual property career may, through their Antitrust and IP course, come to see antitrust as highly relevant to their future work—which of course it is.[2] Geographically broad student recruiting is another option: Overseas law schools, particularly those in China, are a promising source for students with interests, and remarkable sophistication, in U.S. economic and competition policies.

A third approach is to run a larger program, whether something field specific like the Institute for Consumer Antitrust Studies at Loyola-Chicago or one that is business-law oriented like the Corporate and Commercial Law Graduate Certificate and LLM Track at my own institution.[3] My Corporate and Commercial Law programs bring students into my office for advice, which invariably includes "take antitrust before you graduate." We can leverage outside

[2] Those same students may be intrigued to learn that the head of one of the Federal antitrust enforcement agencies is an intellectual property lawyer.

[3] http://mckinneylaw.iu.edu/courses/certificates.cfm#Corporate%20and%20Commercial%20Law%20Graduate%20Certificate; http://mckinneylaw.iu.edu/degrees/llm/program-tracks/corporate-commercial/index.html.

resources: The ABA supports occasional "Why Antitrust" programs at law schools, funding a pizza lunch to entice student attendance.[4]

Antitrust professors should also take more dramatic steps to hawk our product. My single most successful innovation in recruiting students and teaching antitrust has been to move one class, and particular lessons from another, out of the classroom and online.

III. TEACHING ANTITRUST ONLINE

Online education is now in the mainstream. Schools use online teaching methods as early as elementary school and thousands of students across the country pursue their entire high school studies online.[5] Undergraduate and graduate programs are offered online. At Indiana University, where I teach, there are nearly 50 undergraduate, graduate, and professional degrees offered entirely online.[6] Some of those, such as the M.B.A. from the Kelley School of Business, are in programs that are natural feeders to courses in antitrust law.

The legal academy has been slow to catch on. In the late 19th century Christopher Columbus Langdell developed the "case method," including the use of casebooks and Socratic dialog, from his perch as Dean of the Harvard Law School. That pedagogical approach has dominated in all U.S. law schools for at least as long as federal antitrust law has existed. Perhaps wedded to a Langdellian view of legal pedagogy, law schools' primary accrediting agency, the American Bar Association, limits opportunities for online teaching in law schools. No student may take courses online in his or her first year and, in the absence of a waiver, the maximum number of credits students may take online in a JD program is 15.[7]

ABA-accredited online law schools are several years away—at least as regards the JD degree. ABA limits on online courses do not apply to other degree or certificate programs including graduate certificates, LLMs, and the new Masters of Jurisprudence ("MJ") degree.[8]

IV. BENEFITS OF ONLINE CLASSES

Online courses in law school offer several benefits—some obvious, some less so, and some even counter-intuitive. Benefits include reduced cost, improved access, and practice readiness:

1. **Cost**: Presenting a quality online course is no less expensive than if the course is live, so tuition rates are not likely to be reduced,[9] but ancillary expenses of law school, including commuting or housing, may be reduced or eliminated. Online classes also may leverage

[4] *See, e.g.*, http://www.uchastings.edu/news/articles/2015/02/International_Antitrust.php.

[5] *See, e.g.*, http://www.connectionsacademy.com/.

[6] *See* www. http://online.iu.edu/.

[7] *See* Standard 306, "Distance Education," in *ABA Standards and Rules of Procedure for Approval of Law Schools* (2014-15), *available at* http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2014_2015_aba_standards_chapter3.authcheckdam.pdf.

[8] A Masters of Jurisprudence degree is a masters degree for non-lawyers. *See* http://mckinneylaw.iu.edu/admissions/mj/index.html.

[9] By "quality online course," I am excluding the Massive Open Online Course, or MOOC, that has been tried and failed both in and out of law schools.

freely available online sources, reducing the casebook and supplement expenses that may approach 10 percent of a student's overall direct expenses.

2. **Improved Access**: Students in remote locales need not move to be geographically proximate to the school, and students with a need to spend a semester away—perhaps pursuing an externship—can remain enrolled in online classes.
3. **Practice Readiness**: Because facility with a variety of internet-based communication methods is essential in a modern law practice, online teaching promotes practice-ready graduates.

All of these benefits exist, though they may be muted, in classes that are partly online.

It is counter-intuitive, but experiment and experience are showing it to be true that carefully designed online courses can promise better learning outcomes than do live classes.[10] One consistently reported conclusion is that learning effectiveness, as measured by student grades, is unaffected by the mode of instruction.[11] (Studies of teaching effectiveness that exist are conducted in non-law-school settings and extrapolation may be difficult.)

Both survey data and anecdotal experience suggest that with regard to one facet of the educational experience—student comfort in participation—online courses offer substantial benefits.[12] Of course, class participation is bread and butter for law school courses, in particular those, like antitrust, that draw upper-level students and are as much concerned about the analytical process as they are about content dissemination.

These benefits address some of the particularly troubling problems facing antitrust faculty in U.S. law schools. Student demand for online classes is high, particularly in the third year or in part-time programs when externships, study abroad programs, and employment opportunities increase the opportunity cost of showing up for live classes. Taking my Comparative and International Competition Law class online last spring increased my subscribership from eight students the last time I taught the course to 27, including a substantial population of female and minority students.

V. ANECDOTAL EXPERIENCE FROM TEACHING ANTITRUST ONLINE

Teaching online makes use of freely available resources a natural process, including sending students to ABA lunchtime brown sessions on cutting-edge and relevant topics,[13] directing students to oral argument audio broadcasts, and assigning the latest Supreme Court slip opinions. Statutes are easily findable on subscription-based databases or for free with websites like Findlaw[14] and the Cornell Legal Information Institute.[15] In my international and comparative

[10] *See* note 8.

[11] *See, e.g.*, Anna Ya Ni, *Comparing the Effectiveness of Classroom and Online Learning: Teaching Research Methods*, 19 J. PUB. AFFAIRS ED. 199 (2013).

[12] *Id.* at 211 (reporting survey data and citing earlier studies reaching the same result).

[13] ABA lunchtime brown-bags are free for academics and students. *See, e.g.*, http://shop.americanbar.org/ebus/ABAEventsCalendar/EventDetails.aspx?productId=197867272.

[14] http://www.findlaw.com/.

[15] https://www.law.cornell.edu/.

course, materials available through the International Competition Network's[16] and various jurisdictions' internet sites[17] give both a broad and a deep exposure to the variety of laws and cases applying those laws from around the globe.

My own work teaching antitrust online has involved two classes. In Comparative and International Competition Law, I have taught entirely online and asynchronously—time shifted—using a variety of teaching techniques that the online platform facilitates. These include:

- assigned readings from internet-based sources,
- recorded mini-lectures,
- instructor-created text- and audio-commentary expanding on particular topics,
- low-value comprehension quizzes,
- writing assignments,
- discussion boards, and
- student-to-student engagement through both discussion boards and peer reviews of classmates' work.

I opened the course to students at my institution as well as those from three other schools, using a third-party vendor to market the course more broadly. About half of my 27 students joined class from the Netherlands (study abroad), North Carolina, Florida, Texas, and Arizona. While I see opportunities to refine the course before its next presentation, the level of student involvement and comprehension demonstrated by the substantial written product far exceeds what I saw when I last taught the class as a seminar.

My other class is the traditional Antitrust course. Last semester I presented the class in a live classroom setting, supplemented with online teaching techniques including out-of-class assignments, comprehension quizzes, discussions on class topics, and blog-like commentary including references to current events. A course including a combination of live and online techniques is sometimes called "blended" or "hybrid." Out-of-class online interaction increased the breadth and depth of our coverage as well as my ability to monitor student progress through the class. I have been gratified to see an increased level of sophistication in class discussion and final exam answers; I attribute that in part to the range of learning methods that the students encountered.

Relying on a variety of sources instead of the self-contained casebook better approximates the real world environment in which students as lawyers will discover, learn, and apply the law. This process is not unique to antitrust, but the free resources available for antitrust study are in many cases more robust than in other fields of law. Teaching antitrust online can improve learning outcomes while decreasing entry barriers.

I have now demonstrated decreased cost, increased output, and higher quality—a result every antitrust lawyer can applaud!

[16] http://www.internationalcompetitionnetwork.org/.

[17] *See, e.g.*, http://ec.europa.eu/competition/index_en.html.

VI. NEXT STEPS IN ONLINE TEACHING

There is room for a more ambitious project capitalizing on the benefits online teaching promises. We are unrolling a 15-credit graduate certificate in Corporate and Commercial Law that will be available entirely online. Students can take the certificate to achieve concentrated knowledge and experience in business law topics, including antitrust. We anticipate in short order making our MJ degree, with an emphasis in business law and again including opportunities for students to study antitrust, available entirely online.

Few U.S. law schools can offer antitrust-specific degree programs and few U.S. students are likely to find those attractive. When presented online, however, the geographic markets for both teachers and students become global, increasing possibilities for well-run programs. One school in Chicago has recently unveiled two online degrees—an LLM and an MJ—in Global Competition Law, presumably targeted at an audience including U.S. lawyers and students as well as those from overseas.[18]

Graduate certificates and degree programs not subject to ABA limits create opportunities for students without the opportunity cost of the traditional law school program. They should also be attractive to employers, whether traditional legal employers or firms with needs for expertised non-lawyers, as a means for employee training beyond that which can be provided in-house. There are minimal regulatory and practical impediments to a practicing lawyer's joining a law school class, or taking a graduate certificate, to bone up on a specialized area of law that complements a

Antitrust law was never dead, but the field is enjoying a renaissance, and U.S. law schools work hard to meet the bar's need for graduates prepared to move into antitrust and economic regulatory practices. Of the several innovations that help to attract a diverse and engaged student population, online teaching is proving to be one of the most successful.

[18] http://www.luc.edu/law/centers/antitrust/degreesandcertificates/.

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Teaching Antitrust In Bruges

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I teach the core competition law Masters at the College of Europe, Bruges. There are three things I like about this: the students, the students, and the students. First, I have both lawyers and economists in my class. This enables a richer discussion, particularly when we begin contrasting form-based and effects-based enforcement approaches and the varying levels of harm on which prohibitions may be founded.

Second, the students are from all over Europe; I usually have 50-60 students, representing over 20 Member States (and sometimes beyond). This allows a great range of views. Whether they know it or not at the start of the course, the students come with their own sets of rather firmly held priors, particularly regarding what competition on the merits means; and the degree to which markets should be allowed to self-correct or when intervention is needed.

To reveal these priors, one exercise I enjoy doing, usually in about minute one of my first lecture, is to get them all up to the board and write out the word "competition" in their own language, and what it means to them in English. This is not just to give them a hint that they are going to spend a good deal of the course on their feet. It is mainly to reveal some interesting similarities and differences. So, "competition" can be "concurrences," "concurrenza," "competencia," or similarly with a k. Or we can have "Wettbewerb" or some derivation of "rivalita."

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This leads rapidly to a discussion of the concept of "participating in a contest," "running together," or "sharing a river:" the word-origins of competition, concurrence, and rivalry. As a runner and rower myself, it is not a great leap for me to then inflict on them my views of how these concepts can help us discuss what we think matters most in competition law: Is it that the best competitor wins? Is equal opportunity to participate important, or what about handicapping stronger participants? Why would we do this?

A rich debate ensues. Soon we bring in the words they used for what competition means to them: "efficiency" pops up, as does "consumer welfare," usually from those who have read ahead or are economists; others focus on "rivalry," "fairness," and "balance;" some jot down (and sternly defend) "atomize power." This lets me bring in concepts that underpin some aspects of competition law in Europe: Ordoliberal traditions that I suggest still operate, focusing on ensuring "market order."

I hint to the class that they will find case law during the year which holds that there are some competition law offenses that don't depend on proof of actual consumer harm. This usually raises some eyebrows. Then I note some offenses don't even require that consumer harm be likely. There can be offenses that are object-based, rather than dependent on evidence of actual or likely effects.

Similarly there can be a concern in some cases for competition as an "institution," rather than a process. Here we see some cases where no consumer harm is even possible, but there has been some harm alleged to the structure of competition itself. So even before we've really started, we've got some great debate points on which to anchor further analysis.

The third thing I love about my European students is that none of them have ever experienced the case-study method. From their previous degrees on the Continent, they are used to four- to six-hour lectures by the top expert in the field, usually reading from his or her textbook, expounding clear rules and codes. This they are not going to get from me.

What I make clear right from the start is that the reading list is relatively light but expected to be done; and the cases in full. Class time is spent with me initially limbering them up with case studies, and then it is over to them to present some themselves—sometimes alone, sometimes with another student to take the part of the parties, or the authority, or the court. This ensures not only a more alert and more engaged class, but also brings the cases to life and thus allows students to get closer to the facts, to the dynamics that happen within a particular case law stream, to the ramifications of decisions and judgments, and also of particular stances and interventions.

For example, what comes from a harsh approach to vertical restraints? How did the parties react? Did they just decide to merge? Why was that tolerated but the restraint not? Or if case law is vague, for example on information exchange, how do companies react? Is some pro-competitive business conduct thus chilled? Shouldn't we care about that, particularly if it means that some consumers and the market are deprived of innovations? What are the underlying reasons for some arrangements being banned in some jurisdictions, and allowed in others? Is it all about the facts, or is something deeper going on?

This readily takes us to debates, so we can look at a line of case law as a whole, and then uncover various views about it and what it might mean for competition, innovation, and consumer harm on a range of levels. I'm very pleased that the students engage so well in these exercises; not just when I'm personally fired up about a subject but also when I find a particular topic deeply tedious to lecture about, but enormously important to grasp.

I do this with 101 (3) matters, for example. I don't find lecturing about this particularly effective; and if it seems dry to me then that will be communicated to the students and they won't realize how important some of these issues are. So for this, I throw them into groups with various real-life case scenarios where businesses want to (or have been told by governments to) get on with a particular collaboration, but have to self-assess whether they can actually do so in a competition law-compliant way. Initiatives to stop binge drinking inevitably come up, and this usually lubricates the discussion; but also environmental initiatives like reducing plastic bags in groceries or CO2 emissions in distribution channels. It is so rewarding to see a relatively under-studied area such as this come to life when I ask the students from each group to devise and defend their collaboration initiative in front of a European Commission of their peers.

In preparing this article I canvassed my consumers (the students) and was pleased that they reported that these key activities of live engagement with the issues—whether through case studies, group work, or debates—were what they particularly enjoyed and what helped them most not only in understanding competition law but also preparing for the exam. I appreciate that my approach is hard for some who come from a culture where a law course has clear rules, with clear answers, and students just want that told to them. Nevertheless if they are contemplating working in the competition law world, it is better—in my view—that they realize early on how fact-specific it is, how important (and even determinative) economic analysis is, and how underneath the case law are small "p"—political or philosophical—approaches to the respective roles of markets and government intervention.

One final thing I like about teaching these students in Bruges is that many of them do go on to work in competition authorities. I reassure them right from day one that I will indeed teach them the law (with their considerable help). I will indeed go through with them the impeccably reasoned opinions of some Advocates General that have been the basis for firm European Court case law. I confess to deriving some mischievous satisfaction though from telling the class that there is an awful lot out there with which I fundamentally disagree.

I think it is good to be open about this. Law schools are about training critical minds after all. My students can readily identify the underlying priors of the dusty academic roaming about at the front of the class that are causing him to bleat away about opinions and judgments he thinks are mad. I want to expose them to these differences of opinion so they can learn to think for themselves, and be able to challenge—if necessary—any doctrine they come across later on in their careers, particularly where it lacks evidential foundation.

I don't do this to undermine the law. I do it because I'm a firm believer that challenge and debate is essential to develop robust antitrust decisions. Moreover, as Milton Handler has pointed out "In no branch of law has dissent played a more significant role than in antitrust." We still don't have dissent at the European Court and that is why change is so glacial, or has to happen within authorities rather than waiting on judgments.

I want my students to enter their authorities, law firms, economics consultancies, or even the courts, with an even more questioning mind than when I first stood up in their class. I want them to be ready to challenge dogma rather than accept it blindly. And above all I want them to go on to work hard to develop soundly reasoned theories of harm backed up with evidence. That will make them better advisors and officials, and competition policy will be better for it.

A final note: the Competition and Markets Authority, where I also work, has adopted a somewhat similar aim in developing our CMA Academy. Its vision is to "foster and embed intellectual curiosity and excitement and facilitate a culture of excellence," going beyond know-how and having officials share experiences—from econometrics and evidence gathering to witness interviews and litigation—so that we benefit from what is an inherently multi-disciplinary enforcement and policy environment, and thereby make our decision-making processes more robust and enforcement more effective.

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Antitrust Educators Should Teach Cultural Differences in the Global Economy

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I. INTRODUCTION

As a Belgian, I am sensitive to the variety of cultures existing in a given territory. In my country, there are, at least, three different cultures. People speak Dutch, French, and German—not to mention other languages spoken by immigrants coming from Europe or elsewhere.

The situation in Belgium is hardly different from that existing on the European continent elsewhere. In the European Union, three languages are used as working languages by the European institutions. And 24 are considered official languages—that is, languages that can be used in relationships between institutions and citizens.

That diversity is not limited to languages. It also finds an expression in the variety of attitudes people adopt vis-à-vis different sorts of issues to be addressed in society, including how relationships between business actors on economic markets should be handled. Scholars and practitioners involved in antitrust matters can only confirm how different approaches can be, throughout the world, when it comes to regulating competition.

II. JAPAN AND SUPERIOR BARGAINING POSITION

An example is the emphasis placed, in Japan, on the regulation of "Superior Bargaining Positions." That concept refers to situations where, in transactions, one party is powerful and the other, weak. According to Japanese scholarship, such situations may give rise to a tendency, on the part of the powerful one, to constrain the weaker into acquiescing to conditions that would not be accepted were the latter not in a situation of dependency.

"Superior Bargaining Positions" are not regulated everywhere—and, where they are, the possible difficulties associated with regulating them are rarely dealt with under the rules of competition. The reason for such an attitude in many countries is that bargaining positions are generally analyzed as affecting vertical relationships, with no or little impact on competition. However, Japanese scholars, officials, and judges insist that, in their country, these bargaining positions should be regulated—and that that regulation should be integrated in the regime of competition law.

To understand that insistence, one must study the importance of social structure of Japan—what it is today, what it used to be in the past. Long an isolated island, Japan had to deal with the necessity of composing a society where the degree of inter-individual violence would remain under control. To that effect, the population was divided into categories forming a hierarchy. In that hierarchy, those categories were rather hermetic. Rare were the people

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authorized to rise to a superior class. Slipping to an inferior one—thereby making room available in upper categories—was easier.

In such a structure, behavior now qualifying as "abuse of power" was not infrequent. In substance, belonging to a superior category meant that you could coerce those under you. That sort of relationship is illustrated in stories and books about former Japan. Thus, an interesting testimony can be found in "Unbroken"—a film made by American producers and that many students may have seen. That film displays U.S. prisoners mishandled by the Japanese military during the Second World War. It also provides useful insights on relationships among Japanese themselves—on the type of relationship that existed between ordinary people and somebody belonging to a superior category. In the firm, the head of the camp is portrayed as behaving like an emperor with Japanese soldiers playing the role of servants.

That structure, as it existed in former Japan, was altered when, after the Second World War, the United States imposed in Japan western-like rules, including antitrust laws. Beforehand, competition was prohibited—at least between people belonging to socially different categories. Across categories, dependency was the norm. This changed drastically with the introduction and the application of antitrust rules. In the antitrust era, challenging the mighty ones, together with the power they exercise on the lower ranked, became permissible, and even encouraged.

In that new vision, the idea that, in vertical relationships, the powerful can coerce the weak had no place any more. In some sense, that idea that coercion does not belong to modern Japan was expressed, with legal terms, in the rule providing that, henceforth, it would be prohibited, to firms holding Superior Bargaining Positions, to take advantage of these positions. For the Japanese legislator, and the Japanese judiciary, that new rule could only find a place in the regime of competition law as the latter deals with all situations where power has been acquired, or is being detained, by business actors, on economic markets.

III. COMPETITION IN TRADITIONAL COMMUNITIES

The Japanese example shows us that one cannot understand the emphasis placed on certain aspects of antitrust, in given countries, without analyzing the cultural specificities existing in those countries. Does it have implications for education? Should students be aware of subtle cultural distinctions, if the purpose is to teach them how to exercise their legal profession and, ultimately, as some would reckon, make money?

My answer is that cultural differences matter to legal education—they matter a lot. All over the world, it has become a priority to open students to what it is like to live in a globalized world. The only way to achieve that result is to explain to students that approaches to antitrust issues are not unique—that they are not necessarily identical to those encountered in the country where education is taking place. We must explain to students that societies react differently to competition. Some like it—as is the case, mostly, in the United States, since the fifties. Others look at it with suspicion—as was the case, until recently, in Europe, and is still the case, nowadays, in Africa.

In traditional societies, competition is perceived as a threat. It potentially brings about violence in a group where people must live together for years. That observation became obvious when I was spending some time on a tiny, beautiful island in The Netherlands close to Denmark.

There, there was one bakery. The story was that it had always been so. Always—except during a limited period, when an employee of that bakery decided to start his own business and opened another shop, selling the same products, around the corner.

In modern economies, such an initiative is key to a correct functioning of markets. It makes it possible for customers to choose the products best fitting their needs. And it places on undertakings a pressure to deliver the best possible results as regards price, quality, and diversity. But in the traditional society existing on that island, that opening of a new shop brought about an uncontrollable chain of reactions going up to physical violence and, eventually, murder.

This cannot be understood by students if they cannot perceive what it is like to live on a small territory from which it is virtually impossible to escape. At that time, people living on such an island could not imagine sailing to the continent and start a new life in an unknown city where they had no family and could not find a job. Born on the island, you were to die on it.

In such a context, opening a second bakery seriously affected the owner of the first shop. He lost business—an inevitable consequence as people did not eat more bread than before but simply shared their purchases between the two shops to avoid being treated as enemies by either of them. Losing business, he could not provide food and shelter to his family. What do humans do where their life, and the one of their loved ones, is in danger? They fight—sometimes to the death.

In such societies, competition means, as it often does for wild animals, a struggle for survival. In that struggle, traditional societies have much to lose. Violence spreads, with some supporting one side of the battle and others, the other side. This explains the perception, in those societies, that competition is a threat—a threat to their very existence.

IV. THE TRANSFORMATION INTO OPEN SOCIETIES

Originally, the situation was not very different in the United States. When that country was created, communities also had a local dimension. With the development of transport, it became possible to carry out activities away from home. People started to study in different cities. Where not successful, competitors could start, elsewhere, a new life. The space available to anyone, and necessary for each to live, was suddenly widening, and increasing in size. In that new context, people challenged by competitors, and unsuccessful in their struggle, could build elsewhere a new life. Competition was no a longer a fight to death. At its best, it was an invitation to evaluate mistakes, make adjustments, and start again—possibly on a different product and/or geographic market.

That transformation has been experienced in the European Union over the last 30 years. Before the creation of the Union, countries were separate and businesses did not easily cross borders. With the emergence of the European Union, a transformation took place. To explain the scope of that transformation, a good example is *Yves Rocher*—a case where a French company wanted to sell beauty products in Germany. In Germany, there was, at that time, a legislation prohibiting price comparisons among competitors. The law also forbade marketing campaigns featuring, in a flashy manner, substantial price reductions—that is, comparisons between prices charged by one firm and those that used to be charged, beforehand, by that same company.

That legislation was presented by the German legislator as protecting consumers who, attracted by discounts, would purchase products they would not necessarily need. Underlying the legislation, there was also, probably, some lobbying carried out by German firms, aiming at limiting the competition among them for reasons seen above.

That legislation was challenged, however, by the French firm, which hoped to attract clients by undercutting—in a visible manner—the prices charged by German competitors. The case arrived to the Court of Justice EU where it was struck down for incompatibility with European law. Free choice, the Court stated in substance, must be the rule on markets. Customers must be given opportunities to choose the products corresponding, in their judgments, to their needs. Instead of protecting consumers through prohibitions, regulators should ensure that they are properly informed—and that is exactly what marketing campaigns are doing by ensuring that possible clients are duly informed about price discounts.

That case inaugurated, with others of the same nature, a change in the perception that people had, in European, about competition. As in traditional societies, competition used to be considered, in the Member States, as a threat to social cohesion—the sort of cohesion that appeared necessary, at that time, to build national communities. With the emergence of the European Union, and the idea of creating a single market to cover all territories of the Member States, a movement started to develop whereby competition would be analyzed, as in the United States, as an opportunity—an opportunity for firms of European countries to present their products and services to clients located elsewhere in the Union. And an opportunity for consumers to choose among more items as economic borders were opened among Member States.

V. APPROXIMATION OF LEGISLATION

Thus, students must be taught that competition is not perceived in the same manner in all societies. This is the case, at least, for students interested in a private practice at an international level. How about those who prepare themselves for a carrier in public service? For these students, my opinion does not change. Yes, such students should be taught about cultural diversity worldwide—it matters, and it matters to them a lot.

Of course, the context, here, is different. The purpose is not, for these students, to understand how they must deal with clients, courts, or officials in given countries. It is to teach them how to engage with foreign counterparts in fruitful discussions that will serve their country.

This is important in our age where, as globalization gathers pace, activities are often subject to rules applied by different countries. To deal with a plurality of applicable laws, one possibility is to designate one country or one national legislator as having competence. Typically, that approach is implemented in international private law. In competition law, it is applied to actions introduced by private parties before courts in the context of private enforcement.

Public enforcement also plays a role in the application of the rules of competition—a very important role indeed, and the most important one, still, in many countries. The only way to solve the situations of conflict of law, which then emerge, is to organize a progressive approximation of legislations.

Such a process has been taking place, in Europe, in antitrust, for some time, as well as in other fields of the law. It is also happening, at worldwide level, as regards competition law, within the International Competition Network ("ICN"). That network operates as a forum gathering competition law officials from around the globe, with a view to exchanging opinions as to how cases should be solved. Through these discussions, it is hoped, a common language will progressively develop—giving rise, in a longer term, to a coordination of legislation.

In the course of those discussions, it is not indifferent that one type of rule or another be chosen. In substance, each participant seeks to convince others that the approach used in his/her country is better—and should be adopted as the legal standard. Norms indeed reflect values—and it is comfortable for societies to consider that their values are excellent and possibly universal. In such forums, discussions thus take the form of negotiations where the object concerned is not a product, or some sum of money, but rules—rules to be adopted, possibly, as standards, valid worldwide.

On the basis of my experience, I can assert how impossible it is, for an antitrust official with no exposure to cultural diversity, to reach success in that sort of setting. Whatever their object, negotiations imply that participants must be informed about the positions of their counterparts. They must understand these positions, and the reasons why the latter have come to exist.

VI. THE SAME RULES, ALWAYS AND EVERYWHERE?

Robert Bork stated that, with the development of economics, antitrust issues would no longer give rise to divergent solutions. Henceforth, solutions would be universal—that is, they could be applied in all places, at all times. Having developed these economic tools, one could and should get rid of ancient form-based legal reasoning where decisions depended, mostly, on the discretion of the official(s), or judge(s), involved.

I can sympathize with the thirst for solutions that do not depend on personal discretion—on arbitrariness, that is. As a matter of fact, the law as a whole was developed as a remedy against arbitrariness—against the capacity of powerful ones to decide in favor of their interests, their wills, or their visions.

But do we need universal solutions to avoid arbitrariness? Administrative and judicial decisions must be based on clear principles established by law and where personal discretion has no incidence. But these principles do not need to be the same always and everywhere. That is precisely what international antitrust teaches us—that people think differently in different places of the globe and that their opinion also changes with time—as do economics.

Globalization will bring about some form of convergence among practices, attitudes, and rules. But we would be wrong if we were to consider that people should adopt our approach just because we feel that it is the best one. Students need to made aware of that—they need to be taught humility in their dealings with clients, partners, and officials from around the world.